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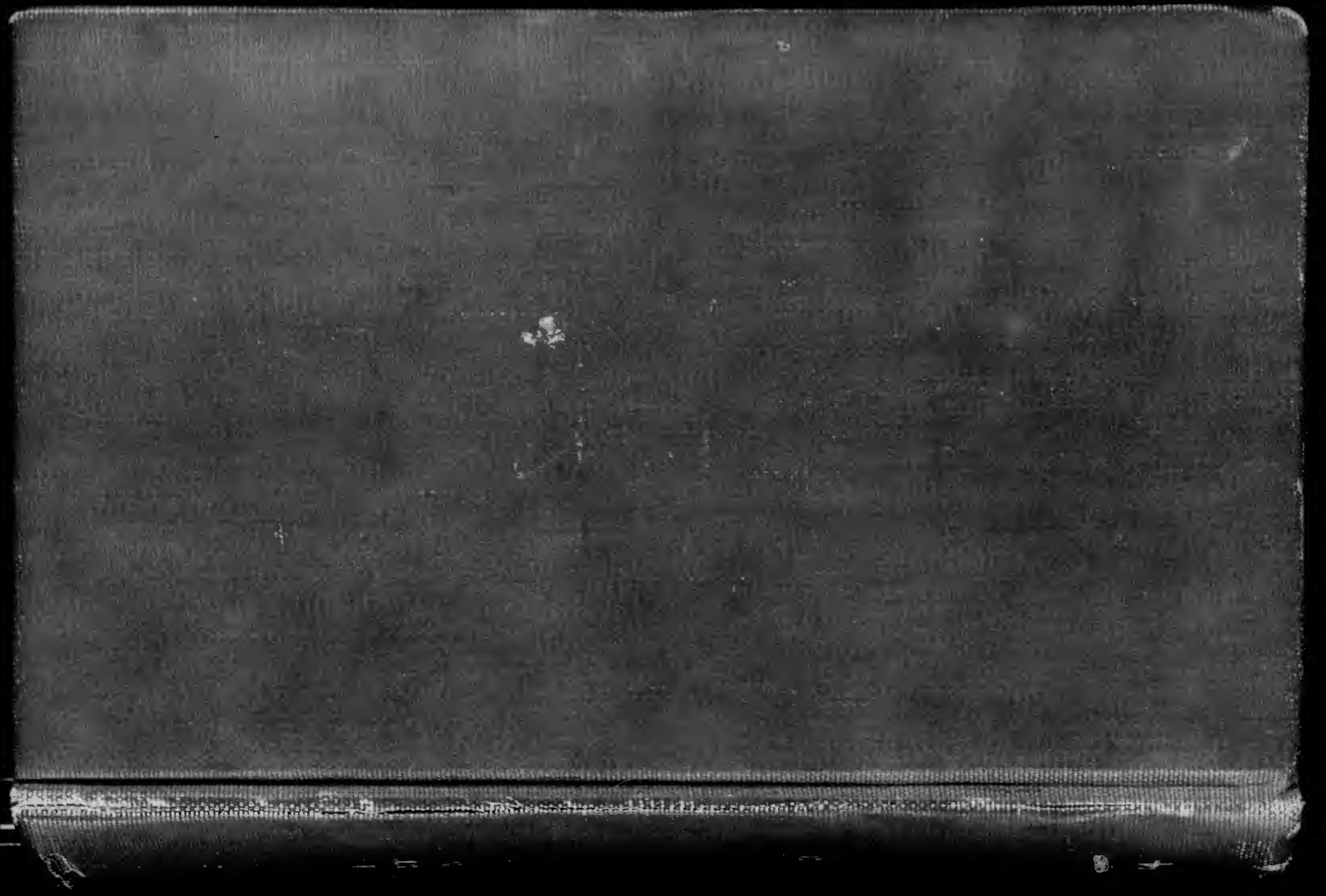
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FEDERAL ANTI-TRUST DECISIONS.

VOL. 1

1890–1899.

[898] UNITED STATES *v.* JELLICO MOUNTAIN COKE & COAL CO. ET AL.[a]

(Circuit Court, M. D. Tennessee. October 13, 1890.)

[43 Fed., 898.]

PRELIMINARY INJUNCTIONS—ILLEGAL COMBINATIONS.—Where the material allegations of a bill filed by the United States against various coal companies, under Act Cong. July 2, 1890, to enjoin their combination in restraint of trade, are denied by defendants' affidavits, a preliminary injunction will not be granted, as plaintiff gives no indemnifying bond in case the injunction should be dissolved.[b]

In Equity.

This case arose on a bill filed by the United States under the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." All the coal companies doing business in the city of Nashville, as members of the coal exchange, were made parties defendant. On the preliminary hearing a temporary injunction was refused.

W. H. H. Miller, Atty. Gen., *Wm. H. Taft*, Acting Atty. Gen., and *John Ruhm*, U. S. Atty.

[a] See also page 9 (46 Fed., 432).

[b] Syllabus copyrighted, 1891, by West Publishing Co.

Syllabus.

G. N. Tillman and *W. L. Granbery*, for defendants.

HAMMOND, J.

This is an application for a preliminary injunction only, and it appears to the court better to await the hearing, and determine upon plenary proof of the exact facts those grave questions which have been suggested, than to decide them now upon the bare statements of the bill which are so general in their character, and quite too barren of any averments of specific facts to enable the court to determine whether the general conclusions of fact averred are true, particularly in view of the affidavits of defendants denying some of the most important of them; and in this view it is unnecessary to hear any counter-affidavits. The court is the more inclined to this course since the bill is not that of a private citizen, complaining of an injury to him, but only by the United States [899] on behalf of the public, and in pursuance of a public policy of enforcing a recent act of congress to prevent combinations in restraint of trade and commerce. It is manifest that the act is new, and this a most important application of it. It would more injure the defendants to grant this preliminary injunction if, on the hearing, it should turn out that the case does not fall within the act, than it would injure the public to withhold the injunction until the final hearing; and the more since the United States gives no bond to protect the defendants against that injury, as a private suitor would be compelled to do. When this is the situation of the parties the rule is to refuse the preliminary injunction, and abide the hearing. The court reserves all expression of opinion on the subject-matter of the bill until that time, as the best for all concerned.

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[721] AMERICAN BISCUIT & MANUF'G CO. *v.* KLOTZ ET AL.

(Circuit Court, E. D. Louisiana. January 8, 1891.)

[44 Fed., 721.]

RECEIVERS—COMBINATIONS TO RESTRAIN TRADE.—Defendant and his partner sold their bakery business to complainant corporation, receiving payment in its stock, and defendant leased to it the premises where the business was conducted, and contracted to carry it on as the purchaser's agent, for a salary. After operating under this arrangement for a time, he repudiated the sale, resumed possession under the old firm name, and refused to account to complainant. The bill was brought to enjoin him from asserting a hostile claim, for an accounting, and a receiver. Defendant, and his partner as intervenor, filed a cross-bill for rescission of the sale for fraudulent representations, and tendered back the stock. Complainant was practically a "trust," organized to monopolize the business, and had already secured control of 35 leading bakeries in 12 different states. *Held* that, while a case was made for a receiver, pending litigation between ordinary parties, the prayer would be denied, as equity would not encourage a combination in restraint of trade, and probably illegal, under Act Cong. July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," and Act La. July 5, 1890, for the same purpose.[a]

Opinion of the Court.

In Equity.

T. J. Semmes and *Bayne, Denegre & Bayne*, for complainant.

W. S. Benedict and *Rouse & Grant*, for defendants.

Before PARDEE and BILLINGS, JJ.

PER CURIAM. This cause is submitted upon an application for a receiver. Some time in May last, the defendant Klotz, and Fitzpatrick, his partner, composing the firm of B. Klotz & Co., sold to the complainant their biscuit and confectionery manufactory for the price of $259,000, and an assumption of the debts of B. Klotz & Co., amounting to $42,000, which it was understood and agreed should be paid out of the income from the future business. The visible property was estimated to be of the value of $101,000, and the good-will of the business to be of the value of $200,000. The price was paid in stock of the complainant's corporation, estimated to be of value at par; that is, to be worth [722] 100 cents on the face value. The purchase was completed, price paid, property delivered, the factory and good-will transferred by Klotz & Co. to the complainant. Klotz leased his bakery premises to complainant for the term of years, and contracted in writing to become, and did become, the agent of the complainant, at a salary of $——— per year. Klotz continued to carry on the business as agent for the complain-

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ant down to some time in November, when he repudiated the sale and the lease, erased the name of complainant from the bakery, as agent, transferred the policies of insurance from the complainant to himself, as an individual, then to B. Klotz & Co., and, for and in the name of the late firm, resumed the possession of all the property he had sold to the complainant, and the conduct of the business of the bakery and the confectionery establishment. He did this without resort to any legal proceedings. He thereafter held possession adversely to the complainant, and excluded it from the bakery. In this state of things, the complainant filed its bill for an injunction, and for an account and for a receiver, against Klotz and W. A. Schall, who was alleged to be co-operating with him in the possession adverse to the complainant. Klotz has filed an answer, and he, together with his former partner, Fitzpatrick, who intervened by petition *pro interesse suo*, have filed a cross-bill asking a rescission of the entire transaction, *i. e.*, the sale and the lease, and tendering the stock which had been received by them as the consideration of the sale. Numerous exhibits and affidavits have been adduced by each party upon this hearing. The recital thus given shows that, in an order inverted from what would be expected, we have before us a cause in which a party who has sold and delivered a business to another, and become his agent, and, as such agent, was in possession of the property sold, sets up a possession adverse to his principal, asks for a cancellation of the sale, and the purchaser and principal asks that the agent shall account, shall be enjoined from asserting any claim hostile to his principal,—in a word, for a confirmation of its rights under the purchase.

The immediate question before us is, what disposition shall be made of the *res*, the business of the bakery and manufactory, pending this contest? The vendor and agent asks that he be allowed to remain in adverse possession. The purchaser and principal asks for a receiver. It is clear that, as to this provisional disposition of the *res*, the defendant Klotz cannot be allowed to gain anything by his ouster of his vendee and principal. He must stand with those equities, and none other, which existed before the ouster. The case as to the

appointment of a receiver must be reviewed and determined as if he (Klotz) had filed his bill averring possession as agent, which he asked to have changed by a decree into a possession as owner, through the cancellation of the sale and the lease; that is, he must aver a legal title in the American Biscuit & Manufacturing Company, which he seeks to have avoided and annulled. If, as in this case, he seeks to do all this by reason of fraud, and he establishes the fraud, a court of equity will not refuse to hear him. He would not be estopped, for fraud vitiates and sets aside even estoppels. Herm. Estop. par. 22, p. 244; *Pendleton* v. *Richey*, 32 Pa. **[723]** St. 58, 63. But, while he is not estopped from proceeding to set aside the sale and the lease by reason of his agency and his obligations as trustee, he comes into court assailing and seeking to cancel a legal title; for until that is done his possession is that of the complainant. Under these circumstances, until the hearing, the practice in the courts of chancery is not to disturb the possession under the legal title prior to the final decree, unless a case of monstrous wrong is established. *Stilwell* v. *Wilkens*, Jac. 280, reported in full in Edwards on Receivers, p. 28, Lord ELDON, when a similar question was presented, observed:

> "The point that struck me was whether, on a bill to impeach a sale for fraud, the court interposes so strongly before the hearing as to take away the possession from persons holding it under the effect of deeds not yet set aside by decree."

And he holds that "it was not the general habit of the court." There the case was so monstrous, and the proof was so strong, that "it was hardly possible that the transaction could stand," and the legal title was interfered with.

This is a leading case, and gives what we find is the rule. The possession under the title is not disturbed unless the proof of fraud is so strong as to lead the court to the clear conviction that it will, on the final hearing, be established. The fraud set up and relied upon by the defendant and intervenor is false and fraudulent representations by the agents of the complainant in this: that they represented that the stock was fully paid-up stock, whereas, in truth and fact, it was none of it paid up in money, and only paid up in part, and, to the extent of that part, by transfer of plants or bakeries and manufactories at an estimated value as capital.

The stock delivered to the defendant and intervenor was not paid up until it was issued to them, and was paid for by a transfer of the bakery and good-will; and then it became paid up, and they were discharged from all liability to be made to contribute as shareholders therefor. The testimony as to what was represented by complainant's agents about the stock being paid up is conflicting; but, when viewed in connection with the circumstances under which the stock was received, fails to satisfy us, upon this preliminary hearing, that any false representations are proved to have been made. The case of the defendant and intervenor, set up in their cross-bill, whereby they oppose the appointment of a receiver, is that of parties who seek to rescind a deed on the ground of fraud, which upon this hearing they fail to establish.

So far we have considered the question of appointing a receiver of the property in controversy *inter partes*, and mainly from the stand-point presented by the defendant's showing, and thereon such appointment seems proper, and we should accord it, but for an aspect of the case originally suggested by the defendant, when the case was pending in the state court, apparently abandoned here, but sufficiently brought to our notice by the exhibits of both parties. We are not satisfied that the complainant's business is legitimate. While the nominal purpose of the complainant's corporation, as stated in its charter, is the manufacture and **[724]** sale of biscuit and confectionery, its real scope and purpose seems to be to combine and pool the large competing bakeries throughout the country into practically what is known and called a "trust," the effect of which is to partially, if not wholly, prevent competition, and enhance prices of necessary articles of food, and secure, if not a monopoly, a large control, of the supply and prices in leading articles of breadstuffs. The case shows that an insignificant number of shares of complainant's stock was unconditionally subscribed for, apparently enough to qualify directors; but the great mass was taken and held by irresponsible parties, to be used in parceling out as full-paid stock to such leading and successful bakeries throughout the country as could be induced to come in on an agreed

value of the property and a large estimate of good-will. Each bakery when secured to be carried on by its former managers, subject, however, as to control of funds, territory, prices, and competition, to the central management; all profits pooled, and of course division thereof to be made on the basis of the stock assigned to each bakery. Under this arrangement complainant has already secured the control, and pooled the business, of 35 of the leading bakeries in 12 different states of the west and south, and is evidently seeking more constituents. The act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," expressly prohibits, under severe penalties, "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," and declares punishable "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the common trade or commerce among the several states." The enforcement of this act is, by the statute, devolved upon the circuit courts of the United States. The first and third sections of an act of the legislature of Louisiana, approved July 5, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies, and to provide penalties for the violation of this act," declare:

"Section 1. That every contract, combination in the form of trust, or conspiracy in restraint of trade or commerce, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, is hereby declared illegal."

"Sec. 3. That every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce within the limits of this state, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In construing the federal and state statutes, we exclude from consideration all monopolies which exist by legislative grant; for we think the word "monopolize" cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the law-maker has used the word to mean "to aggregate" or

"concentrate" in the hands of few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of oth- [725] ers; to accomplish this end by what, in popular language, is expressed in the word "pooling," which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. The expression in each law "combination in the form of trust" would seem to point to just what, in popular language, is meant by pooling.

Now it is to be observed that these statutes outline an offense, but require for its complete commission no ulterior motive, such as to defraud, etc.; and, further, that the language is altogether silent as to what means must be used to constitute the offense. The offense is defined to "combine in the form of trust, or otherwise, in restraint of trade or commerce," and "to monopolize, or attempt to monopolize, any of the trade or commerce." To compass either of these things, with no other motive than to compass them, and by any means, constitutes the offense. One just and decisive test of the meaning of the expression "to monopolize" is obtained by getting at the evil which the law-maker has endeavored to abolish and restrict. The statutes show that the evil was the hindrance and oppression in trade and commerce wrought by its absorption in the hands of the few, so that the prices would be in danger of being arbitrarily and exorbitantly fixed, because all competition would be swallowed up, so that the man of small means would find himself excluded from the restrained or monopolized trade or commerce as absolutely as if kept out by law or force. If this is the meaning of the defining words, does not this corporation, thus glutted with the 35 industries of 12 states, disclose an "attempt to monopolize?" So far, therefore, as the complainant's business is a combination in restraint of trade, or is an "attempt to monopolize, or combine, in the form of a trust, or otherwise, any part of trade or commerce," as these words are properly defined, the law stamps it as unlawful, and the courts should not encourage it. Aside from this, the complainant's business, even if lawful, being of the kind shown above, is not of that meritorious kind that it should be encouraged by a court of equity. The appointment of a receiver by a court of equity is not a matter of strict right, but of judicial discretion. *Fosdick* v. *Schall*, 99 U. S. 235. It falls within that class of interlocutory remedies which courts must grant or withhold, according to a discretion conscientiously exercised, upon a consideration of all the facts which a cause presents, involving the rights of the parties and the interests of the public. The attempt to accumulate in the hands of a single organization the business of supplying bread itself to so large a portion of the poor, as well as the rich, people of the United States should not be favored by a court of equity. It carries with it too much of danger of excluding healthy competition, thereby increasing the difficulty to the general public of participating in a most useful business, as well as adding to the possibility of multitudes of citizens being temporarily, at least, compelled to pay an arbitrary and high price for daily food.

Whatever we may feel compelled to do, on the final hearing of this cause, towards recognizing the complainant's legal rights, and compelling a faithless trustee to account, we are clear that at this preliminary stage, [726] with our present impressions of the character and general scope of complainant's business, the court ought not, by the appointment of a receiver, to aid complainant to perfect, and perhaps to enlarge, his combination or trust; and the refusal to appoint a receiver can result in no serious and lasting injury to complainant, because the shares of stock of complainant company, forming the entire consideration of complainant's purchase, have been tendered in court, and may be impounded, to be held as security for any damages susceptible of proof resulting from defendant's mismanagement of the property pending the suit. The motion for a receiver is denied.

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[432] UNITED STATES *v.* JELLICO MOUNTAIN COAL & COKE CO. ET AL.[a]

(Circuit Court, M. D. Tennessee. June 4, 1891.)

[46 Fed., 432.]

CONSPIRACY—TRUST COMBINATION—INTERSTATE COMMERCE.—An agreement between coal mining companies operating chiefly in one state

[a] See also page 1 (43 Fed., 898).

Opinion of the Court.

and dealers in coal in a city in another state, creating a coal exchange to advance the interests of the coal business, to treat all parties to the business in a fair and equitable manner, and to establish the price of coal, and change the same from time to time, by which it was agreed that the price of the coal at the mines should be 4½ cents, the freight being 4 cents, and the margin of the dealer should be 4½ cents, making the price to the consumer 13 cents, and that, whenever the price of the coal is advanced beyond an advance in freights, one-half the advance shall go to the mine owner, and the other half to the dealer, and a penalty was provided by fine, of any member selling coal at a less price than the price fixed by the exchange, and by which it was forbidden for owners or operators of mines to sell coal to any person other than members of the organization, and for dealers to purchase of miners who were not members, but exempting coal used for manufacturing and steamboat purposes from the prices prescribed until all the mines tributary to that market shoud come into the exchange, or until the exchange could control the prices of coal used by manufacturers, is within the language of Act Cong. July 2, 1890, declaring "every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states," and also the monopolizing, or combination with another to monopolize, trade or commerce among the several states, a misdemeanor.[a]

In Equity. On bill for injunction.

John Ruhm, U. S. Atty., *Lee Broock*, Asst. Dist. Atty., and *James Trimble*, for the United States.

Tillman & Tillman, *Henderson & Jourolman*, and *Hill & Granberry*, for defendants.

[433] KEY, J.

The petition in this case is filed against the members of the Nashville Coal Exchange. The membership of the exchange is composed of various coal mining companies operating mines in Kentucky and Tennessee, chiefly in Kentucky, and of persons and firms dealing in coal at Nashville, Tenn. It is alleged that the purposes, objects, and agreement of the defendants are in violation of an act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and the petition seeks to restrain and prevent the violations of the act by injunction under section 4 of the law. The first section

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Opinion of the Court.

of the act declares that "every contract or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, is declared illegal." The second section declares that "every person who shall monopolize, or combine or conspire with another person or persons to monopolize, any part of the trade or commerce among the several states * * * shall be guilty of a misdemeanor." A violation of the first section is a misdemeanor also. By the fourth section jurisdiction is conferred upon the circuit courts of the United States to prevent and restrain violations of the act, and it is made the duty of district attorneys in their respective districts, under the direction of the attorney general of the United States, to institute proceedings in equity to prevent and restrain such violations. The articles of agreement between the defendants provide, among other things, that the objects of this exchange are, "To do all in its power to advance the interests of the coal business at Nashville, to treat all parties to this agreement in a fair and equitable manner, and to establish prices on coal at Nashville, Tenn., and to change same from time to time, as occasion may require." Prices to consumers at Nashville are to be established so as to sell coal at a fair and reasonable price, so as to allow all parties a fair profit for their product. Every person, firm, or corporation owning or operating mines who ship coal to Nashville shall be eligible to membership in this exchange, and all coal dealers in the city of Nashville are also eligible to membership. None others are eligible. Any member of the exchange who may withdraw from it, and continue in the coal trade in Nashville, or ship any coal to Nashville, shall forfeit and relinquish all interest of any and every kind, however obtained or accrued. The exchange will from time to time establish prices at which coal shall be sold in Nashville. Coal classed as No. 1 shall be valued at the mines at 4½ cents minimum price for bushel of 80 pounds lump, and freight being 4 cents, the dealer's margin to be 4½ cents, making the price of lump coal 13 cents per bushel; No. 2 to be valued at 5 cents at the mine; No. 3 at 6 cents; and when the above prices are advanced in excess of the advance in freights, then one-half the advance shall go to the mine owners and one-half to the dealers. Every member

found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, shall be fined 2 cents per bushel and $10 for the first offense, and 4 cents per bushel and $20 for the second offense. A majority of all the members shall constitute a quorum for the transaction of business. Owners or operators of mines [434] shall not sell or ship coal to any person, firm, or corporation in Nashville, or West Nashville, or East Nashville, who are not members of the exchange, and dealers shall not buy coal from any one not members of the exchange. All coal used for manufacturing and steam-boat purposes shall be exempt from prices made by the exchange until all mines tributary to this market shall become members of the exchange, or until the exchange can control prices to govern coal used by manufacturers. No coal shall be sold in any month to be delivered in any following month except at prices fixed for the particular month in which coal so sold is to be delivered. Fines and penalties are declared, so as to enforce the stipulations embodied in the constitution and by-laws of the exchange.

It can hardly be denied that such provisions as these, by a body of persons such as compose this exchange, is a contract or combination in restraint of trade or commerce, or an attempt between different persons to monopolize a part of the trade or commerce, between parties who are citizens of or reside in different states. It is shown that several mining companies in Kentucky engaged in raising coal, and most of the coal dealers of Nashville, Tenn., have entered into the foregoing mentioned arrangement. It is insisted for the defendants that the subject of agreement is not interstate commerce; that the obligation as to the mining companies ends at the mines. The price is fixed and paid at that point, and consequently controversies in regard to the contract as to them belong exclusively to the courts of the state of Kentucky; that, so far as the dealers are concerned, the price of the coal is fixed for its sale at Nashville, and after it becomes their property by delivery to them, and therefore the courts of Tennessee have the jurisdiction as to them. Various authorities are cited, and the debates in the senate of the United States are read, to sustain this view of the case. As

I understand the contention of defendants' counsel it is that the agreement is not violative of the terms of the act of July 2, 1890; but, if it is, the act is unconstitutional: *First.* Because the constitution confers upon the courts of the United States in such a case jurisdiction over "controversies between citizens of different states." That the fact that parties to a contract are citizens of different states does not confer jurisdiction. There must be a controversy between the parties to the contract, and this litigation is not a dispute between the contracting parties, but between the government and these parties. *Second.* That the act creates and defines criminal offenses, and the constitution provides that the "trial of all crimes except in cases of impeachment shall be by jury," and that section 4 of the act, so far as it attempts to give circuit courts of the United States equitable jurisdiction over the violations of the act, is unconstitutional. It is insisted the proceeding authorized is, in substance, an information in equity charging defendants with a misdemeanor.

I shall not enter into a discussion of the constitutionality of the law. A court, especially an inferior one, should hesitate long and consider carefully before it should declare an act of congress, passed after deliberation and debate, and approved by the president, unconstitutional. The [435] reasons for such a decision in such a case should be clear and undeniable. If doubtful or questionable, the doubt should be resolved in favor of the law. The arguments against the validity of the act have been urged with great plausibility and strength, and an array of authorities have been read as sustaining the views of defendants' counsel. The positions of defendants' counsel have been met with equal force and ability by those representing the government, and many authorities have been referred to in support of the power of congress to pass the law; and without nicely adjusting and weighing the opposing views of counsel, enough appears to prevent me from declaring the act, or any part of it, as outside of the powers granted to congress by the constitution.

The remaining question is whether the agreement and regulations between the defendants are a "contract or combination in restraint of trade or commerce between states;" are

they evidence of a combination to monopolize "any part of the trade or commerce" between the states of Tennessee and Kentucky? The coal mines are in Kentucky, and the coal is to be mined there for a certain price, and the agreement contemplates its shipment to Nashville. To be sure it is not to be transported thither by the defendants or any of them, but the price for which it is to be shipped is fixed or stated, and becomes a part of the price for which the coal is to be sold at Nashville; and when the prices fixed "are advanced in excess of the advance in freights, the one-half of the advance shall go to the mine owners and one-half to the dealers." In making the agreement the transportation of the coal from Kentucky to Nashville was a necessary incident to and element in the arrangement, and its execution would have been impossible without it. The instrumentality of transportation did not belong to nor was it controlled by them, but it was used by them and paid by them for services rendered. The contract provided for the sale of coal in Kentucky, its shipment to Nashville, Tenn., to dealers there, for its retail to consumers. It was, to all intents and purposes, a traffic, trade, commerce between states. Was the purpose of the exchange to monopolize a part of this trade, or to combine in restraint thereof? The exchange does not propose to be governed and controlled by the public markets arising from competition and the operations of the laws of supply and demand. On the contrary, it announces that its purpose is "to establish prices on coal at Nashville, Tenn., and to change the same from time to time as occasion may require," and in carrying out this object it asserts that—

"The exchange will establish prices at which coal shall be sold in Nashville, subject, however, to the following conditions and basis: Coal classed as No. 1 to be valued at the mines at 4½ cents minimum price per bushel of 80 pounds for lump, and freight being 4 cents, the dealer's margin to be 4½ cents, making the price of lump coal 13 cents per bushel; No. 2 to be valued at 5 cents at the mines, No. 3, 6 cents; and when the above prices are advanced in excess of the advance in freights, then one-half of the advance shall go to the mine owners and one-half to the dealers. Any member found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, shall be fined 2 cents per bushel and $10 for the first offense, and 4 cents a bushel and $20 for the second offense."

[436] These provisions, so far as this combination could do so, fixed the lowest price of coal to consumers in and near Nashville at 13 cents per bushel, and prevented coal being sold there at a cheaper rate, no matter how much less it might cost in an open and unobstructed market. Nor is that all. The exchange ordains that "owners or operators of mines shall not sell or ship coal to any firm, person, or corporation in Nashville or West Nashville or East Nashville who are not members of this exchange, and dealers shall not buy coal from any one who is not a member of the exchange." The coal trade is confined, so far as the market supply is concerned, to transactions between the miner and dealer, the prices are fixed by them, and the miner and dealer only are eligible to membership. The miners of the concern cannot sell to any dealer in or near Nashville who is not a party to the agreement, nor can such dealer purchase coal of any miner anywhere who is not a member of the body. The operations of both are confined within the membership. So far as Nashville is concerned, they cannot go to cheaper or more favorable markets, or deal with those who would give more favorable terms. The restraint is positive and undeniable. Moreover, in the first section of the by-laws of the exchange it is asserted that "all coal used for manufacturing and steam-boat purposes shall be exempt from prices made by this exchange until all mines tributary to this market shall become members of the exchange, or until the exchange can control prices to govern coal used by manufacturers." This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steam-boats whenever it could; that the mines of coal tributary to Nashville were all expected to become members of the exchange, whereupon the prices of coal could be fixed absolutely, and the necessary inference from this declaration and the entire organic structure of the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that market, to a large extent, at least, and that

this exchange might now monopolize the business of dealing in domestic coal in the Nashville market, and in the future monopolize by and confine to its membership the entire trade in coal at that point. It seems to me that the purposes and intentions of the association could hardly have been more successfully framed to fall within the provisions of the act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that statute, and that there is no need of authorities to sustain such view of the case. Regarding the act as constitutional, I see no way for the defendants to escape its condemnation.

Proof has been taken, on one hand, to establish that the people of Nashville have been and are being injured by the high prices which have been and are being paid for coal, and the extent of the injury. On the other hand, defendants have introduced proof to show that the higher freight rates to Nashville, and the want of facilities for transportation by railroad and water, are the causes for the higher prices of coal at Nashville than at Louisville or Memphis, but it is needless to enter upon this branch of dispute. "The attempt to monopolize or combine" is de- **[437]** nounced by the second section of the act, and the first section declares that "every contract or combination * * * in restraint of trade or commerce among the several states * * * is hereby declared illegal." The attempt—the contract to do the thing prohibited—is enough to incur the penalties of this law.

I conclude that the defendants, by the organization of the Nashville Coal Exchange, and their operations under it, have been, and at the time of filing the petition in this cause were, guilty of a violation of sections 1 and 2 of the act of July 2, 1890, and should be enjoined from further violations of the law, as provided by the fourth section thereof.

The petition will be dismissed as to such of the defendants as are not, or were not, members of the exchange at the time of the filing of the petition.

[338] CLARKE *v.* CENTRAL RAILROAD & BANKING CO. OF GEORGIA ET AL.

CENTRAL TRUST CO. OF NEW YORK *v.* COMER ET AL.

(Circuit Court, S. D. Georgia, E. D. May 14, 1892.)

[50 Fed., 338.]

RAILWAY COMPANIES—ILLEGAL CONSOLIDATIONS—TRANSFER OF STOCK—RIGHT TO VOTE.—The Ga. Co. of North Carolina acquired by purchase a majority of the stock of the Cent. R. Co. of Georgia, which it afterwards deposited with the Cent. Trust Co. of New York, and finally transferred to the Terminal Co., a system composed of several competitive lines of railroad. This company created a directory of the Cent. R. Co. to suit its purposes, which directory leased the Cent. R. R. to the R. & D. R. Co., a competing line. The lease was enjoined as contrary to Const. Ga. 1877, art. 4, § 2, par. 4, prohibiting the merger of competing corporations. The injunction order directed the election of a new board of directors for the Cent. R. Co., and provided that the stock of the company controlled by the Terminal Co. should not be voted in such election unless transferred in good faith. The stock in question consisted of 42,000 shares, 40,000 of which were those deposited by the Ga. Co. with the C. Trust Co. and transferred to the Terminal Co., and the remainder, 2,200 shares, acquired by the Terminal Co. from other sources. The Terminal Co. and the Ga. Co. filed a paper relinquishing to the Cent. Trust Co. any right they might have to vote such stock. *Held*, no interest in the stock appearing in the Cent. Trust Co., other than that of a mere stakeholder, that the relinquishment in question did not entitle it to vote.[a]

SAME—INCAPACITATING TRUST.—The Cent. Trust Co. was also incapacitated to vote such stock by the fact that it was trustee for a large amount of indebtedness of the Cent. R. Co., and, besides, its charter apparently gives no such power.

SAME.—The Cent. Trust Co. was unfit to be intrusted with the voting power in question because of the fact that its president, a financial expert, was engaged in an attempt to bring about a merger of the Cent. R. Co. with competing lines of railroad in the state of Georgia, and place them under the sole control of the Terminal Co., contrary to the constitution of the state.

SAME—COMITY BETWEEN THE STATES.—Comity between the states will not authorize a foreign railroad corporation to exercise powers within the state which a domestic corporation would not be permitted to exercise under the constitution and policy of the state.

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Opinion of the Court.

SAME—COMPETING CORPORATIONS—ACQUISITION OF STOCK.—The fact that the charter of the Cent. R. Co., granted before the adoption of the constitution of 1877, permitted municipal corporations to purchase its stock, would not authorize a competing corporation to acquire such stock after the adoption of the constitution.

SAME—DISQUALIFYING INTERESTS.—The fact that the Terminal Co. has no appreciable interest in the stock of the Cent. R. Co., because of a mortgage on the railroad executed by the Terminal Co., does not remove the objection to its voting in person or by representative in the election of the directors of that railroad company, in view of the fact that it has large pecuniary interests in two directly competing lines of railroad.

[SAME—ANTI-TRUST LAW.—Transactions of this character are within the spirit, if not within the letter, of the "Sherman Anti-Trust Law." Act of July 2, 1890 (26 Stat. 209). See page 28.]

In Equity. Bill by Rowena M. Clarke against the Central Railroad & Banking Company of Georgia and others, and bill by the Central Trust Company of New York against H. M. Comer, receiver, and others. Motion by the Central Trust Company to modify an interlocutory decree. Motion denied.

Butler, Stillman & Hubbard and *H. B. Tompkins*, for the motion.

Lawton & Cunningham, Denmark, Adams & Adams, Daniel W. Rountree, Marion Erwin, and *A. O. Bacon*, opposed.

SPEER, District Judge.

It is essential to a clear understanding of the questions involved in this motion that a brief statement be made of the **[339]** proceedings heretofore had in the equity cause in which the motion is presented. It is also essential to direct attention in the outset to paragraph 4 of section 2, art. 4, of the constitution of the state of Georgia. This clause of the constitution is as follows:

"The general assembly of this state shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state or elsewhere, or to make any contract or agreement whatever with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses or to encourage monopoly; and all such contracts and agreements shall be illegal and void."

The constitution in which this clause is found was adopted in the year 1877. It was evident at that time, and has become more plainly evident since then, that it was indispensable, by comprehensive and imperative enactments of fundamental law, to arrest the tendencies of corporate bodies towards abnormal and destructive aggregations of power; tendencies which could not have been forseen, and which therefore had not been restricted and limited by the legislation of the past; tendencies which endanger the salutary purposes for which such corporations were created by the state, and which threaten to inflict upon vast multitudes of the people the most destructive injustice and injury,—injustice and injury against which it is obviously the duty of the government to afford them protection. It would be perhaps difficult to express in such narrow compass a restriction of corporate power more conclusive in its inhibitory effect, or more difficult to evade by those who for any motive would seek to avoid its legal force. *Langdon* v. *Branch*, 31 Fed. Rep. 449; *Hamilton* v. *Railroad Co.*, 49 Fed. Rep. 412. The original bill and interventions filed in this cause seek to apply to the facts of the case the legal effect of this constitutional provision and, further, to invoke the doctrine following, announced with great force and clearness by Mr. Justice GRAY in the supreme court of the United States in the case of *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 46, 11 Sup. Ct. Rep. 489:

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"A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside of the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it."

Further:

"That the lease by one corporation of its property and franchises to another corporation is unlawful and void, because beyond the corporate powers of the lessor, and involving an abandonment of its duty to the public."

It appears from the record before the court that on or before the 30th day of May, 1887, certain persons formed a design to obtain control of a majority of the capital stock of the Central Railroad & Banking Company of Georgia. While this company has assets amounting to many millions of dollars, its capital stock is only $7,500,000. For the purpose of

retaining an exemption from state taxation granted by the original charter the capitalization of the stock had been preserved at that com- [340] paratively low figure. From this fact it became relatively an easy matter to obtain a majority of the stock bearing the voting franchise. To accomplish this purpose, D. Schenke, Samuel H. Wiley, and Thomas B. Keogh organized, or attempted to organize, at Hight Point, in North Carolina, a corporation bearing the significant name of "The Georgia Company." The charter was granted by the clerk of the superior court of Guilford county, and the business of the company was, as therein stated, "to purchase, acquire, and to hold, or guaranty, to indorse the bonds or stocks of any railroad company in this or any adjoining state; to lease any railroad in this or any adjoining state; to engage in the business of transportation, and to operate railroads in this and adjoining states; to aid any railroad company in this or any adjoining state; 'except building any railroad,' which is forbidden in said statute." The charter does not appear to have any validity. See St. N. C. Acts 1885, p. 70. This appears to be both a banking and railroad corporation, and such corporations can be created by the legislature only.

It appears, however, that the persons mentioned in the original bill, who had bought about 40,000 shares of the stock of the Central Railroad & Banking Company of Georgia, turned over their entire holding to said Georgia Company; and it was further stipulated and agreed that this stock should be held in a block, with the view to permanently control the management of the Central Railroad and its properties. Thereafter it appears that the Georgia Company deposited with the Central Trust Company of New York its entire holding of this stock, and had issued thereon and sold to the public four millions of the bonds of said Georgia Company. In the mean time, by virtue of its majority control, it had taken charge, through a president and board of directors elected in the main by this block of stock, of the Central Railroad & Banking Company of Georgia. Thereafter the Georgia Company transferred all its capital stock to the Richmond & West Point Terminal Railway & Warehouse Company. This latter company thus came into control

of the Central Railroad & Banking Company. It also had control of the Richmond & Danville Railroad Company, and of the East Tennessee, Virginia & Georgia Railway Company, both of which are directly competitive lines of the Central Railroad & Banking Company. The Terminal Company (as we shall call it for the sake of brevity) now put out, through the Central Trust Company of New York, a large issue of its bonds, secured by a mortgage deposited with the Central Trust Company, on its stock holdings, in all the properties under its control.

With reference to the 40,000 shares of stock of the Central Railroad deposited with it as collateral to secure the bonds of the Georgia Company, it was stipulated in the mortgage that whenever the Terminal Company presented a bond of the Georgia Company the Central Trust Company should issue in lieu thereof a bond of the Terminal Company. Two millions of the bonds of the Terminal Company were left on deposit with the Central Trust Company, with the avowed purpose of procuring by the use of said bonds the 32,000 shares of stock of the Central Railroad, which had not yet been secured by the Terminal Company or the pro- [341] moters of the scheme to possess and control the Central Railroad & Banking Company of Georgia. The Central Trust Company thus became the trustee for this mortgage, a salient feature of which was the design to compass the absolute and undivided ownership of the Central Railroad by a company controlling rival lines, largely by means of the use which had been made of a majority of its stock held in a block by this contract or voting trust, apparently a corporate purpose to obtain $3,200,000 in stock of a company it controlled for $2,000,000. The Terminal Company had obtained elsewhere 2,200 shares of stock, which it likewise deposited with the Central Trust Company; and with regard to all of this stock, thus deposited, it was stipulated by the promoters of the scheme that its voting power should be retained by the Georgia Company, and afterwards, when the Terminal Company absorbed that, by the latter. By means of this voting power the Terminal Company was now the master of the destinies of the Central Railroad, and its president and board of directors had become a directory which was in the control

of the Terminal Company, and, if need be, removable by it. In pursuance of the scheme, this directory on the 1st day of July, 1891, leased for 99 years the Central Railroad & Banking Company of Georgia, and all of its property, nominally to the Georgia Pacific Railroad Company, but really to the Richmond & Danville Company, both of which were under the control of the Terminal Company, which now directed the operation of all the Central properties, with the most disastrous results to the immense and vital system of which it had thus become possessed. This lease and the proceedings of those in charge of the control of the Central Railroad & Banking Company are attacked by the original bill. A temporary receiver was appointed. While this officer was proceeding to take possession of the assets of the Central Railroad & Banking Company the Georgia Pacific and Richmond & Danville Companies threw up the lease, and formally abandoned the possession of all the properties. At the hearing of the rule to show cause why the injunction prayed for should not be granted, and the receiver appointed, after an investigation lasting through several days, the court (Judges PARDEE and SPEER presiding) granted an interlocutory order appointing receivers to take charge of the properties and assets of the Central Railroad & Banking Company, and all subsidiary railroads and steamship companies. The order directed an election for a board of directors to be held on the 16th day of May, 1892, and it enjoined the Central Railroad & Banking Company from receiving the vote of the 42,200 shares of stock controlled by the Terminal Company, and held by the Central Trust Company of New York. It provided, however, that, in case there should be a transfer of that stock in good faith, it might be voted, provided that the court approved the genuineness and legality of the transfer.

The proceeding now before the court is brought to have that order modified, so that the stock may be voted by the Central Trust Company and counted in the election on Monday next. The motion involves the control of the Central Railroad & Banking Company of Georgia, and the many millions of property which constitute its assets. The Central Trust [342] Company is a party defendant to the original

bill, and, in the opinion of the court, might well be held to be bound by the former adjudication. Its counsel were present at the hearing. The cause had been continued in part upon the application of its counsel; they stating that they desired to be heard. It being insisted, however, that the situation of this stock has been changed since that judgment was rendered, the court has heard its application. There are now presented on the part of the Central Trust Company two written representations, one signed by the Georgia Company, by T. W. Scarborough, president, and the other by the Richmond & West Point Terminal Railway & Warehouse Company, by John A. Rutherford, second vice president. The representations both recite the fact of the deposit of the 40,000 shares of Central Railroad stock with the Central Trust Company for the purpose of securing the bonds above mentioned, and they both contain this further statement:

"It may be claimed that the adjudication by your honorable court bears the construction that this company shall not exercise the right to vote upon the said stock reserved by the said deed of trust, and in view of such decision this company yields, transfers, and surrenders any right which it possesses or possessed to vote upon the said stock, or any part thereof, at the election of the shareholders of the Central Railroad & Banking Company of Georgia to be held May 16, 1892, or at any adjournment thereof, in favor of the said Central Trust Company, representative of the said bondholders, the legal and equitable owners of the said 40,000 shares of stock. In making this surrender of any right to vote upon the said stock, the Georgia Company represents to the court that it has not entered into any arrangement, bargain, or understanding of any kind or nature whatsoever with the said Central Trust Company in respect to the exercise of the voting power upon the said stock by that company, and that it will not make or endeavor to make any such bargain, contract, or arrangement, and that the said Central Trust Company shall be entirely free, independent, and untrammeled, so far as the said Georgia Company is concerned, from any direction, interference, or control in the exercise by it of such voting power."

The representation of the Terminal Company purports only to surrender the voting right in 2,200 shares of stock. Both representations restrict the transfer of the voting right reserved by the Terminal Company to the election to be held on May 16, 1892, or at any adjournment thereof. It is difficult to perceive how this instrument differs in any matter of substance from an ordinary proxy. The transfer of the Georgia Company of its right to vote the stock is not considered by the court as material, for that company has really no control over the stock to which a court of equity will pay

any attention. The Georgia Company has been wholly absorbed by the Terminal Company, but the Terminal Company omits to make any transfer of the right to vote the 40,000 shares of stock in question, and limits its representation to the court to 2,200 shares, which it has presumably acquired from sources other than the Georgia Company. It follows, therefore, that as to 40,000 shares of this stock the condition is precisely the same as when the court enjoined the Central Railroad from receiving or counting the votes thereof, for the reason that it had been purchased and held in violation of the laws and constitution of Georgia. But, as we have seen, the transfer of **[343]** the Terminal Company relating to 2,200 shares is nothing more than a proxy; and, the Terminal Company being enjoined from voting the stock directly, it cannot be permitted to vote it by proxy, unless, indeed, it is thought proper to set aside the former judgment of the court in this respect. There appears to be no consideration whatever for this transfer. The Central Trust Company of New York holds this stock merely as a naked trustee to secure certain bonds for which it was pledged as collateral security. Now, when those bonds were issued the stock thus pledged had attached to it no voting power, of which either the Trust Company or the bondholders had the right to avail themselves. Its voting power, therefore, was no part of their security. This transfer, even if it were efficacious to convey the voting franchise of all the stock, would be merely an attempt to ingraft upon the trust a new feature, which the beneficiaries of the trust did not seek, or expect, at the time of its creation. The voting of the stock was enjoined because it was deemed by the court that it would bring about a public wrong, the gravity of which cannot well be foretold. It was further deemed to threaten the continuance and perhaps the aggravation of the illegal and injurious results it had already accomplished. If the Central Trust Company was wholly relieved of any entanglement, with the perplexed and chaotic condition, which the voting power of this block of stock, and the illegal, reckless, and destructive management, its exercise, has entailed upon these properties, the court would even then hesitate long before it would avoid the injunction, which was the outcome of the most anxious consideration by the

learned circuit judge, and by the district judge, merely because the Terminal Company, enjoined from voting itself, had gratuitously conveyed to the Trust Company the power which the latter apparently had not desired, and which was in no sense a part of the contract with its bondholders. But the Central Trust Company is not, in our opinion, in any view, a proper party to vote this stock. It has no interest of its own in the stock. It is simply a stakeholder. There are many situations in which stock may be so placed that it becomes inequitable or illegal for it to be voted. The law places the voting power of pledged stock in the pledgor or mortgagor, even where there is no express stipulation to that effect. *Schofield* v. *Bank*, 2 Cranch, C. C. 115; *Vowell* v. *Thompson*, 3 Cranch, C. C. 428. And where the pledgor or mortgagor is disqualified to vote the stock the disqualification extends as well to the pledgee or trustee. *Ex parte Holmes*, 5 Cow. 426; 1 Woods, Ry. Law, § 61, p. 149, and cases cited. See, also, *Bank* v. *Sibley*, 71 Ga. 726; *Burgess* v. *Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10. It may well be doubted if the charter of the Central Trust Company affords any authority for the exercise of such a power. It is what its name imports, a trust company, and, as was well said in the argument of one of the counsel, if the Central Trust Company "springs from the passive position of a naked trustee into the active operation of a great railroad system,"-the court must be clearly satisfied of its authority by law to do so. If it may do this, it has within its gift the appointment of every officer of this vast railroad system, from president to flag- **[344]** man; and all the vast and most important powers of the railroad, powers in which the people of states distant from the office of the Central Trust Company are profoundly concerned, are likewise within its control. It is moreover the trustee, as we are informed by its counsel and as it appears from the evidence, for twenty-six millions of the indebtedness of this road. It is, then, the agent for its creditors. Can it also be the agent for the debtor? If so, it is easily possible that when the agent of the creditor perceives a debt to be due the agent for the debtor may make default, and thus the entire property be brought to the block. In stating this possibility, no reflection is intended on this great financial institution, but the law will not

permit conflicting trusts or conflicting interests to be reposed in one trustee.

Besides, it appears from the evidence that the accredited president of the Central Trust Company is and has been concerned as the financial expert seeking to bring about a consolidation and reorganization of all the railroads which are or have been under the control of the Terminal Company. These roads operate the competing lines in the state of Georgia, and in the statement of March 1, 1892, addressed by Mr. Frederick P. Olcott, president of the Central Trust Company, to the holders of securities of the Terminal Company, this appears:

"In view of the pending litigation affecting the Central Railroad & Banking Company of Georgia, and questions which are before the courts undetermined respecting its existing lease, and considering the legal difficulties attending a consolidation embracing that company, the committee has found it advisable to make no provision for the present for taking up the outstanding stocks or securities of the Central Railroad & Banking Company of Georgia, but the interest of the Richmond Terminal Company in these stocks and securities will vest in a new corporation, and form a part of the security on a new first mortgage bond."

The East Tennessee, Virginia & Georgia securities will be covered by the same mortgage, and the two roads will be under the same control. Can it be denied that this avowed purpose would have the effect, or be intended to have the effect, to defeat or lessen competition, and to encourage monopoly? And yet with the voting power of this stock in its control the Trust Company can accomplish this result. Not only is this true, but if it be competent for the Central Trust Company to operate one railroad system of which it holds securities, if a few words from the mortgagor, transferring the voting power of stocks pledged with it, can give it control, what it may do with one road it may do with another. If it may vote the stock of the Central, it may vote the stock of the East Tennessee, Virginia & Georgia, the Louisville & Nashville, and all the others, and thus the railroads of an entire section may be the playthings of the officers of this corporation. Surely this may tend to defeat or lessen competition and to encourage monopoly. But whatever may be the powers of the Central Trust Company elsewhere, it certainly cannot exercise such powers as we

have described within the state of Georgia. A corporation of this state could not do so. Comity between the states authorizes a corporation to exercise its charter powers within another state, but it does not permit the exercise of a power where the policy of [345] that state, distinctly marked by legislative enactments or constitutional provision, forbids it. *Runyan* v. *Coster*, 14 Pet. 122; *McDonogh* v. *Murdock*, 15 How. 367; *Marshall* v. *Railroad Co.*, 16 How. 314.

It is said, however, that, by the charter of the Central Railroad & Banking Company, other corporations may own stock in that company. It is quite evident that the language upon which counsel for the movant rely relates to corporations of the classes mentioned in the charter. The cities of Macon and Savannah are mentioned, and other corporations are authorized. Under a familiar rule of construction, this would seem to mean other municipal corporations. Be this as it may, if any other corporation had not purchased the stock before the constitution of 1877, such other corporations cannot since then buy it, or hold it on any contract or agreement whatever which might have the effect, or be intended to have the effect, to defeat or lessen competition or to encourage monopoly. This would be especially true of a non-resident corporation, which, when it enters the state, does so with submission to the settled policy of the state. The court recognizes the soundness of the authorities cited by the learned counsel for movant in argument. It is, however, true that they do not apply to a case like this. It is perhaps true that there is no precedent precisely pertinent to the grave issues presented by this controversy. They have sprung into existence because of the marvelous railroad development of the country, and because of the ease and facility with which a trust owning a bare majority of the stock of a corporation can nullify and deaden the vote of all the minority stock, however great the minority, or however rightful and intelligent would be its exercise. The alarming effect of this power may be illustrated by the facts of this case. Forty thousand shares of stock have deadened the votes of 32,000 shares, and have controlled as many millions in values. These 40,000 shares have been deposited, and bonds issued thereon.

If the voting power of the stock is apportioned among the bonds, 20,100 shares may control the policy of the entire block, and these 20,100 shares may thus control all the millions belonging to the Central properties, and yet stockholders who have 32,000 shares have no voice in the management of the properties, in which perhaps their all is invested.

Even where individuals form a combination to control the majority stock of a corporation, and agree not to transfer their shares to the opposition or not to vote against the combination, such contracts have been held to be void as in restraint of trade, and against public policy. Ordinarily any stockholder may withdraw from such a contract, although it is expressly agreed that it shall be irrevocable. 1 Beach, Priv. Corp. § 305, and cases cited.

It is insisted by the petitioners that the Terminal Company has no appreciable interest in the stock of the Central Railroad. The interest it formerly had was conveyed by the mortgage of 1889. The bonds executed under that mortgage, and secured by the Central stock, have long ago been sold, and the proceeds appropriated by the Terminal Company. But that company has a substantial and large pecuniary interest in the **[346]** Richmond & Danville and the East Tennessee, Virginia & Georgia Railroads. These roads are the natural competitors of the Central. Is it surprising, then, that the Terminal Company, controlling by this "voting trust" the management of the Central, should make the road in which it is not interested suffer for the benefit of its rivals, which it not only controls, but possesses? It is not difficult to perceive that a combination of corporations which produces a condition so inequitable cannot be sanctioned by the law. We believe that transactions of this character are within the spirit, if not within the letter, of the act of congress, known as the "Sherman Anti-Trust Law." Act July 2, 1890, (26 St. at Large, p. 209.) It certainly is, as we have seen, obnoxious to the law of Georgia, and it was certainly as obnoxious to the common law. The baleful effects of such an unlawful scheme have been most significantly illustrated by the record itself. The property of one of the oldest and most renowned railroads in the United States has been brought to the verge of ruin. These stocks were once so solvent and

reliable that trust estates, the property of widows and orphans, of charitable and eleemosynary institutions, were invested in them, at the will of the trustees, without an order of court to sanction the investment. The properties have been impoverished in every department. Skillful artisans and mechanics, who from their apprenticeship have been in the service of the companies, have been turned away. Vast buildings which were once musical with the whirr of machinery and the voices of prosperous and contented workingmen, earning by their useful and valuable labor a comfortable livelihood, are now voiceless. The ashes sleep undisturbed on the forge, and the hammer rusts on the anvil. Merchants and tradesmen who have depended upon the purchasing power of these operatives have been threatened with ruin; numberless houses once occupied by their happy families are now vacant; and those whose all is invested in the securities of this company are haunted with the expectation that the road may default upon its obligations, and be sold under the hammer on foreclosure, and the provision made for their declining years swept from existence. But this, and all of this, is unimportant, compared with the greater interest of the people in their rightful demand that the corporation created by them, and granted vast and valuable franchises, shall be managed as a railroad upon lawful business principles, in the transportation of freight and passengers, and for the development of the state, and that it shall not be the toy of the speculator, and that the franchises which they granted for nobler purposes shall not be made the instrument of their ruin and the degradation of the state. The possession of its stock does not give uncontrollable right in the management of a railroad corporation. The right of the state that the corporation should conform to the purposes for which the law created it is wholly paramount to any and all rights of stockholders. It may not be doubted that the values represented by these 42,000 shares of stock are entitled to the protection of the court, and they will be protected. When it is offered to vote them with the ligitimate purpose for which the majority of shares of stock in a corporation may be lawfully voted, at the instance **[347]** of parties who have legal authority to hold and vote them, they will be voted. The

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court will be, moreover, happy to entertain any proposition for voting them which will result in the management of this road in such manner that it need not be wrecked; in such manner that its matchless properties may be utilized to pay its obligations as they mature, and to protect its values. It is well understood by the court that the mere fact that this stock may not be voted in its present illegal *status* is a menace to the credit of the Central Railroad, and to the power of the court and of its receivers to redeem it for the benefit of all concerned. We have no doubt that, properly managed in accordance with the law, with the encouragement of those who are friendly to it, which its great importance deserves, the Central Railroad & Banking Company cannot only pay its obligations as they mature, but rehabilitate its fortunes, imperiled as they are by this illegal trust voting a majorty of the stock, the exercise of which the court has enjoined. The court is quite as solicitous to protect the interest of the creditors as of stockholders of this great property, but there is nothing in this motion which will justify the court in changing the order, which was mainly, indeed, we may say almost wholly attributable to the wisdom, experience, and acumen of the learned circuit judge; an order intended to preserve the property for the present, to gather anew its dissipated assets, and to restore it as speedily as possible to the lawful charge of those who may be found legally entitled to its management and control. Let an order be taken, denying the application.

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[469] UNITED STATES *v.* GREENHUT ET AL.

(District Court, D. Massachusetts. May 16, 1892.)

[50 Fed., 469.]

ILLEGAL TRUSTS AND MONOPOLIES—INDICTMENT.—Act Cong. July 2, 1890, (26 St. p. 209,) "to protect trade and commerce against unlawful restraints and monopolies," provides, in section 2, that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc. *Held*, that an indictment thereunder which fails to allege that defendants monopolized, or conspired to monopolize, trade and commerce among the several states, or with foreign nations, fails to state an offense, even though it does allege that they did certain acts with intent to monopolize the traffic in distilled spirits among the several states, and that they have destroyed free competition in such traffic in one of the states, and increased the price of distilled spirits therein.[a]

Opinion of the Court.

At Law. Prosecution of Joseph B. Greenhut and others for violation of the law against monopolies. Indictment quashed.

Frank D. Allen, U. S. Atty.

Elihu Root, *Richard Olney*, *Simpson, Thacher & Barnum*, *Charles A. Prince*, and *Bordman Hall*, for defendants.

NELSON, District Judge.

This is an indictment under the second section of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." 26 St. p. 209. The indictment sets forth that the defendants are the officers of the Distilling and Cattle Feeding Company, a corporation chartered by the laws of the state of Illinois, and having its principal place of business in Peoria, in that state; that, as such officers, they purchased or leased seventy-eight theretofore competing distilleries within the United States; and, within certain dates specified, used, managed, controlled, and operated said distilleries, and manufactured sixty-six million gallons of distilled spirits, and sold the product within the United States, part of it in the district of Massachusetts, at prices **[470]** fixed by them, the whole being seventy-five per cent. of all the distilled spirits manufactured and sold within the United States during the period; that all said acts (except the purchasing and leasing of the distilleries) were done with the intent to monopolize to the company the manufacture and sale of distilled spirits in Massachusetts, and among the several states, to increase the usual prices at which distilled spirits were sold, to prevent and counteract free competition in the sale of distilled spirits, and thereby to exact great sums of money from citizens of Massachusetts and of the several states, and from all others purchasing; that, in pursuance of such intent, the defend-

[a] Syllabus copyrighted, 1892, by West Publishing Co.

ants, as such officers, agreed with D. T. Mills and Co. and other dealers in Massachusetts that, if such dealers would buy all their supplies of distilled spirits from the company for six months, the company would give them a rebate of two cents a gallon on their purchases; that by means of the rebate agreements and by their control of the distilleries, and of the manufacture, sale, and prices of seventy-five per cent. of all the distilled spirits manufactured and sold in the United States during the period named, the company, and the defendants as its officers, had made large sales of distilled spirits to D. T. Mills and Co. and other dealers in Massachusetts at prices fixed by the defendants in excess of the usual prices at which such spirits were then sold in that state, such spirits having been manufactured in other states, and transported therefrom into Massachusetts, and had unlawfully monopolized to said company the manufacture and sale of distilled spirits, and had increased the usual prices at which distilled spirits were then sold in Massachusetts, and had prevented and counteracted the effect of free competition in the price of spirits in Massachusetts, and had exacted and procured great sums of money in said district from D. T. Mills and Co. and others. To this indictment the defendant Greenhut filed a motion to quash, and the other defendants demurred, upon the ground that the indictment is insufficient in law, and does not charge any offense created by any statute of the United States.

The second section of the act is as follows:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

An indictment framed under this section should contain a distinct averment in the words of the statute, or in equivalent language, that, by means of the acts charged, the defendants had monopolized, or had combined or conspired to monopolize, trade and commerce among the several states or with foreign nations. This indictment contains no such averment. It does not charge that the defendants entered into any unlawful combination or conspiracy. Nor does it con-

tain any averment that they had monopolized trade or commerce among the several states [471] or with foreign nations. It avers merely that by means of the acts alleged they had monopolized the manufacture and sale of distilled spirits, without stating that in so doing they had monopolized trade and commerce in distilled spirits among the several states or with foreign nations. It is true that the indictment charges that the defendants have done certain things with intent to monopolize the traffic in distilled spirits among the several states, and that they have increased the usual prices at which distilled spirits were sold in Massachusetts, and have prevented and counteracted the effect of free competition in such traffic in Massachusetts. But none of these things are singly made offenses by the statute. The indictment in this particular is clearly insufficient according to the elementary rules of criminal pleading, and charges no offense within the letter or spirit of the second section of the statute.

Other questions presented upon this indictment were argued by counsel, and among them the important questions whether the acts charged constitute an unlawful monopoly, within the meaning of the statute; and, if they do, whether congress has the constitutional authority to declare such acts to be unlawful and criminal, and whether the things charged against the defendants were not rather the doings of the corporation than of its officers. In regard to these questions it is only necessary to remark that they seem to be of such a character as to require that they should not be decided finally against the government by the trial court, but should be reserved for the determination of the appellate court, when presented upon an indictment not otherwise insufficient in law. Indictment quashed. Judgment for the defendants.

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[205]

IN RE CORNING ET AL.

UNITED STATES *v.* GREENHUT ET AL.

(District Court, N. D. Ohio, E. D. June 11, 1892.)

[51 Fed., 205.]

MONOPOLIES—CRIMINAL LAW—INDICTMENT.—An indictment under the act of July 2, 1890, relating to monopolies, averred that defendants,

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in pursuance of a combination to restrain trade in distillery products between the states and monopolize the traffic therein, acquired by lease or purchase, prior to the passage of the act, some 70 distilleries, producing three quarters of the distillery products of the United States, and that they continued to operate the same after the passage of the law, and by certain described means sold the product at increased prices. *Held*, that no crime was charged in respect to the purchase or continued operation of the distilleries, since there was no averment that defendants obligated the vendors of the distilleries not to build others, or to withhold their capital or experience from the business.[1] [a]

SAME.—The indictment further averred that defendants, in pursuance of the combination, shipped certain of the products to Massachusetts, and sold them there through their distributing agents to dealers, who were promised a rebate of five cents per gallon on their purchases, provided such dealers purchased their distillery products exclusively from the distributing agents, and sold them no lower than the prescribed list prices, said rebate to be paid when such dealers should sign a certificate that they had so purchased and sold for six months; and that by this means defendants had controlled and increased the price of distillery products in Massachusetts. *Held*, that no crime was charged with respect to such sales, since there was no averment of any contract whereby the purchasers bound themselves not to purchase from others, or not to sell at less than list prices.

CRIMINAL LAW—FEDERAL COURTS—REMOVAL OF PRISONER.—On an application to a federal court for the removal of a resident of the district to a distant state and district for trial, it is the duty of the court to scrutinize the indictment, disregarding technical defects, but to refuse the warrant if the crime alleged is not triable in the district to which a removal is sought, or if the indictment fails to charge any offense under the law.

At Law. Indictment against Joseph B. Greenhut and others for violating the law against monopolies. Heard on application for a warrant to remove defendants to another district for trial. Denied and prisoners discharged.

Allen T. Brinsmade, Dist. Atty., for the United States.

Elihu Root, *Thos. Thatcher*, and *S. E. Williamson*, for defendants.

[1] See U. S. v. Greenhut, 50 Fed. Rep. 469 [ante p. 30], for a decision in the district court of Massachusetts on motion to quash.

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Opinion of the Court.

RICKS, District Judge.

This cause comes before me upon the application by the district attorney for a warrant for removal to the district of Massachusetts of Warren Corning and Julius French, citizens of this judicial district, against whom is pending an indictment preferred by the United States in the district court for the district of Massachusetts. A certified copy of the indictment, together with the return of A. J. Williams, a United States commissioner for the circuit court of this district, that said defendants refused to give bail, and were by him committed, is filed. The defendants object to the granting of a warrant for removal, because the indictment does not charge an offense against the laws of the United States. Being residents and citizens of this judicial district, they **[206]** claim the right, upon this application, to challenge the sufficiency of the indictment, and insist that it is the duty of the district judge, before ordering the removal of a citizen to a distant district for trial, to scrutinize the indictment, and to refuse the warrant in case it appears upon the face of the indictment either that the crime alleged was not committed in the district to which the removal is asked, or that the indictment does not sufficiently charge an offense under the law, or for other material defects in that instrument, or in the act upon which it is founded. The order of removal is not a mere ministerial act on the part of the district judge, but is a judicial function, including the exercise of a legal discretion upon the papers presented in support of the application. I fully concur in the opinion of Judges Dillon and Treat in *Re Buell*, 3 Dill. 116. In that case, on the proposition that the question of the sufficiency of the indictment was for the court in which it was found, and not for the district judge on an application for the warrant of removal, Judge Dillon said:

"I cannot agree to the proposition in the breadth claimed for it in the present case. The provision devolves on a high judicial officer of the government a useful and important duty. In a country of such vast extent as ours, it is not a light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely provides the previous sanction of the district judge to such removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the

only probable cause relied on or shown was an indictment, and that indictment failed to show an offense against the United States, * * * would misconceive his duty, and fail to protect the liberty of the citizen."

Ordinarily, where an offense charged was committed in the district where one or more of the several defendants reside, the trial of the accused should be had in the district of which he is or they are inhabitants. Where an offense has been committed in several different districts, and the accused reside in other and different districts, the government has a right to elect in which one of the districts the prosecution may be conducted; and, under proper conditions, may elect to prosecute them in a district other than that in which they or either of them reside. There may be exceptional conditions which would justify prosecution in a district remote from that in which any one of a number of defendants resides, or far remote from the district where the principal business of the accused is conducted. But the spirit of our laws is to indict and try offenses in the district where the defendants reside, if the offense was committed in such district, and if local influences and prejudices are not too serious obstacles to be overcome.

I am moved to these remarks because it appears in this case that, if the indictment sufficiently charges an offense in the district of Massachusetts, a similar offense was committed in almost every other district of the United States, and more flagrantly in the district in which some of the accused reside, and in one of which several of them reside and conduct their principal business. It appears from the indictment that one of the defendants resides in the southern district of New York, where **[207]** many transactions similar to those averred in the indictment take place; several reside in the southern district of Ohio; several reside in this district; and several reside in the northern district of Illinois, where the corporation was organized and has its legal residence, and conducts its principal business. In each of these four districts similar offenses were committed.

These are not stated as reasons why they should not be removed for trial, if, in fact, a sufficient indictment is pending against them in the district of Massachusetts, but rather as justifying a closer scrutiny into the indictment than if the

only offenses committed were those alleged in this indictment, or the district of Massachusetts was the only place where the strong arm of the law could reach them. Does the indictment charge an offense under the act of July 2, 1890, known as "An act to protect trade and commerce against unlawful restraints and monopolies?" The first section of the act declares illegal "every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations." The second section declares that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

The indictment alleges that before the enactment of the law in question the defendants, for the purpose of monopolizing and restraining the trade and commerce in distillery products among the several states of the nation, combined with others, and purchased or leased or otherwise obtained control of 70 distilleries, which had theretofore been competing, separate distilleries, and so operated them as to produce 77,000,000 gallons of distillery product, which output comprised about 75-100 of the total production of the distilleries of the United States; and that the condition of trade in such products during the period charged was such that the defendants, by means of their combination, were able to prevent free competition on the actual price of such products, and thereby control the price, so as to augment and increase the price thereof to consumers in the district of Massachusetts, and to restrain trade therein among the several states.

The first count of the indictment alleges a combination on the part of the defendants to restrain the trade and commerce in the district of Massachusetts, and between that state and other states of the Union, in distillery products, of which it charges that defendants produced 75-100 of the entire production of the United States, and avers that on October 3, 1890, they sold to Mills & Gaffield, in Boston, 5,642.82 gallons of alcohol, said alcohol being part of the product of said distilleries, and made in Peoria, Ill., and intended to be trans-

ported and sold to said Mills & Gaffield in Boston; and with the intent to restrain the trade therein they fixed the price at which said Mills & Gaffield should sell the same in the district of Massachusetts, or for transportation to the other states, and did compel said Mills & Gaffield to sell said alcohol at no less price than that fixed by the defendants; and, by reason of their com- [208] bination, said defendants did control the amount of said products sold in said district or for transportation to other states, and did counteract the effect of free competition on the usual price at which said products were sold in Massachusetts or for transportation to other states, and did increase and augment the price at which said products were sold in said state, and for transportation to other states, and did thereby exact and procure great sums of money from the citizens of said district, and thereby, and by other means to the jurors unknown, restrain the trade and commerce in said products, between the state of Massachusetts and other states of the Union.

The second count charges the defendants with combining and monopolizing to themselves the trade and commerce in distillery products. It charges, in the same terms set forth in the first count, the purchase and lease of 70 distilleries, controlling 75-100 of the distillery products of the United States, which distilleries had been before that time competing producers; and with the same purpose, to monopolize the trade in said products, they made 75-100 of the entire output of the distilleries of the several states; and with the intent of controlling the trade and price of said products in said state of Massachusetts, and between the several states, and of monopolizing the trade in said state and between said states, did, on the 18th day of September, 1890, sell to C. I. Hood & Co., of Lowell, in said state, through Webb & Harrison, as distributing agents for defendants, 526.52 proof gallons of alcohol, and with intent to monopolize said trade did then and thereby promise said Hood that if, for a certain time agreed upon, said Hood should purchase exclusively from the defendants his supplies of such goods as defendants were then making, and during that period should not sell such goods at any lower prices than the list of the defendants' distributing agents, and should subscribe to a certificate that he

had purchased all such supplies from defendants, and had not sold the same at prices lower than their distributing agents had sold the same, then defendants would return to said Hood five cents per proof gallon on the goods so purchased by Hood. On September 23, 1891, Kelly & Durkee having purchased from said Webb & Harrison, as distributing agents of defendants, 85.54 proof gallons of alcohol, said defendants, with intent to, and in pursuance of said attempt to monopolize the trade, etc., did at Boston, on said date, promise Kelly & Durkee that, if for the period agreed on they purchased exclusively of one or more certain dealers named, their supplies of goods then made by defendants, said dealers being then distributing agents for defendants, and should not sell such goods at any lower prices than such dealers' list prices, which said defendants controlled and fixed, and should certify that they purchased all their distillery products for said period from some one of the dealers so named by defendants, and had not sold any goods so purchased at any lower prices than said dealers' list prices, with freight (if any) paid, then said defendants would repay to said Kelly & Durkee five cents for each proof gallon purchased; and that defendants, in pursuance of said combination, did make other promises to Hood, to the [209] same effect, and also to Kelly & Durkee, and did thereby, in the way charged, attempt to monopolize the trade in said products in said district, and between the several states of the Union.

The third count charges a combination in restraint of trade, alleging a transaction with Hood on October 2, 1891, involving purchases by him of 518.81 gallons of distillery products, under circumstances substantially the same as averred in the preceding counts; alleging that defendants promised Hood, six months from the date of said purchases, a rebate of five cents per gallon, upon conditions similar to those averred in the second count, and averring divers other similar contracts with Hood in the said district.

And the fourth count avers that on the 7th day of May, 1892, said defendants entered into a certain contract in restraint of trade and commerce in distillery products among the several states, and especially in restraint of trade and

commerce in Massachusetts and other states, with Kelly & Durkee, which contract was, in substance, that, for the purpose of securing the continuous patronage of the purchaser, the defendants, six months after date, promised to repay to Kelly & Durkee five cents per proof gallon of defendants' products then purchased, upon condition that said purchasers or their successors, from date of voucher or purchase to time of payment, shall buy exclusively such kind of goods as are produced by defendants from some one of their agents designated, and shall not sell the same at prices lower than said dealers' list prices, and shall certify to that effect, said defendants acting in the name of the Distillery & Cattle Feeding Company, being from the 22d of September, 1891, up to the finding of the indictment, manufacturers of said distillery products within certain states of the United States other than Massachusetts, and the kind of goods referred to in said contract being distillery products, said Kelly & Durkee having on the said 7th day of May complied with all the conditions of said contract. The first, third, and fourth counts are based on the first section of the act, and charge a combination and conspiracy in restraint of trade, while the second count charges a combination to monopolize a part of the trade in distillery produces between the states.

Now, giving to this indictment the broadest possible construction; giving to the facts therein set forth and to the acts committed the meaning most favorable to the prosecution,—what is the offense charged? It is that the defendants, prior to the act of July 2, 1890, by lease or purchase, acquired some 70 distilleries throughout the several states of the Union, and from them produced 77,000,000 gallons of distillery products, which then constituted 75-100 of the entire distillery products of the United States, and that they continued to operate said distilleries on the same extended scale after the act became a law; that part of these products were shipped to the district of Massachusetts, to be sold there and for transportation to other states, and sold by the defendants, through their distributing agents, to dealers in Massachusetts, under a promise on the part of the defendants that if said dealers should purchase their distillery products exclusively from the [210] distributing agents of the defendants, and should sell the same at prices not lower than the list prices of such distributing agents, and should at the expiration of six months after such purchases certify that they had so exclusively purchased from defendants' agents, and had so sold at the said prices, then defendants would pay to such dealers a rebate of five cents per gallon on all their purchases. The indictment avers that the price at which said products sold was higher than had before that time prevailed, and that by said arrangement defendants controlled and augmented the prices of said products, and by said means exacted and received from the people of the district of Massachusetts a large amount of money over and above that usually received for such products.

These are the substantial facts relied upon to constitute the crime. Of course, it is alleged, with the usual particularity, that all this was done in pursuance of a combination to restrain trade between the states, and to monopolize to the defendants the traffic in the several states in distillery products, and done with the intent and purpose to control the production of said articles and fix the prices at which they should be sold. But it is not sufficient to charge an unlawful intent, or to aver that a combination or a course of business is in restraint of trade, or a monopoly of trade, in order to constitute a crime. Acts relied upon to make the offense must be stated. A combination of act and intent is needed to constitute a crime. No averment of intent alone is sufficient; neither is any amount of act alone; the two must combine.

Assuming an unlawful intent and purpose of a combination to restrain trade and monopolize traffic in these distillery products, as charged in the indictment, do the acts set forth constitute such restraint and monopoly? In what respect did the sales made, as charged, restrain trade or monopolize the traffic in distillery products? These terms, as used in the act of congress under consideration, are well defined at common law, and must be considered with reference to such established meaning. The indictment was prepared with great care by the district attorney of Massachusetts, and it is safe to assume that he has charged therein all the acts which he believed it possible to prove upon the trial. Assuming this to be true, the indictment is significant in what it

omits to charge in the respects above referred to. It is not averred that, when defendants purchased their 70 distilleries, they obligated the vendors not to build other distilleries, or not to continue in the distillery business in the future. It is not averred that defendants attempted in any way to bind the vendors to withhold their capital or skill or experience in the business from the public in the future. There is no averment that the defendants in any manner, or at any time, attempted to control the business of the remaining one fourth of the distilleries in the United States, or in any way attempted to limit their output, or by agreement with them control the price at which their products should be sold, or in any degree restrain their trade, or limit the territory over which their trade should extend. The full scope of the averments in this respect is that before this law was passed by congress the defend- [211] ants legally purchased with their own capital three fourths of the distilleries in the United States, and that they produced 77,000,000 gallons of distillery products, and sold these products in the markets of the several states at the best possible prices; and that they continued so to own and operate said distilleries, and so to sell their products, after the passage of this act. This they did without any attempt at any time, by contract, to control the production of the other distilleries, or the prices at which they should sell, or without any contract with such distillers in any way restraining trade. The indictment, therefore, in my judgment, wholly fails to charge a crime, so far as the purchase of said distilleries or their manufacture of distilled products before the passage of the act is concerned, or so far as they are charged with continuing to own and operate them with unlawful intent after the passage of the act.

Do the acts, in connection with the transportation and sale of said products in the district of Massachusetts as charged, constitute an offense? The substantial facts in this respect, as averred, are that defendants sold their products in Massachusetts, through distributing agents, to dealers there, who were promised a rebate of five cents per gallon on all their purchases, provided said dealers purchased their distillery products exclusively from defend-

ants' agents, and provided they sold the same at prices no lower than the list prices of such agents; and said rebate was to be paid when the dealers should sign a certificate that they had so exclusively purchased from defendants' agents, and had so sold at prices no lower than the list prices of said agents. The indictment in these averments is again significant for its omissions. It fails to charge a contract on the part of the dealer that he would not purchase distillery products from other distilleries, or any contract on his part binding himself to sell at defendants' prices. Such dealers were offered the rebate as an inducement to purchase exclusively from the defendants, and to sell at the prices defendants fixed; but there is no contract averred by which the dealers obligated themselves to do so. In what respects, then, are these acts charged different from the customary efforts of manufacturers or dealers to increase the sale of their products and push their business by the many artifices of trade?

There are no contracts averred, as between the defendants and their customers, which are in restraint of trade. Their acts are rather intended to increase their trade, but not by restraining the liberty of the customer to deal with others, if he wishes to, or can do so, with advantage to himself. If these acts are illegal and in restraint of trade, and if they constitute a monopoly under this act, it may well be denominated an act to restrain legitimate enterprise, and limit and qualify the ownership in property. The acts charged are common and frequent to many branches of manufacture and trade, and if the defendants are guilty in the manner of making sales of their products, as set forth in the indictment, the act is more sweeping in its provisions than ever contemplated by congress, as manifestly appears from the debates in the senate when the act was before it for consideration. From those debates it is evident that the congress did not intend to limit the amount of capital a citizen [212] should invest in any line of business, or restrain his energy or enterprise in acquiring for himself all the trade possible in such business, provided in doing so he did not, by illegal contracts

or devices, restrain others from pursuing the same business, or deprive the public from enjoying the advantages of the free use of capital, skill, and experience of competitors. I am therefore of the opinion that as to the manner in which the defendants made the sales of their products, so far as their acts are set out in the indictment, there is no restraint of trade or monopoly shown, and there is no crime stated or charged. The indictment is therefore insufficient in charging a crime as to either the purchase and use of the distilleries or as to the sale of their products.

It was contended by counsel that, after these products reached the state of Massachusetts, they became property owned and held by the defendants under the laws of that state, and what was done with such products thereafter in that state did not in any way relate to commerce between the states, and therefore the act of congress could not be held to apply to such sales. It was further urged that, if congress intended to say that the acquisition of these distilleries, by purchase or lease, by the defendants, before the act was passed, was a crime, such act was unconstitutional, because *ex post facto* in its character. It was further contended that if congress meant to define as a monopoly—and therefore as a crime—the acquisition by the defendants of the large number of distilleries alleged in the indictment, when such ownership or control was lawful in the states where they were so owned, then congress exceeded its powers, and such act is void. But I have not deemed it necessary to pass upon these questions. I have carefully considered all the acts and unlawful combinations set forth in the indictment in the first, third, and fourth counts, and, for the reasons hereinbefore stated, I am satisfied they are insufficient to make out the crime covered by the first section of the act, viz., a combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states; and giving to the word "monopoly" its common-law meaning, which is the meaning congress clearly intended, I find the allegations in the second count insufficient to make out the crime covered by the second section of the act, viz., a combination or conspiracy to monopolize any part of the trade or commerce between the states.

In reaching this conclusion, I am relieved to know that if I am in error the government can speedily protect the public from this alleged monopoly by a civil proceeding in any district in the United States in which the defendants transact their business. The act of congress wisely made special provision for just such civil suits, and conferred jurisdiction upon the circuit courts of the United States to enjoin parties from carrying on any monopoly or business in restraint of trade. The district attorneys of the United States, by permission of the attorney general, may institute such proceedings in equity in any district where proper service of process can be obtained upon any of the defendants, and provisions are made for speeding such cases to an early hearing. A suit of this nature was lately instituted in the United States circuit court **[213]** at Nashville, Tenn., by the United States through its district attorney, and against an illegal coal monopoly, doing business under a combination clearly differing from this case, and manifestly illegal; and that company was enjoined from doing business, and the public in that suit protected against the high prices in coal which resulted from a contract held illegal under this act. If, therefore, the attorney general of the United States should deem it proper to further test the question of whether the business of the defendants in this case is a monopoly, or in restraint of trade, he may authorize such a civil proceeding to be instituted, and by such suit speedily secure an adjudication from the circuit courts as to the effect and scope of this act. Inasmuch as these defendants were legally engaged in this extended business before the act of congress was passed, it would be fair and proper to proceed against them first by such civil suit. The public would be better protected, and more promptly benefited, by such proceeding, because it could be speedily heard, and relief be effectually granted, by an injunction restraining such business, and destroying the monopoly, if such the court should adjudge it to be. The warrant for removal will therefore be denied, and the defendants discharged from further custody.

[213]

IN RE TERRELL.

UNITED STATES *v.* GREENHUT ET AL.

(Circuit Court, S. D. New York. June 28, 1892.)

[51 Fed., 213.]

CRIMINAL LAW—HABEAS CORPUS—JURISDICTION OF CIRCUIT COURTS—REMOVAL OF PRISONER.—Where a prisoner, arrested under warrant based upon an indictment in a distant state and district, is held pending an application to the district court for a warrant of removal for trial, the circuit court of the district in which he is held has authority on *habeas corpus* to examine such indictment, and to release the prisoner, if in its judgment the indictment should be quashed on demurrer.[a]

ILLEGAL COMBINATIONS—CONTRACTS IN RESTRAINT OF TRADE—INDICTMENT.—An indictment under the act of July 2, 1890, relating to monopolies, averred in the fourth count that defendants, in pursuance of a combination to restrain trade in distillery products between the states, shipped certain whisky to Massachusetts, and sold it there through their distributing agents to dealers under a contract whereby said dealers were promised a rebate of five cents per gallon on their purchases, providing such dealers purchased their distillery products exclusively from the distributing agents, and sold them no lower than the prescribed list prices; said rebate to be paid when such dealers should sign a certificate that they had so purchased and sold for six months; and that by this means defendants had controlled and increased the price of distillery products in Massachusetts. *Held*, that no crime was charged with respect to such sales, since there was no averment of any contract whereby the dealers bound themselves not to purchase from others, or not to sell at less than list prices. *In re Corning*, 51 Fed. Rep. 205, approved.

Petition by Herbert L. Terrell for a writ of *habeas corpus*. Prisoner discharged.

Thos. Thacher and *Elihu Root*, for petitioner.

[214] *Edward Mitchell*, Dist. Atty., and *Maxwell Evarts*, Assist. Dist. Atty., for the United States.

LACOMBE, Circuit Judge.

The petitioner was arrested in this district upon a warrant issued by a United States commissioner here. The warrant was based upon an affidavit, which was itself based solely

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upon the fourth count in an indictment found by the grand jury in the district court of the United States for the district of Massachusetts. The peitioner being in custody of the United States marshal to await the order of the district judge, under Rev. St. § 1014, for his removal to the district of Massachusetts, writs of *habeas corpus* and *certiorari* were issued, to which returns have been made. It is not disputed by the district attorney that it is not only the right, but the duty, of the district court, before ordering removal, to look into the indictment, so far as to be satisfied that an offense against the United States is charged, and that it is such an offense as may lawfully be tried in the forum to which it is claimed the accused should be removed; and the same right and duty arises upon *habeas corpus*, whether the petitioner is held under the warrant of removal issued by the district judge whose decision is thus reviewed, or under the warrant of the commissioner to await the action of the district judge. The later decisions of the circuit courts abundantly establish this proposition. *In re Buell*, 3 Dill. 116; *In re Doig*, 4 Fed. Rep. 193; *U. S.* v. *Brawner*, 7 Fed. Rep. 86; *U. S.* v. *Rogers*, 23 Fed. Rep. 658; *U. S.* v. *Fowkes*, 49 Fed. Rep. 50. This practice was followed in *Re Pallisser*, 136 U. S. 257, 10 Sup. Ct. Rep. 1034, and approved by the supreme court in *Horner* v. *U. S.*, 143 U. S. 207, 12 Sup. Ct. Rep. 407. There is good cause for holding that this power should be exercised liberally, whenever the judge before whom the questions are raised, on application for a warrant of removal, or on *habeas corpus*, is satisfied, from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it. This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses committed perhaps in some place he had never visited, he were removable to a district thousands of miles from his home, to answer to an indictment fatally defective, on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending. Nor should the mere novelty of the points raised be held to preclude the court, before which comes the question of removal, from passing upon them, when it has no doubt as to how it

would pass upon them if the cause were pending before it. If the questions are of such a character that it is thought desirable that the opinion of an appellate court should be obtained, such a proceeding as this is the more appropriate way in which to raise them, for a decision here adverse to the government is reviewable by appeal; but a similar decision on the trial is final, as the government cannot appeal from a criminal judgment. *U. S.* v. *Sanges*, 144 U. S. 310, 12 Sup. Ct. Rep. 609.

[215] The points of law arising upon this indictment were all carefully considered by Judge Ricks in his opinion (filed June 11, 1892, N. Dist. Ohio) on application for a removal in *Re Corning*, 51 Fed. Rep. 205. In that opinion I entirely concur; and the district attorney, apparently admitting its application, has discussed only the questions arising under the fourth count, urging that the learned judge did not fully apprehend the averments of that count, and therefore erred in holding that no contract was averred by which the dealers obligated themselves to purchase exclusively from defendants, and to sell at the prices defendants fixed. It is insisted that the paper set out in the fourth count became a contract on May 7, 1892, when the purchasers signed it, and that it is distinctly charged that defendants made such contract "in restraint of trade and commerce among the several states" on May 7, 1892. But, though it be conceded that the contract set forth in the indictment was made on that day, it does not follow that it was a contract in restraint of trade. The only trade which it is pretended was at all curtailed or affected in any way was the trade of Kelly & Durkee in distillery products between September 23, 1891, and May 7, 1892. During that period they bought such products only from certain named dealers in a limited number of states, and sold only at prices fixed by the defendants; but they did so only because they chose to,—because the offer of a rebate to purchasers who would thus conduct their business was an inducement operating upon their self-interest. No obligation of any kind constrained them so to do; during that entire period, certainly, no contract restrained them, for there was no contract in existence. They were entirely free to buy from whom they pleased, and to

sell at any price they chose. The statute does not prohibit the offering of special inducements to such purchasers as shall make all their purchases from a single concern, and shall sell only at the prices fixed by it, even though those inducements be so favorable as to accomplish their object. It is not the actual restraint of trade (if such be restraint of trade) that is made illegal by the statute, but the making of a contract in restraint of trade, of a contract which restrains or is intended to restrain trade. It is difficult to understand upon what principle it can be contended that trade is restrained by a contract, when no contract exists. That, when the trade in distillery products which Kelly & Durkee carried on between September 16, 1891, and May 7, 1892, was restrained, (if restrained it were,) there was no contract in existence, is conclusively admitted on the face of the indictment itself, which charges the statutory offense, to wit, the making of a contract, etc., as committeed on May 7, 1892. The petitioner should be discharged.

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[272] BISHOP *v.* AMERICAN PRESERVERS' CO. ET AL.[a]

(Circuit Court, N. D. Illinois. June 8, 1892.)

[51 Fed., 272.]

CONTRACTS IN RESTRAINT OF TRADE—TRUST COMBINATIONS.—Act Cong. July 2, 1890, (26 St. at Large, p. 209,) which forbids combinations in restraint of interstate commerce, and gives a right of action to any person injured by acts in violation of its provisions, does not authorize suit where the only cause of action is the bringing of two suits which have not been decided.[b]

SAME—PLEADING.—A declaration in such an action which does not aver that the goods manufactured by plaintiff, and in respect of which he claims to be injured, are a subject of interstate commerce, or that the acts complained of have anything to do with any contract in restraint of trade, or that the parties are citizens of different states, is demurrable.

At Law. On demurrer to declaration.

Action by Andrew D. Bishop against the American Pre-

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[a] See also vol. 2, p. 51 (105 Fed., 845).

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servers' Company, Bernard E. Ryan, and T. E. Dougherty, for injuries alleged to have been sustained in his business and property by reason of acts of the defendants in violation of the "Anti-Trust Law," (26 St. at Large, p. 209.) That act makes illegal all combinations "in restraint of trade or commerce among the several states," and provides that "any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor, and recover threefold damages."

Lyndon Evans and *Frederick Ornd*, for plaintiff.

Kraus, Mayer & Stein, for defendants.

BLODGETT, District Judge, (orally.)

This suit is now before the court on a demurrer to the declaration by the defendants, the American Preservers' Company, Bernard E. Ryan, and T. E. Dougherty.

Plaintiff charges that in 1888 he was engaged in the business of man- **[273]** ufacturing fruit butter, jellies, preserves, etc., in the city of Chicago, and that, at the instance of others engaged in the same business, he entered into an agreement with them for the formation of a trust or combination for the purpose of advancing and maintaining the prices of such goods, and that a trust or combination called the "American Preservers' Trust" was organized for that purpose, of which plaintiff became a member, and to which he conveyed his property and plant which he had used in said business; that afterwards the managers of the organization decided to take in more manufacturers and their property, and adopt the form of organizing under a charter granted under the laws of West Virginia for the purpose of conducting the business of said trust, and that he assigned and transferred his property used in said business to the said company, the American Preservers' Company, one of the defendants herein; that, after he had so transferred his property to the said trust and company, differences arose between himself and the managers of said trust, and the said trust known as the "American Preservers' Company" brought a suit of replevin in one of the courts of the city of Chicago, and took possession of the property and plant, books, etc., which plaintiff had used

in the management of his business in connection with said trust, and that said defendant, the American Preservers' Company, has also brought suit at law in this court against plaintiff, claiming to recover the sum of $3,000. This is the substance of the declaration.

It is sufficient for the purposes of this demurrer to say:

1. This declaration does not show that the suits complained of are yet decided. It may on trial be shown and decided that the defendant has the right to maintain both these actions against plaintiff.

2. As a rule an action at law cannot be maintained for bringing even a false and fictitious action against a person. The commencement of a suit at law is an assertion of the right in a manner provided by law, and persons so commencing suits cannot be subjected to other actions or penalties by reason of their having done so, or for asserting or prosecuting what they claim as a legal right. The remedy of the party so sued is in defending the suit, and, if he is successful in his defense, he recovers costs, and sometimes damages. *Gorton* v. *Brown*, 27 Ill. 489; *Speer* v. *Skinner*, 35 Ill. 282; *Wetmore* v. *Mellinger*, 64 Iowa, 741, 18 N. W. Rep. 870.

It is clear from the allegations in this declaration that the plaintiff has attempted to bring this suit under the provisions of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, (26 St. p. 209.) But the injuries complained of are not such as give a right of action under this statute. Although this defendant, the American Preservers' Company, may be an illegal organization, it may have a valid right in the property replevied, as against plaintiff, and the right to sue and collect the $3,000 for which suit is brought. If, from difficulties growing out of the organization and management of the alleged trust, an altercation and quarrel had ensued between plaintiff and the other members or officers of the trust, and plaintiff had been assaulted by the persons he was so associ- **[274]** ated with, it is very clear he would have had no right of action under this statute. Further, it is not averred in the declaration that the goods manufactured by plaintiff are a subject of interstate commerce.

Neither does it appear that the suits complained of had anything to do with the alleged contract in restraint of trade. Certainly, as it seems to me, until the decision of the suits complained of, plaintiff has sustained no damage for which he cannot be adequately compensated by the costs and damages to be awarded in the determination of those cases, if it shall be held there was no right of action. Can a party to an illegal contract bring suit? *Miller* v. *Ammon*, 12 Sup. Ct. Rep. 884, (decided by the supreme court May 16, 1892.) Do not deem it necessary to pass on that question at this time. The declaration is also fatally defective in not averring the citizenship of the parties to be such as gives this court jurisdiction. The demurrer is sustained.

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[819] STRAIT ET AL. *v.* NATIONAL HARROW CO.[a]

(Circuit Court, N. D. New York. August 10, 1892.)

[51 Fed., 819.]

PATENTS FOR INVENTIONS—ENJOINING SUITS FOR INFRINGEMENT—MONOPOLIES.—The fact that a corporation owning letters patent upon a particular kind of machinery has entered into a combination with other manufacturers thereof to secure a monopoly in its manufacture and sale, and to that end has acquired all the rights of other manufacturers for the exclusive sale and manufacture of such machines under patents, will not entitle a stranger to the combination to enjoin the corporation from bringing any suits for infringement against him or his customers.[b]

In Equity. Suit by William Strait and others against the National Harrow Company for an injunction to restrain actions and suits for infringement of patents. On demurrer to the bill. Sustained.

Frederick Collin, for plaintiffs.

Edward H. Risley, for defendant.

WALLACE, Circuit Judge.

This is a suit wherein the relief demanded is a permanent injunction to restrain the defendant from instituting or prosecuting any action in any court of law or equity against the

[a] Not decided under the anti-trust law, but occasionally cited and commented upon.

[b] Syllabus copyrighted, 1892, by West Publishing Co.

plaintiffs for the infringement of any letters patent owned by the defendant covering improvements in spring-tooth harrows, or from instituting or prosecuting any such suits against any person using the spring-tooth harrows manufactured by the plaintiffs. The defendant has demurred to the complaint. In substance, the complaint shows that the defendant has entered into a combination with various other manufacturers of spring-tooth harrows for the purpose of acquiring a monopoly in this country in the manufacture and sale of the same, and, as an incident thereto, has acquired all the rights of the other manufacturers for the exclusive sale and manufacture of such harrows under patents, or interests in patents, owned by them respectively. Such a combination may [820] be an odious and wicked one, but the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of, the patented article, if he believes the patent is being infringed; and the motive which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attemt to assert his legal rights. "The exercise of the legal right cannot be affected by the motive which controls it." *Kiff* v. *Youmans*, 86 N. Y. 329.

The complaint alleges that the plaintiffs, and the other persons threatened with suit, do not infringe any of the patents of the defendant; but, as was said by Mr. Justice HUNT, in *Celluloid Manuf'g Co.* v. *Goodyear Dental Vulcanite Co.*, 13 Blatchf. 384:

"To allow the action is to reverse the proper position of the parties. Whoever receives letters patent from the United States received thereby a *prima facie* right to maintain an action against every infringer of the right given by such letters. While it is true that such right is *prima facie* only, and that the holder must be prepared to maintain it in the courts when attacked, it is still a

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right on his part to sue such alleged violators. The present action would convert the right to sue into a liability to be sued, which is quite a different thing. * * * The defendant has a right of action against each one of these individuals. It has the right to sue the whole of them. It has the right to sue any one of them, and to allow the others to go undisturbed. While it would not be a high-minded theory, I know of no principle that, as a matter of law, would prevent its seeking the feeblest of them all,—the one least able to defend himself,—and to make a victim of him. If that individual shall appear to have infringed upon this defendant's patents, he is liable to the damages, although he may be poor,—unable to defend himself,—although others may have offended in a greater degree, and although we may condemn the spirit which selected him as the particular defendant. On principle this cannot be doubted."

See, also, *Asbestos Felting Co.* v. *United States & F. Salamander Felting Co.*, 13 Blatchf. 453; *Tuttle* v. *Matthews*, 28 Fed. Rep. 98; *Kelley* v. *Manufacturing Co.*, 44 Fed. Rep. 19; *Chemical Works* v. *Hecker*, 11 Blatchf. 552.

If the defendant had brought suit against the plaintiffs for some breach of contract or violation of its alleged rights, founded upon the combination agreement, then it might become pertinent to inquire into the character of the combination, and ascertain whether the court would enforce any rights growing out of it. But in a suit brought for the infringement of a patent by the owner, any such inquiry, at the behest of the infringer, would be as impertinent as one in respect to the moral character or antecedents of the plaintiff in an ordinary suit for trespass upon his property. Even a gambler, or the keeper of a brothel, cannot be deprived of his property because he is an obnoxious person or a criminal; and it is no **[821]** defense to the trespass upon it, unless it was removed or destroyed in the suppression of a nuisance, that it was used in carrying on the unlawful occupation. *Ely* v. *Supervisors*, 36 N. Y. 297.

The demurrer is sustained.

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[104]

IN RE GREENE.

(Circuit Court, S. D. Ohio, W. D. August 4, 1892.)

[52 Fed., 104.]

HABEAS CORPUS—PRISONER HELD FOR REMOVAL TO ANOTHER DISTRICT—INDICTMENT.—On *habeas corpus* to release a person held under a warrant of a United States commissioner to await an order of the

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district judge for his removal to another district to answer an indictment, it is the right and duty of the circuit court to examine the indictment to ascertain whether it charges any offense against the United States, or whether the offense comes within the jurisdiction of the court in which the indictment is pending.[a]

CRIMINAL LAW—OFFENSES AGAINST UNITED STATES—COMMON-LAW DEFINITIONS.—There are no common-law offenses against the United States, and the offenses cognizable in the federal courts are only such as the federal statutes define, provide a punishment for, and confer jurisdiction to try; but when congress adopts or creates a common-law offense the courts may properly look to the common law for the true meaning and definition thereof, in the absence of a clear definition in the act creating it.

SAME—MONOPOLIES—INDICTMENT.—Under the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," an indictment simply following the language of the statute would be wholly insufficient, for the words of the act do not themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense; and the indictment must, therefore, be tested by the specific facts alleged to have been done or committed.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—MONOPOLIES.—Congress has no authority, under the commerce clause or any other provision of the constitution, to limit the right of a corporation created by a state in the acqui- **[105]** sition, control, and disposition of property in the several states and it is immaterial that such property, or the products thereof, may become the subjects of interstate commerce; and it is apparent that by the act of July 2, 1890, in relation to monopolies, congress did not intend to declare that the acquisition by a state corporation of so large a part of any species of property as to enable the owners to control the traffic therein among the several states, constituted a criminal offense.

MONOPOLIES—RESTRAINT OF TRADE.—To constitute the offense of "monopolizing, or attempting to monopolize," trade or commerce among the states, within the meaning of section 2 of said act, it is necessary to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engaging therein.

SAME—INDICTMENT.—In an indictment under section 1 of the act of July 2, 1890, to protect trade and commerce against monopolies, one count alleged, in substance, that on a specified date defendants, under the guise of the Distilling & Cattle Feeding Company, sold to certain persons in Boston a quantity of alcohol, then in Illinois, and that, by reason of the fact that said company controlled the manufacture and sale of 75 per cent. of all distillery products in the United States, defendants fixed the price at which the purchasers

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[a] Syllabus copyrighted, 1893, by West Publishing Co.

Statement of the Case.

should and did sell such alcohol, and "did compel" said purchasers "to sell said alcohol at no less price than that fixed" by them, but there were no allegations as to the means of compulsion. *Held*, that it could not be assumed from these allegations that the means used was a contract with the purchasers, and the count was bad, as being too vague to charge any contract or restraint of trade between the states.

SAME—RESTRAINT OF TRADE—WHAT CONSTITUTES.—An arrangement whereby the said company promised persons who purchased from its distributing agents that if, for the ensuing six months, they would purchase their distillery products exclusively from such agents, and would not resell the same at prices less than those fixed by the company, then, on being furnished with a certificate of compliance therewith, it would pay a certain rebate on the amount of such purchases, did not constitute a contract in restraint of trade, within the meaning of section 1 of said act, since the purchaser was not in any way bound to the performance of the conditions named; nor did such arrangement operate to "monopolize," or "as an attempt to monopolize," trade and commerce, within the meaning of section 2 of said act.

SAME.—Nor was there any offense under the statute, even after the purchaser complied with the conditions of the promise, and thereby became entitled to the rebate, for such compliance had no retroactive effect to create a valid contract between the parties prior thereto.

SAME.—Even if the promise could be considered as a binding contract between the parties, the restraint thereby imposed was only partial and reasonable in the protection of defendant's business, and was not of the general character necessary to constitute an unlawful contract in restraint of trade. *Mogul S. S. Co.* v. *McGregor*, [1892] App. Cas. pt. 1, p. 25, approved.

SAME—INDICTMENT OF STOCKHOLDERS FOR ACTS OF CORPORATION.—In indictments of individuals under the said statute, where all the acts alleged to constitute the offense are charged to have been done by a corporation, an omission to state what relation defendants bore to the corporation, other than that of stockholders, is fatal, since mere stockholders cannot be held criminally responsible for the acts of the corporation.

At Law. Petition by Louis H. Greene for a writ of *habeas corpus* to release him from the custody of the United States marshal, by whom he is held under a warrant of a United States commissioner, awaiting an order for his removal to the district of Massachusetts to answer an indictment for an alleged violation of the act of July 2, 1890, relating to monopolies. Prisoner discharged.

Opinion of the Court.

John W. Herron, for the United States.

Ramsey, Maxwell & Ramsey, for Greene.

JACKSON, Circuit Judge.

The petitioner, a citizen and resident of Ohio, having been arrested and taken into the custody of the United [106] States marshal of this district upon a warrant of a United States commissioner, here to await an order of the judge of the district court, under section 1014 of the Revised Statutes, for his removal to the district of Massachusetts for trial upon an indictment found and pending therein against him and others for alleged violations of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," has applied to this court to be discharged from such custody, claiming that he is illegally restrained of his liberty; that said indictment against him in the district court of Massachusetts, on which his arrest and confinement is solely based, charges him with no offense against the United States under said act of July 2, 1890; and that said district court has no jurisdiction over either his person or the alleged offense on which it is sought to remove him there for trial.

It admits of no question that it is both the right and duty of this court, upon this application, to consider and determine whether the indictment pending against the petitioner in the district of Massachusetts charges either a criminal offense or one that comes within the jurisdiction of that court. It is well settled that upon application for an order of removal under section 1014, Rev. St., the district court or judge may properly look into the indictment to ascertain whether an offense against the United States is charged, and whether the court to which the accused is sought to be removed has jurisdiction of the same. In such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion. The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions. Such has been the uniform practice of the federal courts. *In re Buell*, 3 Dill. 116:

In re Doig, 4 Fed. Rep. 193; *U. S.* v. *Brawner*, 7 Fed. Rep. 86; *U. S.* v. *Rogers*, 23 Fed. Rep. 658; *U. S.* v. *Fowkes*, 49 Fed. Rep. 50; *Horner* v. *U. S.*, 143 U. S. 207, 12 Sup. Ct. Rep. 407. These cases have recently been followed and approved by Judge Ricks in the case of *In re Corning*, (U. S. v. *Greenhut*,) 51 Fed. Rep. 205, and by Judge Lacombe in *Re Terrell*, (*U. S.* v. *Greenhut*,) 51 Fed. Rep. 213, upon removal proceedings under the same, or substantially the same, indictment as that pending against petitioner. In the *Terrell Case*, Judge Lacombe properly states that the same right and duty of looking into the indictment arises upon *habeas corpus*, whether the petitioner is held under the warrant of removal issued by the district judge, whose decision is thus reviewed, or under the warrant of the commissioner, to await the action of the district judge.

It is insisted by the district attorney, on behalf of the United States, that if the indictment is insufficient it must be met by a motion to quash, or some other appropriate proceeding in the court in which it is pending, and whose action would be subject to review; and the case of *In re Lancaster*, 137 U. S. 393, 11 Sup. Ct. Rep. 117, is relied on to support his contention that under *habeas corpus* proceedings the sufficiency of the indictment should not be inquired into. We do not understand that **[107]** decision as laying down any such general proposition as claimed for it in cases like the present. In that case the petitioners, being in the custody of the United States marshal under an indictment pending against them in the circuit court for the southern district of Georgia, applied to the supreme court for leave to file in said court their petition for a writ of *habeas corpus*, upon the grounds that the matters and things set forth and charged against them in the indictment did not constitute any offense under the laws of the United States, or cognizable in the circuit court. "In this posture of the case," say the supreme court, "we must decline to interfere." In this case it appears that the circuit court in which the indictment was pending had taken jurisdiction, and had the petitioners by its direction in the custody of its marshal, and no reason was shown for not invoking the judgment of said court upon the sufficiency of the indictment. The supreme court, in declining

to interfere, acted in accordance with its well-settled rule not to issue or grant a writ of *habeas corpus* in the exercise of its original jurisdiction, except when the inferior court is acting without jurisdiction, or is exceeding its power to the prejudice of the party seeking relief. *In re Lane*, 135 U. S. 446, 10 Sup. Ct. Rep. 760; *Ex parte Mirzan*, 119 U. S. 584–586, 7 Sup. Ct. Rep. 341. It certainly did not intend to lay down the proposition that no other court than that in which an indictment was pending could look into the sufficiency of such indictment, or pass upon the question whether it charged an offense, or was within the proper jurisdiction of such court; for in the more recent case of *Horner* v. *U. S.*, 143 U. S. 214, 12 Sup. Ct. Rep. 410, it is said:

"The district judge, in exercising his jurisdiction under section 1014, Rev. St., to issue a warrant for the removal of Horner to the southern district of Illinois, had a right to determine whether of not the offense was within the jurisdiction of the district court of the United States for that district, and that determination was reviewable by *habeas corpus*."

In the second case of *Horner* v. *U. S.*, 143 U. S. 570, 12 Sup. Ct. Rep. 522, no question of removal to another district was involved, nor had any indictment been found; but the petitioner was simply held to await the action of the grand jury, and prematurely sought to raise, by *habeas corpus* proceedings, the question under examination, whether any offense had been committed. The present proceeding is essentially different, and comes within the rule stated above by Judge Lacombe. If the indictment shows no offense committed against the United States in Massachusetts, the petitioner is unlawfully and illegally restrained of his liberty in being held in custody to await an order for his removal to that district for trial, and is entitled to the same measure of relief as though the removal had been ordered by the district judge. The right of the government to have the petitioner tried in the district of Massachusetts where the indictment is pending is not questioned if the case against him comes under section 731 of the Revised Statutes, providing that, "when any offense against the United States is begun in one judicial circuit, and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, deter- **[108]** mined,

and punished in either district in the same manner as if it had been actually and wholly committed therein." There is, however, nothing in this provision of the law which deprives the court of the right and duty to look into the indictment to determine whether any offense against the United States is charged, and, if so, whether it was either begun or completed in the district of Massachusetts, so as to give the federal court there jurisdiction of the case. If, in cases like the present, the mere pendency of an indictment against a party in a state other than that of his domicile should be held to preclude all inquiry into the question whether he is charged with any offense against the United States, or whether the court wherein such indictment is pending has jurisdiction to try the accused, the rights of the citizen would be open to serious abuse. We are clearly of the opinion that the authorities establish a different rule, and we therefore proceed to the consideration of the indictment against the petitioner, to ascertain if any offense is charged against him, and, if so, whether the district court of Massachusetts has any jurisdiction in the premises.

The indictment is based upon alleged violations of sections 1 and 2 of the act of July 2, 1890, which read as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The indictment contains four counts. The 1st, 3d, and 4th allege violation of section 1, and the 2d count charges a violation of section 2. The 1st, 2d, and 3d counts recite, in the same general way, that on the 11th day of February, 1890, the petitioner and other associates, in the states of Ohio, Illinois, and New York, engaged with each other in a combination, in restraint of trade and commerce, in distillery

products; that, for the purpose of restraining trade and commerce in said products among the several states of the United States, they, in the form and guise of a corporation known and designated as the Distilling & Cattle Feeding Company, which was on said 11th day of February, 1890, organized under the laws of Illinois, thereafter, and prior to August 1, 1890, obtained control, by purchase, renting, and leasing, 70 other distilleries within the United States used for the manufacture of said distilling products, which products were on February 11, 1890, and continuously thereafter, up to the finding of the indictment, "a subject of trade and commerce among the several states of the said United States;" that each of said distilleries were, at the respective dates of their pur- **[109]** chase, renting, or leasing and running under said control, separate and distinct, and competing in the manufacture and sale of distilling products among the several states; that, in pursuance of said combination, they used, managed, and controlled all said distilleries, and by means thereof did, during the period last mentioned, manufacture and sell, and control the manufacture and sale, within the United States, of 77,000,000 gallons of said distillery products, said quantity being 75 per cent. of all the distillery products made and sold within and among the United States during said period; that the condition of trade and commerce in said products among the several states during said period was such that, by controlling the manufacture and sale of 75 per cent. of said distillery products, they were able to control and fix the price at which they would sell such products to dealers therein in the several states, and to control and fix the price at which such dealers should sell the same to citizens of the several states during said period; that by said means they intended to control the amount of said distillery products manufactured and sold among the several states, and to control and fix the price at which said distillery products should be sold by all dealers therein among the several states, and in the state of Massachusetts, and to prevent and counteract the effect of free competition in the usual price at which said products were sold among and within the several states, and to increase and augment the usual price thereof, and thereby exact and procure great sums of money from the citizens of

Massachusetts and other states purchasing distillery products, and to secure to themselves exclusively the trade and commerce in said distillery products, and by all the means aforesaid unlawfully to restrain the trade and commerce in such products among the several states of the United States.

The first count then alleges that, in pursuance of said purpose and intent, they, under the form and guise of said Distilling & Cattle Feeding Company, on October 3, 1890, did at Boston, within the district of Massachusetts, "negotiate a sale, and did sell," to the firm of D. T. Mills & Co., 5,642.82 proof gallons of alcohol, which was then in the state of Illinois; that by reason of said combination, and of their control of the large number of distilleries and the manufacture of 75 per cent. of all such products in the United States, they did fix the price at which said D. T. Mills & Co., who were dealers therein at Boston, should and did sell said alcohol within said district of Massachusetts, or for transportation into any other state, "and did compel said Mills & Co. to sell said alcohol within said district of Massachusetts for use in said district, or for transportation to other states of the United States, at no less price than that fixed" by the accused; that by this means they controlled the amount of distilled products sold within the state of Massachusetts, and did fix the price at which said products were sold by dealers in said state; that they thereby prevented and counteracted the effect of free competition on the usual price at which said products were sold within the state, and did increase and augment the usual price at which said distillery products were sold in the state of Massachusetts for use therein or transportation therefrom, and that they thereby, and by the means aforesaid, did "re- **[110]** strain the trade and commerce in said distilling products between the state of Massachusetts and the states of the said United States other than the state of Massachusetts," contrary to the form of the statutes in such case made and provided.

The second count, based upon the second section of the act, after the aforesaid general recital, charges an unlawful attempt to monopolize the trade and commerce in distillery products under the form and guise of said Distilling & Cattle Feeding Company; and the specific acts therein alleged are

that on September 18, 1890, C. I. Hood, of Lowell, Mass., purchased from Webb & Harrison, as distributing agents of the accused, 526.52 proof gallons of alcohol; that the defendant, in the form and guise of the aforesaid company, promised said Hood a rebate of five cents per gallon on the purchase price of said alcohol, upon condition that for six months from the date of the promise he should have bought his supply or supplies of distillery products exclusively from said company's agents, and should not have sold any of the products so purchased at less than the company's distributing agents' list prices, and should furnish evidence of compliance with those conditions in the form of a certificate. This count alleges a similar arrangement with Kelly and Durkee on the sale to them, September 23, 1890, by the company's distributing agents, of 85.54 proof gallons of alcohol. It also sets out a list of the distributing agents from whom purchases could be made, and the agreement of the company as to the five cents per gallon rebate, and the condition on which it would be made. It is alleged that, by means of said premises and terms of rebate to said purchasers, the accused, under the form and guise aforesaid, did attempt to monopolize to themselves the trade and commerce in said distillery products among the several states, in violation of law.

The third count is based upon the first section of the act. It alleges an agreement made by the aforesaid company with C. I. Hood, at Lowell, Mass., on the sale to him of 518.88 gallons of said company's products, made October 2, 1890, for a rebate upon the same terms and conditions as set forth in the second count, by which arrangement and promise it is charged that the accused "did attempt to execute and carry out the purpose and intent aforesaid to restrain the trade and commerce in said distillery products among the several states of the said United States, and especially between the state of Massachusetts and other states of the United States, against the peace," etc.

The fourth count is also founded upon section 1 of the act. It sets out a contract or agreement of the Distilling & Cattle Feeding Company with Kelly and Durkee, bearing date at Peoria, Ill., September 23, 1891, promising to pay the latter $4.27 as a rebate of 5 cents per gallon on 85.54 proof gallons

of the company products purchased that day, upon the same terms and conditions as alleged in the second and third counts; and then sets forth the certificate of said Kelly and Durkee that they had since the date of the agreement purchased all their supply of such goods as are produced by the Distilling & Cattle Feeding Company, exclusively from one or more of the dealers or distributing agents of the company, [111] of which a list is attached. This certificate bears date May 7, 1892, and it is charged that the purchaser's compliance with the terms and conditions on which the company promised to make or pay the 5 cents per gallon on rebate was a contract in restraint of trade and commerce, within the provisions of the statute.

In the consideration of this indictment it should be borne in mind that there are no common-law offenses against the United States; that the federal courts cannot resort to the common law as a source of criminal jurisdiction; that crimes and offenses, cognizable under the authority of the United States, are such, and only such, as are expressly designated by law; and that congress must define these crimes, fix their punishment, and confer the jurisdiction to try them. *U. S.* v. *Hudson*, 7 Cranch, 32; *U. S.* v. *Coolidge*, 1 Wheat. 415; *U. S.* v. *Britton*, 108 U. S. 199–206, 2 Sup. Ct. Rep. 531.

When congress, under and in the exercise of powers conferred by the constitution, adopts or creates common-law offenses, the courts may properly look to that body of jurisprudence for the true meaning and definition of such crimes, if they are not clearly defined in the act creating them. *U. S.* v. *Armstrong*, 2 Curt. 446; *U. S.* v. *Coppersmith*, 4 Fed. Rep. 198. The act of July 2, 1890, on which the present indictment is based, in declaring that contracts, combinations, and conspiracies in restraint of trade and commerce between the states and foreign countries were not only illegal, but should constitute criminal offenses against the United States, goes a step beyond the common law, in this: that contracts in restraint of trade, while unlawful, were not misdemeanors or indictable at common law. It adopts the common law in making combinations and conspiracies in restraint of the designated trade and commerce criminal offenses, and creates a new crime, in making contracts in restraint of trade mis-

demeanors, and indictable as such. But the act does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. We regard it as well settled by the authorities that an indictment, following simply the language of the act, would be wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense intended to be punished. *U. S.* v. *Cruikshank*, 92 U. S. 542; *U. S.* v. *Simmonds*, 96 U. S. 360; *U. S.* v. *Carll*, 105 U. S. 611; *U. S.* v. *Britton*, 107 U. S. 655, 2 Sup. Ct. Rep. 512; *U. S.* v. *Trumbull*, 46 Fed. Rep. 755.

Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statutes, but by the specific acts or particular facts, which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several [112] states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused "engaged in a combination," or "made contracts in restraint" of such trade or commerce, or "monopolized" or "attempted to monopolize" the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute: "Every offense consists of certain acts done or omitted under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth." *U. S.* v. *Cruikshank*, 92 U. S. 542, 563.

Do the particular facts set forth in the indictment consti-

tute violation of the statute? In construing and applying the provisions of the act to the specific offenses charged, it must be assumed that congress did not intend to make the enactment either retroactive or give it an *ex post facto* operation and effect. No criminality can therefore be ascribed to the acts of the accused in respect to their recited combination on February 11, 1890, in restraint of trade and commerce in distillery products by means of the Distilling & Cattle Feeding Company, a corporation organized by them on that day under the laws of Illinois, and its acquisition and control prior to the passage of the act of July 2, 1890, of 70 other distilleries, which enabled said company to manufacture and sell 70,000,000 gallons of said distillery products, said quantity being 75 per cent. of all the distillery products manufactured and sold in the United States between the date or dates of acquiring said distilleries and the finding of the indictment. It is not alleged that this acquisition and control of the 70 other distilleries by the accused or by the Distilling & Cattle Feeding Company, by means of which this large production was secured, was in any respect unlawful; nor is it alleged, or even recited, that the parties from whom said 70 other distilleries were acquired, were by contract restrained from thereafter engaging in the distillery business, either generally or partially. From anything averred or recited to the contrary, it must be presumed, in this proceeding, that the defendants, or the Distilling & Cattle Feeding Company, in whose form and guise the accused is said to have acted, were in the rightful possession and control of the numerous distilleries employed by them in the manufacture of distilled products; and the quantity of such products, whether large or small, can in no way affect the right of disposition incident to lawful ownership. Congress may place restriction and limitations upon the right of corporations created and organized under its authority to acquire, use, and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But congress certainly has not the power or authority under the commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations created by the

states, or the citi- **[113]** zens of the states, in the acquisition, control, and disposition of property. Neither can congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that congress has no jurisdiction over, and cannot make criminal, the aims, purposes, and intentions of persons in the acquisition and control of property, which the states of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several states or with foreign nations. Commerce among the states, within the exclusive regulating power of congress, "consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities." *County of Mobile* v. *Kimball*, 102 U. S. 691–702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826. In the application of this comprehensive definition, it is settled by the decisions of the supreme court that such commerce includes, not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation. That it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another. That such commerce begins, and the regulating power of congress attaches, when the commodity or thing traded in commences its transportation from the state of its production or *situs* to some other state or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of the property in the state of its destination. When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the state ceases, and that of congress attaches and continues, until it has reached another state, and

become mingled with the general mass of property in the latter state. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, the sale, distribution, and consumption thereof in the latter state forms no part of interstate commerce. *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Brown* v. *Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; *Coe* v. *Errol*, 116 U. S. 517–520, 6. Sup. Ct. Rep. 475; *Robbins* **[114]** v. *Taxing Dist.*, 120 U. S. 497, 7 Sup. Ct. Rep. 592; and *Kidd* v. *Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6. In the latter case the supreme court pointed out the distinction between commerce and the subjects thereof, and held that the manufacture of distilled spirits, even though they were intended for export to other states, was not commerce, falling within the regulating powers of congress.

Stripping the indictment of its verbiage,—its general recitals and conclusions of law,—does either count thereof charge any real offense against the United States over which the district court of Massachusetts has jurisdiction? The specific offense charged in the first count is that the defendants, under the form and guise of the Distilling & Cattle Feeding Company, sold on October 3, 1890, to Mills and Gaffield, copartners under the name of D. T. Mills & Co., a certain quantity of distilled products then in the state of Illinois; that, by reason of said Distilling & Cattle Feeding Company's controlling the manufacture and sale of 75 per cent. of all such products in the United States, they fixed the price at which said purchasers should and did sell said alcohol for use in Massachusetts, or for transportation into any other state, "and did compel said Mills and Gaffield, as copartners, to sell said alcohol at no less price than that fixed"

by them. It is not alleged how said Boston purchasers were "compelled" to sell at the prices fixed by the defendants, nor how, or under what arrangement, the defendants fixed the price at which the alcohol should be sold in Massachusetts, or for transportation therefrom. Was it one of the provisions of the contract of sale and purchase, or was it by a combination or conspiracy between the defendants and the Boston purchasers? The means described by which the defendants were enabled to fix the price at which the purchasers should sell the alcohol was certainly not a "contract, combination, or conspiracy in restraint of trade and commerce among the states." If they, by force or duress, "compelled" the purchasers to sell at a price fixed by them, such compulsion would not constitute either a contract, combination, or conspiracy in restraint of trade. It cannot be assumed, under the language employed in this count, that there was any "contract" between the defendants and Mills and Gaffield which by its terms and provisions restrained the latter in respect to the price at which they should or did sell the alcohol. The count certainly charges no "combination or conspiracy," within the meaning of the act, between the defendants and the Boston purchasers. The charge is too vague and general to show a "contract" in restraint of trade, such as the first section of the act contemplates and declares illegal. It cannot be aided by presumption or intendments. It is bad upon its face, and charges no offense committed in the state of Massachusetts of which the United States courts in that state could take jurisdiction.

The second count charges an attempt on the part of defendants to monopolize to themselves, under the form and guise of said Distilling & Cattle Feeding Company, the trade and commerce in distillery products among the several states, and between the state of Massachusetts and other states; the special acts on which this charge is based being that, **[115]** on the purchase of certain quantities of alcohol by C. I. Hood, and Kelly & Durkee, (citizens and residents of Massachusetts,) in September, 1890, from certain distributing agents of the Distilling & Cattle Feeding Company, the defendants, under the form and guise of said company, agreed and promised that if said purchasers would, for a certain designated

period, (six months,) buy all their supply or supplies of distillery products exclusively from said company's distributing agents, (two of whom, as appears in the count, were located at Boston, Mass.,) and would not sell the alcohol or other distillery products so purchased at any lower prices than the list prices of such distributing agents, and would make a proper certificate of such facts, then the said Distilling & Cattle Feeding Company would make and pay to said purchasers a rebate of five cents per gallon on each gallon purchased by them. The third and fourth counts set out substantially the same arrangement and agreement as to the payment of a rebate of five cents per gallon upon the purchasers' compliance, during the period stated, with the aforesaid terms and conditions, and charge the same to have been contracts in restraint of trade and commerce among the states, within the purview of the statute. We may therefore consider those three counts together. Do the facts therein set forth constitute either an "attempt to monopolize" trade and commerce in distillery products among the states, or contracts in restraint of such trade? It is not very clear what congress meant by the second section of the act of July 2, 1890, in declaring it a misdemeanor to "monopolize," or "attempt to monopolize," any part of the trade or commerce among the states or with foreign nations. It is very certain that congress could not, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and

developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns.

A "monopoly," in the prohibited sense, involves the element of an exclusive privilege or grant which restrained others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more **[116]** individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. As defined by Blackstone, (4 Bl. Comm. 159,) and by Lord Coke, (3 Co. Inst. 181,) it is a grant from the sovereign power of the state by commission, letters patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given. When this section of the act was under consideration in the senate, distinguished members of its judiciary committee and lawyers of great ability explained what they understood the term "monopoly" to mean; one of them saying: "It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." Another senator defined the term in the language of Webster's Dictionary: "To engross or obtain, by any means, the exclusive right of, especially the right of trading, to any place or with any country, or district; as to monopolize the India or Levant trade." It will be noticed that, in all the foregoing definitions of "monopoly," there is embraced two leading elements, viz., an exclusive right or privilege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an "attempt to monopolize" any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such trade or com-

merce by means which prevent or restrain others from engaging therein. It was certainly not a "monopoly," in the legal sense of the term, for the accused or the Distilling & Cattle Feeding Company to own 70 distilleries, and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. In this acquisition and operation of the 70 distilleries, which enabled the accused or said Distilling & Cattle Feeding Company to manufacture and control the sale of 75 per cent. of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distillery products, by the enlargement and extension of business, was not an attempt to monopolize trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration.

Was the arrangement with the Boston purchasers, as to making them a rebate upon the conditions stated, an attempt to monopolize any part of the trade and commerce among the states in distillery products? It is not alleged, nor is it to be inferred from anything that is set forth, that said purchasers bound themselves, or entered into any contractual [117] obligations or understanding, to buy their distillery supplies exclusively from the distributing agents of said Distilling & Cattle Feeding Company. They were left at perfect liberty to purchase when, where, or from whom they pleased. No contractual or other restraint was placed upon them. Upon certain conditions, which it was entirely optional with them to comply with or disregard, a rebate was promised by the seller. Such an arrangement does not amount to a contract to purchase exclusively from said distilling company or its distributing agents. But, suppose it did, there was nothing in such an agreement unlawful or in

contravention of the statute. The promise of a rebate, as an inducement for exclusive trading, certainly does not constitute an "attempt to monopolize," when the purchaser is left at liberty to buy where he pleases, and when all other sellers of the article are left unrestrained in offering the same, or greater, inducements. As to the remaining condition upon which the rebate was to be payable, the same observation may be made. The purchasers were placed under no contractual or other restraint in respect to the price at which they should sell. They were simply offered a rebate, as an inducement not to undersell the vendor's distributing agents, two of whom were located at Boston, Mass. The arrangement relied on, considered either in detail or as a whole, involved no "attempt to monopolize any part of the trade or commerce among the states." The rebate promised, upon condition of exclusive purchases and not underselling the vendor's distributing agents, was a legitimate method of inducing trade; but the means thus employed in no way operated to prevent or restrain others from offering the same, or greater, inducements. The condition as to not selling at lower prices than those of the distributing agents may have had a tendency to maintain prices, but that would not have been an attempt to monopolize trade. The inducements offered for the exclusive trade, and to sell at no lower prices than the price list of the distributing agents, was not prejudicial to the public. It was in no way contrary to public policy, or an unlawful restraint of trade, as will be seen from the authorities hereinafter referred to. But, aside from this, it is not shown that said arrangement necessarily involved or related to interstate traffic. It is not alleged that Webb & Harrison, the distributing agents, from whom Hood and Kelly and Durkee made their purchases of alcohol, were located or made such sales in some other state than Massachusetts; nor that the alcohol itself was beyond the limits of that state when purchased. Neither is it shown that the exclusive purchases thereafter to be made, as one of the conditions on which the rebate was to be paid, could not have been made in the state of Massachusetts, it appearing from the face of the count that two of such distributing agents were located at Boston, in said state. Without dwell-

ing further upon its consideration, we are clearly of the opinion that this second count fails to charge any offense against the petitioner.

What has been already said applies largely to the third and fourth counts. The matter of the promised rebate upon the same conditions as set forth in the second count, which is charged to have been a con- [118] tract in restraint of trade and commerce among the states, and between the state of Massachusetts and other states, does not constitute any offense against the United States, or in any way contravene the first section of the act of July 2, 1890, because there was actually no contract which bound, or attempted to bind, the Massachusetts purchasers of alcohol, as to where or from whom they would make further purchases during the period stated, nor as to the price or prices at which they should sell. They were simply offered an inducement in respect to those matters, which they were at perfect liberty to comply with or decline. They were not restrained by any contractual obligation during the stipulated period. The agreement was wholly unilateral during that period. Upon compliance with the conditions as alleged in the fourth count, they were entitled to the rebate; but such compliance had no retroactive operation to create a valid and subsisting contract between the parties prior thereto, or during the period intervening between the date of the promise and the full compliance with the conditions on which the rebate was to be paid. During that period there was between the parties no contract in restraint of trade. But suppose the arrangement could by any possibility be construed into a contract between the parties from the date of the promise, or during the stipulated period, it could not be held to be a contract in restraint of trade. It is not deemed necessary to review the authorities upon the subject of contracts in restraint of trade, nor would it be at all profitable. It is well settled that contracts in general restraint of trade are contrary to public policy, and therefore unlawful. The arrangement under consideration cannot possibly be considered as one in general restraint of trade. Where the restraint is partial, either as to time or place, its validity is

to be determined by its reasonableness and the existence of a consideration to support it. The question of its reasonableness depends on the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is secured. No precise boundary can be laid down as to when, and under what circumstances, the restraint would be reasonable, and when it would be excessive. *Navigation Co.* v. *Winsor*, 20 Wall. 64–68; *Beal* v. *Chase*, 31 Mich. 490; *Ward* v. *Byrne*, 5 Mees. & W. 549; *Horner* v. *Graves*, 7 Bing. 735; *Mallan* v. *May*, 11 Mees. & W. 667; *Whittaker* v. *Howe*, 3 Beav. 383; *Hodge* v. *Sloan*, 107 N. Y. 244, 17 N. E. Rep. 335. In the present case, the arrangement treated as a contract was founded upon a valid consideration, and only secured to the vendors a reasonable protection in their business. It was not an unlawful contract in restraint of trade. The authorities fully support this conclusion. In addition to those referred to above, we cite the following: *Brown* v. *Rounsavell*, 78 Ill. 589; *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658; *Chicago, etc., R. Co.* v. *Pullman South. Car Co.*, 139 U. S. 79, 11 Sup. Ct. Rep. 490; *Mogul S. S. Co.* v. *McGregor*, [1892] App. Cas. pt. 1, p. 25, (decided by the house of lords in December, 1891.) In this latter case there was a combination or association of ship owners who, being engaged in the trade with China, with a view of obtaining a monopoly of the homeward tea trade and ex- [119] cluding the plaintiffs from competing with them for the same, and thereby keep up freight, offered to rebate or repay every sixth month, to such merchants and shippers in China as should have shipped their tea exclusively in vessels of the association, 5 per cent. on all freight paid by them. The plaintiffs, as rival and competing ship owners, were thereby excluded from this business, and sued for damages, and the question (almost identical with that under consideration) was presented whether the combination and arrangement adopted by the association to secure the exclusive transportation of tea trade was in any way unlawful. It was first passed upon, and held to be free from objection, by Lord Coleridge. 21 Q. B. Div. 554, 4 Ry. & Corp. Law J. 611. His decision was sustained on appeal. (23 Q. B.

Div. 598, 7 Ry. & Corp. Law J. 223,) and was finally affirmed by the house of lords. It would be highly instructive to quote at length from the opinions delivered in the house of lords, if the limits of this opinion permitted. The reasoning and conclusions there reached fully sustain our conclusions in the present case.

But there is another and fatal objection to all the counts of this indictment. All the acts and matters charged as criminal offenses were, as shown upon the face of the indictment, the acts of the Distilling & Cattle Feeding Company, a corporation organized under the laws of Illinois. It is not alleged what relation the accused bore to said corporation; nor does it appear whether their connection therewith was other than that of mere stockholders, except as to the defendant Greenhut. By the eighth section of the statute, it is provided "that the word 'person' or 'persons' wherever used in that act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country." If the acts charged constitute criminal offenses, the Distilling & Cattle Feeding Company is the "person" who has committed the same. It would be unheard of in criminal jurisprudence to make its stockholders criminally responsible for the corporation's violation of the statute. That corporation can readily be reached and prosecuted by the government, either civilly or criminally, for what it may have done in contravention of the law, without requiring the courts, by strained construction of the statute, to extend its provisions and make them embrace all parties merely interested in such corporation. Except in conspiracy offenses, there is no criminality by representation. We have not deemed it necessary or proper to attempt the difficult task of defining the cases to which the statute will apply. The enactment was manifestly aimed at the trust combinations and associations formed by individuals and corporations, which the state courts have in most instances declared illegal. The conclusion of the court is that the petitioner, Lewis H. Greene should be discharged, and it is accordingly so ordered and adjudged.

[646] UNITED STATES *v.* NELSON ET AL.

(District Court, D. Minnesota. October 10, 1892.)

[52 Fed., 646.]

MONOPOLIES—SUFFICIENCY OF INDICTMENT—WORDS OF STATUTE.—An indictment under the act of congress, "to protect trade and commerce against unlawful restraint and monopolies," (26 St. at Large, p. 209,) must contain a certain description of the offense, and a statement of facts constituting same, and it is not sufficient simply to follow the language of the statute.[a]

SAME—WHAT CONSTITUTES—AGREEMENT TO RAISE PRICE.—An agreement between a number of lumber dealers to raise the price of lumber 50 cents per thousand feet, in advance of the market price, cannot operate as a restraint upon trade, within the meaning of the act of congress, "to protect trade and commerce against unlawful restraint and monopolies," (26 St. at Large, p. 209,) unless such agreement involves an absorption of the entire traffic, and is entered into for the purpose of monopolizing trade in that commodity with the object of extortion.

At Law. Indictment under the act of July 2, 1890, (26 St. at Large, p. 209,) "to protect trade and commerce against unlawful restraints and monopolies." Demurrer to all the counts sustained.

The United States District Attorney.

W. E. Hale, for defendants.

NELSON, District Judge.

In the case of *United States* v. *Benjamin F. Nelson, Sumner T. McKnight, William H. H. Day, et al.*, a demurrer is interposed to the indictment. Pressure of business in court has prevented an earlier decision, and I can now only give my reasons briefly for sustaining the demurrer. The indictment intends to charge offenses under the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies." This statute declares contracts, combinations in the form of trusts or otherwise, and monopolies to restrain trade or commerce among the

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several states and foreign nations, illegal, and makes them offenses, and affixes the punishment. The indictment purports to charge the defendants with violating the law by entering into a contract, and unlawfully engaging in a combination in the form of a trust, and confederating together in a conspiracy in restraint of trade among the several states. There are 12 counts in the indictment. The first 6 counts charge the offense in the language of the statute, and the others set forth facts which are claimed to constitute the offense. The federal courts by this act are given jurisdiction to apply remedies in cases where interstate commerce is injuriously affected by combinations and contracts which the state courts had formerly applied to protect local interests. In order to administer the law, the court must determine what is an unreasonable and unlawful restraint of trade or commerce by contracts, trusts, and conspiracies, and whether a contract is injurious to the public. In all cases at common law, it must be made to appear that the acts complained of threatened the interests of the public, and this is true whether the remedy sought to be applied is by civil or criminal proceedings. It is urged by the district attorney that, the offense being statutory, the general rule in such cases, to wit, **[647]** that it is sufficient to allege the offense in the language of the statute, will sustain the first six counts. I cannot agree to that. This is not a case where every fact necessary to constitute the offense is charged, or necessarily implied, by following the words of the statute; and the words themselves fully and directly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense; and it is not sufficient to follow only the language of the statute. Where the act becomes illegal and an offense only from the means used to effect it, as in this statute, the indictment must state, where it is practicable, so much as will show its illegality and charge the accused with a substantial offense. See *U. S.* v. *Cruikshank*, 92 U. S. 558. The charge must contain a statement of facts constituting the offense, and a certain description of it, which this indictment does not in either of the first six counts, and they cannot be sustained.

Do the facts set forth in the last six counts describe an offense which the statute forbids? The first of these counts

charges, in substance, that the defendants were each dealers in lumber in the United States, and each transacted business at numerous towns and cities in different states, and on September 7th, at the city of Minneapolis, they agreed together that they would raise the price of lumber 50 cents per thousand feet in advance of the market price of pine lumber in the states of Wisconsin, Minnesota, Iowa, Illinois, and Missouri, and in pursuance of such agreement they did then and there raise the price of pine lumber 50 cents per thousand feet in each of said states in which they transacted business. How this advance in price by these parties in the several states mentioned could regulate thereby the price for all dealers is not set forth. It appears that the idea of the pleader was that a mutual agreement between several dealers that they would raise the price of the lumber owned or manufactured by themselves 50 cents per thousand feet above the market price necessarily advanced the price of all the pine lumber for sale in those states to that extent, and none could be purchased for a less price. While it may be true that some of the other dealers might attempt to induce purchasers to be governed by the price fixed in their locality by the parties to the agreement, and try to keep up prices, yet competition in the commodity would soon bring the price down, unless there were fraudulent or coercive means resorted to for the purpose of restraining other dealers, and preventing them from exercising their own judgment as to prices.

An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate as a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least. What has been said in regard to this count applies to the remaining five, in which **[648]** wrongful combinations and conspiracies in restraint of trade are alleged, and a monopoly of the whole or a part of the

Syllabus.

trade and commerce in lumber in the several states mentioned. The allegations are too indefinite and uncertain, and the demurrer to all the counts is sustained.

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[440] UNITED STATES *v.* TRANS-MISSOURI FREIGHT ASS'N ET AL.[a]

(Circuit Court, D. Kansas. November 28, 1892.)

[53 Fed., 440.]

CARRIERS—COMBINATIONS TO MAINTAIN RATES.—An agreement between several competing railway companies, and the formation of an association thereunder, for the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the several lines, without preventing or illegally limiting competition, is not an agreement, combination, or conspiracy in restraint of trade in violation of the act of July 2, 1890, § 1.[b]

SAME—MONOPOLIES.—Nor is such an agreement in violation of section 2 of such act, as tending to the monopolization of trade and commerce.

SAME—PUBLIC POLICY—TRANSFER OF FRANCHISE.—Where each company, by such agreement, maintains its own organization as before, elects its own officers, delegates no powers to the association to govern in any respect the operations or methods of transacting the routine [441] business of the several competing lines, but simply requires that each company shall charge just and reasonable rates, and provides for certain regulations in regard to changes in such rates, such contract or agreement is not forbidden by public policy as amounting to a transfer of the franchises and corporate powers of such companies.

SAME—MONOPOLIES—INTERSTATE COMMERCE ACT.—It was not the intention of congress to include common carriers subject to the act of February 4, 1887, within the provisions of the act of July 2, 1890, which is a special statute, relating to combinations in the form of trusts and conspiracies in restraint of trade.

In Equity. Bill by the United States against the Trans-Missouri Freight Association, the Atchison, Topeka & Santa

[a] Affirmed by the Circuit Court of Appeals, Eighth Circuit (58 Fed., 58). See p. 186. Reversed by the Supreme Court (166 U. S., 290). See p. 648.

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Opinion of the Court.

Fe Railroad Company, and others, for the dissolution of an association or combination alleged to be in restraint of trade in violation of the act of July 2, 1890, and for an injunction restraining the several companies from carrying into effect the agreement under which the association was formed. Bill dismissed.

J. W. Ady and *S. R. Peters*, for complainant.

George R. Peck, *B. P. Waggener*, *Wolcott & Vaile*, *Wallace Pratt*, *J. P. Dana*, *Spencer*, *Burnes & Mosman*, *J. D. Strong*, *W. F. Guthrie*, *J. M. Thurston*, *A. L. Williams*, *N. H. Loomis*, *R. W. Blair*, *John R. Hawley*, *W. F. Evans*, *M. A. Low*, *James Hagerman*, and *T. N. Sedgwick*, for defendants.

RINER, District Judge.

This is a bill in equity, brought by the United States attorney for the district of Kansas, by direction of the attorney general, in the name of the United States against the Trans-Missouri Freight Association and 18 railway companies, which, it is alleged in the bill, constitute the association.

The object and purpose of the bill is to obtain a decree declaring said freight association dissolved, and enjoining defendants, and each of them, from carrying out the terms of a certain memorandum of agreement entered into by and between the 18 railway companies forming this association, which agreement, it is alleged, is unlawful, because maintained by said railway companies in violation of an act of congress, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890.

It is alleged in the bill that the defendants (the 18 railway companies) are common carriers incorporated under public statutes of several states and of the United States, and are engaged in moving, carrying, and transporting freight and commodities in the commerce, trade, and traffic which is continuously carried on among and between the several states of the United States, and among and between the several states and territories of the United States, and between the

states and territories of the United States and foreign countries; and that prior to March 15, 1889, each of the defendant railway companies owned, operated, and controlled separate lines of railroad, and furnished to persons engaged in trade and others, among the states and territories of the United States, separate, distinct, and competing lines of transportation between the states and territories of the United States lying west of the Mis- [442] souri river and east of the Pacific ocean, and that to encourage and secure the benefit of the competing lines of transportation throughout that region of country the government of the United States and the states and territories within the region just mentioned had granted to the defendants public franchises, land grants, securities, and subsidies of great value. That on the 15th day of March, 1889, the defendant railway companies, not being content with the rates of freight they could receive with free competition among themselves, but contriving and intending unjustly and oppressively to establish and maintain arbitrary rates of freight and transportation in the interstate commerce throughout said region, did combine, conspire, confederate, and unlawfully agree together, and did enter into a written agreement and contract, known as the "Memorandum of Agreement of the Trans-Missouri Freight Association," by the terms of which said agreement the association has control of all competitive traffic between points in that region of country lying west of a line commencing at the ninety-fifth meridian, on the Gulf of Mexico, and running north to the Red river, and thence to the eastern boundary of the Indian Territory; thence along the eastern line of said territory and of the state of Kansas to Kansas City, Mo.; thence, by the Missouri river, to the point of intersection of that river with the eastern boundary line of Montana; thence by said eastern boundary line to the international line between this country and the British possessions. That the said association, by a board created by each company appointing one person to represent it in the association, and that the several railway companies, members of the association, gave to the association the power to establish and maintain rules, regulations, and rates on all competitive traffic, through and local, within the region of

country described in the agreement; and that said association, by the terms of the agreement, is given the power to punish by fine any member that reduces the rate fixed by the association.

It is further alleged in the bill that the said agreement took effect on the 1st day of April, 1889, and that ever since that time the said railway companies, by reason of said agreement and combination, and under duress of the fines and penalties prescribed in the articles of agreement, have put in force and maintained, and now maintain, tariffs and rates of freight fixed by said association; and that the officers and agents of said railway companies have, ever since said agreement took effect, refused to put in force reasonable rates of freight, based upon the cost of construction and operation of their several lines of railroad and other proper elements to be considered in the making of freight rates; and that the people engaged in trade and commerce within the region of country mentioned in said articles of agreement are, by reason of said combination and association, deprived of rates of freight, benefits, and facilities which might reasonably be expected to flow from free competition between said several lines of transportation. It is further alleged in the bill that, notwithstanding said association is in violation of the act of congress of July 2, 1890, said defendants, since the date of said act, have, and still continue to maintain, the arbitrary rates of freight fixed by the [443] said Trans-Missouri Freight Association, to the great injury and prejudice of the public and to the people of the United States. Then follows the prayer that the defendants, and each of them, be enjoined from further agreeing, combining, conspiring, and acting together to maintain rules and regulations for carrying freight upon their several lines of railroad, to hinder trade and commerce between the states and territories of the United States; and that they be enjoined from continuing in a combination, association, or conspiracy to deprive the people engaged in trade and commerce among the states and territories of the United States of such facilities, rates, and charges of freight and transportation as will be attained by free and unrestrained competition between said several lines of railroad; and that said defendants

be enjoined from agreeing, combining, conspiring, and acting together to monopolize or attempting to monopolize freight traffic in the states and territories of the United States and that all and each of them be enjoined from agreeing, combining, conspiring, and acting together to prevent each or any of their associates in said agreement from carrying freight and commodities in the trade and commerce between the states and territories of the United States, except at such rates as shall be voluntarily fixed by the officers and agents of each of said roads acting independently and separately in its own behalf.

The defendants the Missouri, Kansas & Texas Railway Company, the Chicago, Kansas & Nebraska Railway Company, and the Denver, Texas & Ft. Worth Railroad Company have filed answers, denying that they were members of the Trans-Missouri Freight Association. The other 15 companies have each filed a separate answer, but, as they are substantially the same as to the facts, it will not be necessary to refer to them separately. They each admit that they are common carriers engaged in transporting persons and property among the several states and territories of the United States, and allege that, as such common carriers, they are subject to the provisions of the act of congress approved February 4, 1887, entitled "An act to regulate commerce," with the various amendments thereof and additions thereto, and that said act and the amendments constitute the system of regulation which has been established by congress for the common carriers subject to said act; and they deny that they are subject to the provisions of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. Further answering, the defendants admit that they severally own, control, and operate separate and distinct lines of railroad fitted up for carrying on business as common carriers of freight, independently and disconnectedly with each other, except that common interest exists between certain of the companies named in the answer. It is further admitted by the defendants that the lines of road mentioned in the bill are lines of transportation and communication engaged in freight traffic between and among the states and territories of the

United States, and are through lines for freight traffic in that region of country lying west of the Mississippi and Missouri rivers and east of the Pacific ocean, but deny that they are the only such lines, and **[444]** allege that there are several others, naming them. It is further admitted that prior to the organization of the freight association the defendants furnished to the public, and persons engaged in trade, traffic, and commerce between the several states and territories of the United States and countries named in the bill, separate, distinct, and competitive lines of transportation and communication, and allege that they still continue to do so. It is further admitted that some of the roads mentioned in the bill received aid by land grants from the United States, and others received aid from the states and territories by loans of credits, donations of depot sites and right of way, and in a few cases by investments of money, and the people of the said states and territories to a limited extent made investments in the stocks and bonds in some of said railroads, while other of the lines mentioned in the bill were almost entirely constructed by capital furnished by nonresidents of said region. It is further admitted that the purpose of said land grants, loans, donations, and investments was to obtain the construction of competitive lines of transportation and communication, to the end that the public, and people engaged in trade and commerce throughout said region of country, might have the facilities afforded by railways in communicating with each other, and with other portions of the United States, and with the world, and denied that they were granted for any other purpose. Defendants further admit the formation, on or about March 15, 1889, of the voluntary association described in the bill as the Trans-Missouri Freight Association.

Further answering, defendants deny that they were not content with rates prevailing at the date of agreement; they deny any intent to unjustly increase rates, and deny that said agreement destroyed, prevented, or illegally limited or influenced competition; they deny that arbitrary rates have been fixed or charged; they deny that rates have been increased, or that the effect of free competition has been counteracted; they deny any purpose in the formation of said association

to monopolize the freight traffic or commerce between the states and territories within the region mentioned in the bill, and deny that the said agreement is in any respect the unlawful result of any confederation or conspiracy. Further answering, defendants allege that they are subject to the provisions of the act of congress approved February 4, 1887, entitled "An act to regulate commerce," in the matter of adjusting rates on their several roads, so as to prevent unjust discrimination against persons and localities, which involves an adjustment between different companies interested in joint rates, and doing business in said region of country, requiring preconcerted action between defendant companies, and that this service is the greater part of the work of the association. The defendants admit that the chairman of the association is authorized to investigate rate cutting, and that the articles of agreement provide that he may assess fines for violations thereof, but allege that no attempt has been made to enforce the collection of fines since 1890. Further answering, the defendants allege that the principal object of the association is to establish reasonable rates, rules, and regulations on all freight traffic, and the maintenance of **[445]** such rates until changed in the manner provided by law. It is further alleged that the agreement was filed with the interstate commerce commission, as required by section 6 of the act of February 4, 1887. Defendants further allege that it is not the purpose of the association to prevent members from reducing rates or changing the rules or regulations fixed by the association, and that by the terms of the agreement each member may do so; the preliminary requirement being that the proposed change shall be voted upon at the meeting of the association, after which, if the proposal is not agreed to, the line making the proposal can make such reduced rate notwithstanding the objection of the other lines. That the purpose of this provision is to afford opportunity for the consideration of the reasonableness of any proposed rate, rule, or regulation by all lines interested, and an interchange of views on the effect of such reduction; and that reductions of rates have been made in many instances, through said process, by said association. It is admitted by the answer that this agreement took effect

April 1, 1889, and that it has since remained operative, and that the rates, rules, and regulations properly fixed and established from time to time, under said agreement, have been put into effect and maintained in conformity to law; but it is denied that by reason of said agreement, or under duress of fines and penalties or otherwise, the defendants have refused to establish and maintain just and reasonable rates, and it is alleged that the object of the association at all times has been and is to establish all rates, rules, and regulations upon a just and reasonable basis, and to avoid unjust discrimination and undue preference.

The answer further denies that shippers or the public are in any way oppressed or injured by reason of the rates fixed by the association, but, on the contrary, it is alleged that the agreement, and the association established under it, have been beneficial to the patrons of the defendant railway lines, composing the association, and the public at large.

A copy of the agreement is set out at length, and attached to the answer of the Atchison, Topeka & Santa Fe Railway Company.[1] The case was set down for hearing on bill and answer, and the pleadings only are to be considered. The answer, therefore, is admitted to be true in all its allegations of fact, even when not stated positively; and the defendants only aver that they believe, and hope to be able to prove, such facts, but the complainant does not thereby admit conclusions of law, nor matters concerning which the court takes judicial notice.

The act of congress of July 2, 1890, which it is alleged in the bill is violated by the agreement to form and the formation of the freight association, in the first section declares every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, to be illegal, and provides for the punishment by fine or imprisonment of every person who shall make any such contract, or engage in any such combination or conspiracy. Section 2 declares that every person who shall monopolize **[446]** or attempt to monopolize or combine or conspire with any other person or persons to monopolize any

[1] See note at end of case.

part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine or imprisonment. Section 3 makes the provisions of the first section applicable within the territories, and between one territory and another, and between a territory and a state, and between the District of Columbia and a territory or state. Section 4 confers jurisdiction upon the several circuit courts of the United States to prevent and restrain violations of the act, and makes it the duty of the district attorneys in the respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violation. Section 5 provides for bringing in other necessary parties. Section 6 provides for the seizure and condemnation of property owned under any contract or combination prohibited by the act, and being in the course of transportation from one state to another or to a foreign country. Section 7 gives a right of action to any person injured by violations of the act, and authorizes a recovery of threefold damages. The eighth and last section provides that the word "person" or "persons," whenever used in the act, shall be construed to include corporations or associations existing under or authorized by the laws either of the United States or of the territories or of any state or of any foreign country.

It will be seen from an examination of this statute that its purpose was to reach two evils: First, contracts, combinations, or conspiracies in restraint of trade; and, second, monopolies. It was urged at the argument that the contract mentioned in the bill, and the association formed thereunder, came within the provisions of this act of July 2, 1890, for the reason that it is a contract or agreement in restraint of trade, in that it prevented free competition in the matter of transportation of freight among the several states within the region specified in the bill; counsel for the government insisting that "trade and commerce among the several states of the Union is free, except as regulated and restrained by acts of congress, and that no state, municipality, corporation, individual, or combination of individuals can by any act or device legally restrain, hinder, and retard it." On the other

hand, it is insisted by the defendants that there is no fixed rule of law by which to determine whether any given contract is in restraint of trade, but that in determining the question the courts must look to the particular circumstances of each case.

In disposing of this branch of the case, I will first briefly refer to some of the decided cases cited by counsel in their briefs.

The case of *Com.* v. *Carlisle*, Brightly, N. P. 36, was a case where certain master shoemakers had entered into an agreement not to employ any journeymen shoemakers who would not consent to work at reduced wages; the purpose being to re-establish wages for this class of labor which had prevailed before that time, but which the defendants had been compelled to advance by reason of a combination among the workmen. The court, in deciding the case, said:

"Where an act is lawful for an individual it can be the subject of conspiracy when done in concert only where there is a direct intention that in- [447] jury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individulas, and where such prejudice or oppression is the natural and necessary consequence flowing from the act."

The case of *People* v. *Fisher*, 14 Wend. 9, was an indictment against journeyman shoemakers for conspiring together to fix the price of making boots, and establishing a penalty against any journeyman shoemakers who should make boots for a less rate than that fixed by the parties to the agreement, and also agreeing to refuse to work for any master shoemaker who should hire a man who reduced the rates for making boots; and it was held in that case that this was a conspiracy against trade and commerce, and, as such, prohibited under a statute providing: "If one or more persons shall conspire to commit any act injurious to trade or commerce, they shall be guilty of a misdemeanor." In passing upon the case, Savage, C. J., said:

"The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than $1.00 per pair, but he has no right to say that no other mechanic shall make them for less. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to effect such an object, are injurious, not only to the individual particularly oppressed, but to the public at large."

Hooker v. *Vandewater*, 4 Denio, 349, was an action to compel a division of net earnings between several lines of boats engaged in transporting persons and freight on the Erie and Oswego canals. The agreement was that each party should run his line of boats upon these canals during the period of canal navigation in 1842, at rates of freight fixed by themselves, from which neither should deviate; and to indicate the interest of each the respective lines were converted into stock, amounting in all to 69 shares. All were to share equally in the net earnings of all the lines in proportion to the number of shares of such stock, and to enforce performance of the contract a common agent was appointed, to whom each party to the agreement was to advance and keep good $35 on each share of such stock, and who was from time to time to receive returns of the business done by each line, and adjust the proportions from the earnings due to each, and out of this common fund to pay and liquidate all such sums as should appear from time to time to be due from one to the other. It was held in this case that the transaction amounted to a conspiracy to commit an act injurious to trade, and was therefore illegal and void.

The case of *Stanton* v. *Allen*, 5 Denio, 434, was a suit upon a promissory note, given, as stated upon the face of the note, for percentage on tolls for the season of 1843. In this case an agreement had been entered into by the proprietors of boats on the Erie and Oswego canals, to regulate the price of freight and passage by a uniform scale to be fixed by a committee chosen by themselves, and to divide the profits of their business according to the number of boats employed by each, with a provision in the contract prohibiting the members from engaging in similar business out of the association, and it was held that the tendency of such an agreement was to pre- [448] vent wholesome competition, and was therefore against public policy, and void.

The case of *Association* v. *Kock*, 14 La. Ann. 168, was a contract between several persons engaged in selling bagging, to the effect that none of them should sell any bagging without the consent of a majority, and providing a penalty of $10 for each bale of bagging sold in violation of the agreement, and the action was to recover penalties under the agreement,

amounting to $7,400. The court in that case decided that the contract was a combination in restraint of trade, for the reason that its purpose was to enhance the market price of an article of prime necessity to cotton planters, and was therefore contrary to public policy, and could not be enforced.

The *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173, was an agreement between five coal companies to divide two coal regions of which they had control, and to appoint a committee to take charge of their interests, which committee was to decide all questions, and appoint a general agent at Watkins, N. Y.; the coal mined to be delivered through him. Each corporation was to deliver its proportion, at its own cost, in the different markets, at such time, and to such persons, as the committee might direct, and the committee to adjust the prices and rates of freight. By the terms of the agreement the companies might sell their coal themselves, however, to the extent only of their proportion; the agent to have the power to suspend shipments of either beyond their proportion. Prices were to be averaged, and payments made to those in arrear by those in excess. Neither party to the contract was to sell coal otherwise than specified in the agreement. The action was to recover on a bill of exchange drawn for balances under this contract. It was held that there could be no recovery, for the reason that the contract under which the balances were claimed was void as against public policy.

The case of *Craft* v. *McConoughy*, 79 Ill. 346, was an action for a division of profits under a contract between grain dealers at the town of Rochelle, in Illinois, in which it was provided:

"Each separate firm shall conduct their own business as heretofore, as though there were no partnership in appearance, keep their accounts, pay their own expenses, ship their own grain, and furnish their own funds to do business with; prices and grades to be fixed from time to time as convenient, and each one to abide by them. All grain taken in store shall be charged 1½ cents per bushel monthly. No grain to be shipped by any party at a less rate than 2 cents per bushel."

The court held the agreement void, as in restraint of trade, for the reason that, while the agreement upon its face seemed to indicate that the parties had formed a partnership for

the purpose of controlling the trade in grain, yet, from the terms of the contract and other proof in the record, it was apparent that the object was to form a secret combination, which would stifle all competition, and enable the parties by secret and fraudulent means to control the price of grain, cost of storage, and expense of shipment; adopting the language of the court:

"In other words, the four firms, by shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of a town and surrounding country."

[449] In the case of *Salt Co.* v. *Guthrie*, 35 Ohio St. 666, the contract was for the purposes of regulating the prices and grade of salt. By the terms of the agreement each member of the association was prohibited from selling any salt during the continuance of the association, except at retail, and then only to actual consumers at the place of manufacture, and at the prices fixed by the directors from time to time. The action was to recover the possession of 1,000 bushels of salt manufactured under the contract. The court denied the plaintiff's right to recover, stating: "The clear tendency of such an agreement was to establish a monopoly, and to destroy competition in trade," and for that reason, on grounds of public policy, courts will not aid in its enforcement.

The case of *Texas & P. Ry. Co.* v. *Southern Pac. Ry. Co.*, 41 La. Ann. 970, 6 South. Rep. 888, was a suit for specific performance of a contract to divide net earnings between competitive points. The court declined to specifically enforce the contract, saying—

"That all contracts which have a tendency to stifle competition or to create or foster monopolies with the view of unreasonably increasing the market value of commodities are against public interest, and contrary to public policy."

The case of *Anderson* v. *Jett*, (Ky.) 12 S. W. Rep. 670, was another case of a contract to divide net earnings, and it was there held that, where the object or tendency of the agreement was to prevent or impede free and fair competition in the trade, and where the agreement might in fact have that tendency, it was void, as being against public policy.

The case of *Gibbs* v. *Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553, was a contract for a settlement between certain gas companies, which the plaintiff procured, and for his services in procuring the agreement he sought to recover. The object and purpose of the contract was to regulate the price of gas in the city of Baltimore, and provided, among other things, that the rate should not be changed except by mutual agreement of the parties, and that the entire receipts from the sale of gas should be proportioned and divided between the companies in fixed ratios, without regard to the gas actually supplied by either; and also prohibited one of the companies from laying any more pipes for the purpose of supplying the city with gas, and provided that in the future all pipes or mains should become the property of the other company; and also provided that either party violating the terms of the contract should pay to the other company the sum of $250,000 as liquidated damages. The court in this case, speaking by Chief Justice Fuller, said:

"Courts decline to enforce contracts which impose a restraint, though only partial, upon business of such character that restraint to any extent will be prejudicial to the public interest; but where the public welfare is not involved, and the restraint upon one party is not greater than protection to the other party requires, a contract in restraint of trade may be sustained."

Thus it will be seen that the question whether or not the contract is prejudicial to public interest is in this case made the test. If it is prejudicial to public interest, then it cannot be sustained, even where the restraint is only partial, because in contravention of public pol- **[450]** icy; where it is not, it may be sustained. It has been decided in a great many cases that contracts in restraint of trade were perfectly valid, even where they prevented the party from engaging in the business, which was the subject-matter of the contract, within the entire state where the contract was made; the test being whether the contract was reasonable, and whether or not it was prejudicial to the public interest.

Roller Co. v. *Cushman*, 143 Mass. 353, 9 N. E. Rep. 629; *Davis* v. *Mason*, 5 Term R. 120. In this case Lord Kenyon, in sustaining an agreement restraining a surgeon from practicing his profession within five miles from a certain town, said—

"That the public were not likely to be injured by the agreement, since every other person was at liberty to practice as a surgeon in the town."

To the same effect is *Homer* v. *Ashford*, 3 Bing. 322. In the case of *Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345, the court, in passing upon the validity of a contract in general restraint, which extended throughout the whole kingdom, said:

"All the cases, when they come to be examined, seem to establish this principle: that all restraints upon trade are bad, as being in violation of public policy, unless they are natural, and not unreasonable, for the protection of the parties in dealing legally with some subject-matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labor, skill, or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract."

See, also, *Hubbard* v. *Miller*, 27 Mich. 15; *Thermometer Co.* v. *Pool*, 51 Hun, 157, 4 N. Y. Supp. 861; *Gloucester Isinglass & Glue Co.* v. *Russia Cement Co.*, 154 Mass. 92, 27 N. E. Rep. 1005; *Beal* v. *Chase*, 31 Mich. 490; *Match Co.* v. *Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419; *Navigation Co.* v. *Winsor*, 20 Wall. 64.

The case last referred to was a contract in which a party engaged in navigating the waters of California alone sold a steamer to other parties, who were engaged in navigating the Columbia river, in Oregon and Washington territories; and it was agreed between the parties that the purchasers of the steamer should not employ it or suffer it to be employed for 10 years from the date of sale in any waters of California. Three years afterwards, the purchasers, under this contract, sold the steamer to a party engaged in navigating Puget sound, subject to the stipulation that she should not be run or employed on any routes of travel on the rivers, bays, or waters of the state of California or the Columbia river and its tributaries for the period of 10 years. The supreme court held the contract valid. Mr. Justice Bradley, speaking for the court, said:

[451] "It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void, but an agreement which

operates merely in partial restraint of trade is good, provided it be not unreasonable."

Again, in the same case, the learned justice takes occasion to say that—

"Cases must be adjudged according to their circumstances, and can only be rightly judged when the reason and grounds for the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy: One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced."

I think the cases are uniform to the effect that, where the contract is publicly oppressive, and the restrictions are broader than are necessary for the legitimate protection of the other party to be benefited by the contract, then the contract is unreasonable,—a contract in restraint of trade,—and therefore void; otherwise not. Undoubtedly all contracts which have a direct tendency to prevent healthy competition are detrimental to the public, and, therefore, to be condemned; but when contracts go to the extent only of preventing unhealthy competition, and yet at the same time furnish the public with adequate facilities at fixed and reasonable prices, and are made only for the purpose of averting personal ruin, the contract is lawful. The rule of law which recognizes the rights of the public to have the benefit of fair and healthy competition, and to require that equal facilities and reasonable rates shall be secured to all, does not condemn a contract between railway companies operating competing lines, which is made for the sole purpose of preventing strife, and preventing financial ruin to one or the other, so long as the purpose and effect of such an agreement is not to deprive the public of its right to have adequate facilities and fixed and reasonable prices. On the contrary, such agreements, instead of being obnoxious to the law, because detrimental to the public interest, are to be

upheld, for the reason that they benefit the public by preventing unjust discrimination among shippers, and providing equal facilities for the interchange of traffic, and thus avoiding many of the unfair and unjust results which often follow the unrestricted competition of rival companies. Applying this rule to the contract complained of in the case at bar, can it be said that the contract is unlawful? I think not. The allegation of fact in the answer (which is to be taken as true) is that the object and purpose of the agreement and the formation of the association thereunder was to maintain just and reasonable rates, and to prevent unjust discriminations, in compliance with the terms of the act regulating commerce, by furnishing equal facilities for the interchange of traffic between the several lines. How, then, can it be said that the **[452]** public is injuriously affected by this agreement? The rates or charges are uniform and reasonable, and unjust discriminations are prohibited. Equal facilities for the interchange of traffic are provided for; hence no right to which the public is entitled is violated. The term "competition" must not be construed to apply solely to the question of rates. There are many other considerations included within the term. There may be very active competition between these railway lines outside of the question of rates, viz. by offering to the public advantages in the matter of equipment, facilities at feeding stations for the proper care of live stock, shortening of time, and in many other ways the most active competition may prevail, all of which the public receives the benefit of; and so long as the rate charged is fair and reasonable, as stated in the answer, which must be construed to mean no more than a fair compensation to the carrier for the services performed, the public cannot complain.

As stated by Christiancy, J., in the case of *Beal* v. *Chase*, reported in 31 Mich. 521:

"The public is quite as much interested in the prosperity of its citizens in their various avocations as it can possibly be in their competition. The latter may bring low prices to purchasers, but may also bring them so low that capital becomes unprofitable, and business men fail, to the general injury of the community."

I think that it cannot be said that the public is benefited by competition when that competition is carried beyond the

bounds of reasonable prosperity to the parties engaged in it, for surely the citizen investing his capital, whether in railways or otherwise, is entitled to the benefit of a contract which affords to him only a fair protection for his investment, and which does not interfere with the rights of the public by imposing unjust and unreasonable charges for the service performed. Such contracts, as was stated in the case of *Homer* v. *Ashford*, "are not injurious restraints of trade, but securities necessary for those engaged in trade. The effect of such a contract is to encourage, rather than cramp, the employment of capital in trade, and to promote industry." Applying this rule to the agreement under consideration, my own view is that it is not an agreement, combination, or conspiracy in restraint of trade, in violation of the first section of the act of July 2, 1890.

It is further urged by counsel for the government that this association unavoidably tends to a monopolization of trade and commerce, and for that reason is in violation of the second section of the act of July 2, 1890. A "monopoly" is defined by Mr. Justice Story to be "an exclusive right, granted to a few, of something which was before of common right;" and by Lord Coke to be "an institution by the king, by his grant, commission, or otherwise, to any persons or corporations, of or for the sole buying, selling, making, working, or using of everything whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade." While it is undoubtedly true that these railroad companies perform quasi public functions, and for that reason owe certain duties to the public, yet, after a careful examination of this contract, I must confess that I have been unable to discover in **[453]** it a single element of a monopoly, especially as defined at common law. While it is true that the public are entitled to adequate facilities and to just and reasonable rates at the hands of these corporations, they are entitled to just that, and no more; and the allegation of the answer is that this was the very purpose of the contract. In view of this allegation,—which is to be taken as true in this case,—I do not see how it can be said that the contract tends to create a mo-

nopoly when, by its very terms, everything to which the public is entitled is provided for, and the public interest fully protected. But it is urged by counsel for the government that this should be held to be a contract tending to monopolize trade and commerce, for the reason that its tendency is to prevent free and unrestricted competition. What I have said in reference to competition in discussing contracts in restraint of trade is equally applicable here. My own view is that the contention of counsel is altogether too broad. The public is not entitled to free and unrestricted competition, but what it is entitled to is fair and healthy competition; and I see nothing in this contract which necessarily tends to interfere with that right.

Again, it is urged that this contract amounts to the transfer of the franchises and corporate powers of these railway companies, and that the contract, therefore, is forbidden by public policy. There is no doubt but what it is beyond the power of a corporation to disable itself by contract so that it cannot perform every public duty which it has undertaken. Mr. Justice Miller, in delivering the opinion of the court in the case of *Thomas* v. *Railway Co.*, 101 U. S. 71, says:

"Where a corporation, like a railroad company, has granted to it, by charter, a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void, as against public policy."

But wherein the principle announced in this case can be applied to the contract under consideration, I am wholly unable to perceive. In what manner are the franchises or corporate powers of any of these railway companies transferred to this association? Each company maintains its organization as before, elects its officers and operates its line in exactly the same manner now as it did before the organization of the association. No powers whatever are given to the association to govern in any respect the operations or methods of transacting the business of any of the lines. Each line is left perfectly free to transact all of the business it can secure, and in its own way. True, the contract requires that each company shall charge just and reasonable rates, and also contains provision for regulating changes in rates; but wherein is this a surrender of any corporate franchise into the hands of an irresponsible power? The contract provides that this association shall consist of a representative of each of the lines. This representative may or may not be an officer of the company. Suppose we concede that he is not, but is a person appointed by the officers of the company authorized to make such appointment, he **[454]** then becomes the agent of the company for that purpose, and he may lawfully act on its behalf, and hence his act would be the act of the company through its duly-authorized agent, and the rate, rule, or regulation made by the association and put into effect by any company, party to the agreement, would not be merely the rate, rule, or regulation of the association, but a rate, rule, or regulation of the company itself, acting through its proper officers or agents, and hence no surrender or transfer of any corporate power conferred upon it by its charter; nor would it be thereby relieved of any burden imposed.

One further question remains in this case: Does the provision of the act of July 2, 1890, relate to the business of common carriers, or, in other words, does it include, and was it intended to include, combinations or agreements between railway companies? It is urged by the defendants that they are not included within that act; that the provisions of the act operate, and were intended to operate, upon other and different combinations, and that they have no application to agreements or combinations between railway companies, for the reason that congress had already provided by the act of February 4, 1887, entitled "An act to regulate commerce," a full and comprehensive code of railway regulation, modeled on the most effective systems of the different states and of England. This last-mentioned act may be summarized as follows: That the provisions of the act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water. It provides that all charges for services shall be reasonable and just; that unjust discriminations and undue or unreasonable preferences shall not be

made; that reasonable, proper, and equal facilities for the interchange of traffic between lines, and for the receiving, forwarding, and delivering of passengers and property between connecting lines shall be provided; that there shall be no discrimination in the rates and charges as between connecting lines; that it shall be unlawful to charge a greater compensation for a short haul than for a long haul over the same line, in the same direction, under substantially similar circumstances; that there shall be no pooling of earnings. The act provides for the filing and publication of tariffs, including joint tariffs of connecting roads, and also provides for 10 days' notice of any advance in rates.

The act further provides that any combination, contract, or agreement, express or implied, to prevent, by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination, shall be unlawful. The act provides penalties for violations of its provisions, establishes a commission of five members to exercise a supervisory control over the common carriers subject to the act, and to enforce the provisions of the act. It will be seen from an examination that this act is in the nature of a special act, being confined in its application to common carriers, while the act of July 2d is clearly, by its terms, a general statute. It includes every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade, and every person who shall monopolize or attempt to monopolize any part of the trade and commerce [455] among the states. I think no rule is better settled than, where a general statute has been enacted, which might include, in the absence of other provisions, a subject-matter which has already received consideration at the hands of the legislature by a special act, that the general act will not be construed to embrace the subject contained in the special act, unless it clearly appears from the language employed that it was the intention of the legislature that it should be included. The intention of the legislature should, of course, be followed, and that is to be ascertained from the words used in the statute, and from the subject to which the statute relates, with a view of meeting the mischief sought to be remedied;

and in doing this it is the duty of the court to restrict the meaning of general words whenever it is satisfied that the literal meaning would extend the statute to cases which the legislature never designed to include. As stated by Mr. Justice Davis in the case of *Reiche* v. *Smythe*, 13 Wall. 164:

"If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words whenever it is found necessary to do so in order to carry out the legislative intention."

It is equally the duty of the court to give to these statutes such a construction that both may stand, if that can be done. Applying these rules, can it be said that it was the intention of congress to include common carriers subject to the act of February 4, 1887, within the provisions of the act of July 2d? I think it very clearly appears from an examination of these statutes, and considering the evil sought to be remedied, that such was not the intention of congress.

The whole subject relating to common carriers had already been carefully provided for by the act of February 4, 1887, and a commission appointed, whose duty it was to see to it that the carriers subject to that act complied with its requirements, with power to the courts, when necessary, to enforce its provisions; hence it is but reasonable to presume that if congress had considered anything in addition necessary for the proper regulations and control of these carriers, it would have provided for it by an amendment of that act, instead of including it in a general statute, some of the provisions of which would necessarily conflict with the legislation then in force upon a subject which had already received the special consideration of congress. I think it was the purpose of congress to remedy a very different evil then existing. A number of combinations in the form of trusts and conspiracies in restraint of trade had sprung up in the country which were dangerous to its commercial interests; for example, the steel-rail trust, cordage trust, the whisky trust, the Standard oil trust, dressed-beef trust, the school-book trust, the gas trust, and numerous other trusts and combinations, which threatened to destroy the commercial and industrial prosperity of the country. These trusts assumed the absolute control of the various corporations entering into them, direct-

ing which of the constituent members of the trust should continue operations and which should cease doing business; how much business should be transacted by each, what prices should be **[456]** charged for their product, and in fact had the power to direct every detail of the business of every corporation forming the trust. It was to combinations and conspiracies of this sort that the act of July 2, 1890, was directed. I conclude, therefore, that the bill should be dismissed, and it is so ordered, but not at the cost of the complainant.

NOTE.

Memorandum of agreement: "Memorandum of agreement made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz.: Atchison, Topeka & Santa Fe R. R., Chicago, Rock Island & Pacific Ry., Chicago, St. Paul, Minneapolis & Omaha Ry., Burlington & Missouri River R. R. in Nebraska, Denver & Rio Grande R. R., Denver & Rio Grande Western Ry., Fremont, Elkhorn & Missouri Valley R. R., Kansas City, Ft. Scott & Memphis R. R., Kansas City, St. Joseph & Council Bluffs R. R., Missouri Pacific Ry., Sioux City & Pacific R. R., St. Joseph & Grand Island R. R., St. Louis & San Francisco Ry., Union Pacific Ry., Utah Central Ry., and such other companies as may hereafter become parties hereto,—witnesseth, for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

"Article 1. The traffic to be included in the Trans-Missouri Freight Association shall be as follows: (1) All traffic competitive between any two or more members hereof, passing between points in the following described territory: Commencing at the Gulf of Mexico, on the 95th meridian, thence north to the Red river; thence via that river to the eastern boundary line of the Indian Territory; thence north by said boundary line and the eastern line of the state of Kansas to the Missouri river at Kansas City; thence via the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the international line,—the foregoing to be known as the 'Missouri River line;' thence via said international line to the Pacific coast; thence via the Pacific coast to the international line between the United States and Mexico; thence via said international line to the Gulf of Mexico; and thence via said Gulf to the point of beginning, including business between points on the boundary line as described. (2) All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri river line. Exceptions: (a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business via their lines between points in Colorado and points in Utah. All local business between Denver and Trinidad and intermediate points; all local business of the A., T. & S. F. between Pueblo and Canon City, Colo.; all stone traffic having both origin and destination within the state of Colorado. The jurisdiction of this association in so far as

the business of the Denver & Rio Grande Railroad and the Denver & Rio Grande Western Railway Companies is concerned, covers the following traffic, namely: All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian Territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad. All freight traffic between Ogden, Spanish Fort, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand. Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver & Rio Grande Western Railway. (b) Traffic included in the Trans-Continental and International Association. (c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern states east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers. (d) Traffic passing between Missouri river points and points in the **[457]** territory east of said river. (e) All traffic to points on the Northern Pacific and Manitoba Railways. (f) Traffic to points in Arkansas. (g) Coal, stone, and gravel from Colorado, Wyoming, and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Missouri. (h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado. (i) Business to and from Florence, Colorado, by all lines.

"Art. 2. Section 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two-thirds vote of the members. Sec. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting—regular or special—is convened it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person, who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings, when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents. Sec. 3. A committee shall be appointed to establish rates, rules, and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ, the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree, it shall be arbitrated in the manner provided in article 7. Sec. 4. At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates or change in any rule or regulation governing freight traffic,—eight days in so far as applicable to the traffic of Colorado or Utah. Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed, of which due

Note—Memorandum of agreement.

notice has been given, and all parties shall be bound by the decision of the association, so expressed, unless then and there the parties shall give the association definite written notice that in 10 days thereafter they shall make such modification, notwithstanding the vote of the association: provided that, if the member giving notice of change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of such majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote, upon such other traffic put into effect corresponding rates, to take effect on the same day. By unanimous consent, any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice. Sec. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman, upon investigation, shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate, it shall be reported to the association; and if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made. Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the [458] association: provided, however, that when one road has a proprietary interest in another, the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms. Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper or any one else to secure a reduction or change in rates or change in the rules and regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed. Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed. Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines. Sec. 11. Any member not present

Note—Memorandum of agreement.

or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

"Art. 3. The duties and powers of the chairman shall be as follows: Section 1. He shall preside at all meetings of the association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association. Sec. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties hereto on business covered by this agreement; and each of the parties hereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require. Sec. 3. He shall construe this agreement, and all resolutions adopted thereunder; his construction to be binding until changed by a majority vote of the association. Sec. 4. He shall publish in joint form all rates, rules, and regulations which are general in their character, and apply throughout the territory of the association, and shall also publish, in the manner above, such rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest. Sec. 5. He shall be furnished with copies of all way-bills for freight carried under this agreement, when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof. Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on the members for the different amounts thus shown to be due. Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violations, as provided for herein. Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member. Sec. 9. Only the parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 3, article 3, of the agreement.

"Art. 4. Any willful underbilling in weights, or billing of freight at wrong classification, shall be considered a violation of this agreement; and the rules [459] and regulations of any weighing association or inspection bureau, as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

"Art. 5. The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at its first regular meeting thereafter, determine the matter, which may be done by a two-thirds vote of the members.

"Art. 6. There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employes, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

Statement of the Case.

"Art. 7. In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association: provided, however, that in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

"Art. 8. This agreement shall take effect April 1, 1889, subject thereafter to 30 days' notice of a desire on the part of any line to withdraw from or amend the same."

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[40] BLINDELL ET AL *v.* HAGAN ET AL.[a]

(Circuit Court, E. D. Louisiana. February 9, 1893.)

[54 Fed., 40.]

COMBINATIONS IN RESTRAINT OF TRADE—EQUITY JURISDICTION.—The statute against unlawful restraints and monopolies (Act 1890, 26 St. p. 209) does not authorize the bringing of injunction suits or suits in equity by any parties except the government.[b]

SAME.—The jurisdiction of the circuit court to entertain a suit to enjoin a combination of persons from interfering with and preventing shipowners from shipping a crew may be maintained on the ground of preventing a multiplicity of suits at law, and for the reason that damages at law for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural, and not susceptible of proof.

SAME—INJUNCTION PENDENTE LITE—EVIDENCE.—Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another [41] crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorze the court to enjoin interference with the business of the complainants by such combination, pendente lite.

In Equity. Bill by Blindell Bros. against C. Hagan and others to enjoin interference with their business as shipowners. On application for an injunction pendente lite. Granted.

Henry P. Dart and *F. B. Earhart*, for complainants.

J. Ward Gurley, jr., and *J. D. Grace*, for respondents.

[a] Affirmed by the Circuit Court of Appeals, Fifth Circuit (56 Fed., 696). See p. 182.

[b] Syllabus copyrighted, 1893, by West Publishing Co.

Opinion of the Court.

BILLINGS, District Judge.

This application is made and submitted on the bill and amended bill of complaint and numerous affidavits and counter affidavits. The substance of the bill, as amended, is that the complainants are aliens, being subjects of the kingdom of Great Britain, and that the defendants are citizens of the state of Louisiana; that the complainants are owners of the steamship *Violante*, which they are using in the carrying trade between this port and Liverpool; that they are prevented from shipping a crew by the unlawful and well-nigh violent combination of the defendants; that this combination is so numerous as to make it impossible for the complainants to obtain a crew without the restraining order of this court; that this unlawful interference of the defendants is interrupting the business of the complainants, which is that of persons engaged in the carrying trade between New Orleans and Liverpool, and is doing them an irreparable injury. The injunction has been asked for, first, under the act of 1890, (26 St. p. 209,) known as "An act to protect trade and commerce against unlawful restraints and monopolies." This act makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violaion, but it gives no new right to bring a suit in equity, and a careful study of the act has brought me to the conclusion that suits in equity or injunction suits by any other than the government of the United States are not authorized by it.

This brings me to the second ground upon which the injunction is asked. The citizenship of the parties is such that the United States circuit court has jurisdiction, and the complainants may urge before this court any grievance which they may have in law or equity as fully as they could do in the courts of a state. That the complainants may maintain a suit at law is conceded by the solicitors for the defendants. The prohibition in the statute of 1789 against suits in equity in the courts of the United States, where the plaintiff has a plain and adequate remedy at law, has been repeatedly held to enunciate or introduce no new doctrine, but it is enforced rigidly by the courts of the United States, because, if a suit in equity is allowed, the defendant is cut off from the right

of trial by jury, which is by the constitution of the United States guaranteed to him in all common-law cases involving upwards of $20. There can be equity jurisdiction only when the case in question belongs to one of the recognized classes of cases over which equity has jurisdiction. The [42] question, therefore, is, does this case belong to one of those recognized classes? If it does, it is because the nature of the alleged injury is such that it would be difficult to establish in a suit at law the damage of the complainant, and because to entertain it would prevent a multiplicity of suits. Undoubtedly Chancellor Kent lays down the correct rule in *Jerome* v. *Ross*, 7 Johns. Ch. 333, that cases of ordinary trespass are not within the cognizance of equity; but in *Livingston* v. *Livingston*, 6 Johns. Ch. 500, 501, he adds a qualification which shows the ground of discrimination between such trespasses as equity will enjoin and those which will not: "There must be something particular in the case of a trespass, * * * or to make out a case of irreparable mischief," in order to authorize equity to interfere, and an injunction to issue.

In Laussats' notes to Fonblanque's Equity, at page 3, he lays down the principle which is the fundamental one, concurred in by all the writers upon equity as the basis of equity jurisdiction in cases of trespass, as follows: "The foundation of this jurisdiction of equity is the probability of irreparable mischief, the inadequacy of a pecuniary compensation, and the prevention of a multiplicity of suits." The difficulty has been in applying this principle. Where there is a large combination of persons to interfere with a party's business by violence, the equity jurisdiction, if maintainable at all, is maintainable on either of two grounds,—the nature of the injury, including the difficulty of establishing in a suit at law the amount of actual damages suffered, or the prevention of a multiplicity of suits. The jurisdiction, for these reasons, was maintained in the following cases: *Emack* v. *Kane*, 34 Fed. Rep. 47; *Casey* v. *Typographical Union*, 45 Fed. Rep. 135, 144; *Gilbert* v. *Mickle*, 4 Sandf. Ch. 381, (marg. p. 357;) *Sherry* v. *Perkins*, 147 Mass. 212, 17 N. E. Rep. 307. In *Osborn* v. *Bank*, 6 Wheat, 845, the court says:

"In those cases [wrongful transfer of stocks and other securities] the injured party would have his remedy at law; * * * but it is the province of a court of equity in such cases to arrest the injury, and prevent the wrong. The remedy is more beneficial and complete than the law can give."

With reference to another class of cases, courts of equity have sometimes taken jurisdiction for the reason which requires that they should take jurisdiction here, viz. those cases for specific performance when there could be no adequate compensation in damages. In *Taylor* v. *Neville*, cited by Lord Hardwicke in *Buxton* v. *Lister*, 3 Atk. 383, a specific performance was decreed of a contract of a sale of 800 tons of iron to be delivered and paid for in a certain number of years, and by installments. Equity enjoins in such cases, because, though the injured party may have his suit at law, his damages must be conjectural. See *Adderley* v. *Dixon*, 1 Sim. & S. 607, 611. So in cases of trespass, where a business is interrupted, and the profits of pending enterprises and voyages are intercepted, the party injured must fail of recovering full compensation, for his damages must at law be largely conjectural; and for this reason, as well as to prevent a multiplicity of suits, he may, by an injunction in equity, arrest the threatened wrongdoing, and prevent the [43] consequent injury, which is irremediable, because it consists in the loss of profits which are not susceptible of proof.

My conclusion, therefore, is that the bill of complaint in this cause states a case over which a court of equity must take jurisdiction, in that it is a case where the threatened damages are irremediable at law, as well as one where the equity suit will prevent a multiplicity of suits.

As to proof upon the question of fact. There have been filed in this case in all 49 affidavits. I subjoin to this opinion a summary of each of these depositions. The preponderance of proof establishes that the British steamship *Violante* arrived at this port from Vera Cruz November 29, 1892, and on the 30th the crew was paid off. At that time the crew made no complaint regarding the food they received, or their treatment, or the safety of the ship, and continued at their duties until about noon of December 15, 1892, without complaint, except that some of the crew had asked the captain whether they would be paid before leaving port for the days in which the ship had been lying at the wharf, to which he answered

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he could not do so, as it would be a violation of all agreements between the crew and the ship. On December 15, 1892, after the ship had been cleared from the customhouse, and the pilot had come aboard, the crew, with the exception of the steward and the cook, retired from the ship. Being steamer *Violante*, after her crew left, on the 15th of December 15th, as contemplated. It is also established that the steamer *Violante*, after her crew left, on the 15th of December, did not succeed in getting a crew until December 24, 1892, after the restraining orders had been issued against the defendants in this cause, and that, during the whole period of nine days, the police authorities were called upon, and went to the assistance of the master and agents of the vessel in getting a crew; that, while other steamers in the vicinity had no difficulty in getting crews, the steamer *Violante* was unable to get a crew to stay on the vessel until they got the protection of the restraining orders from this court. I think the evidence establishes that the inability of the ship to retain the crew already shipped, and her inability to obtain another crew, except after the interference of this court by its restraining orders, were due to the acts of the defendants. The evidence fails to connect the defendant Dunn with the unfriendly acts of the other defendants. I think the case, upon the question of facts, as well as law, is with the complainants, and that the injunction pendente lite should issue against the defendants, except the defendant Dunn. As to him it is refused.

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[994] UNITED STATES *v.* WORKINGMEN'S AMALGAMATED COUNCIL OF NEW ORLEANS ET AL.[a]

(Circuit Court, E. D. Louisiana. March 25, 1893.)

[54 Fed., 994.]

INJUNCTION—WHEN GRANTED—UNLAWFUL COMBINATIONS.—Where an injunction is asked against the interference with interstate commerce by combinations of striking workmen, the fact that the strike is ended and labor resumed since the filing of the bill is no ground for refusing the injunction. The invasion of rights, especially

[a] Affirmed by the Circuit Court of Appeals, Fifth Circuit (57 Fed., 85). See p. 184.

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where the lawfulness of the invasion is not disclaimed, authorizes the injunction.[a]

SAME—BILL AND ANSWER—WAIVER OF OATH.—Where the bill for injunction waives the oath of the respondents, an answer, under oath, denying all the equities of the bill, can, under the amendment to equity rule 41, be used at the hearing with probative force of an affidavit alone. Whether the injunction should issue must be determined by the whole evidence submitted.

UNLAWFUL COMBINATIONS—RESTRAINT OF TRADE.—The act declaring illegal "every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations," (26 St. at Large, p. 209,) applies to combinations of laborers as well as of capitalists.

SAME—EVIDENCE—ADMISSIBILITY.—In order to sustain the allegations of a bill praying an injunction against a combination in restraint of interstate commerce, the complainant may offer in evidence, as matter of history, the official proclamation of the various government officers, and also newspaper reports supported by affidavits containing manifestoes and declarations of the respondents.

SAME—LAWFUL COMBINATIONS TURNED TO UNLAWFUL PURPOSES.—The fact that a combination of men is in its origin and general purposes innocent and lawful is no ground of defense when the combination is [995] turned to the unlawful purpose of restraining interstate and foreign commerce.

SAME—LABOR STRIKES.—A combination of men to secure or compel the employment of none but union men becomes a combination in restraint of interstate commerce, within the meaning of the statute, when, in order to gain its ends, it seeks to enforce, and does enforce, by violence and intimidation, a discontinuance of labor in all departments of business, including the transportation of goods from state to state, and to and from foreign nations.

In Equity. Suit by the United States against the Workingmen Amalgamated Council of New Orleans, La., and others, to restrain the defendants from interfering with interstate and foreign commerce. Injunction granted.

F. B. Earhart, United States Attorney.

A. H. Leonard, *M. Marks*, and *Evans & Dunn*, for defendants.

BILLINGS, District Judge.

This cause is submitted upon an application for an injunction on the bill of complaint, answer, and numerous affida-

[a] Syllabus copyrighted, 1893, by West Publishing Co.

vits and exhibits. The bill of complaint in this case is filed by the United States under the act of congress entitled "An act to protect trade and commerce against unlawful restraint and monopolies," (26 St. at Large, p. 209.) The substance of the bill is that there is a gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several states and with foreign countries. It avers that a disagreement between the warehousemen and their employes and the principal draymen and their subordinates had been adopted by all the organizations named in the bill, until, by this vast combination of men and of organizations, it was threatened that, unless there was an acquiescence in the demands of the subordinate workmen and draymen, all the men in all of the defendent organizations would leave work, and would allow no work in any department of business; that violence was threatened and used in support of this demand; and that this demand included the interstate and foreign commerce which flows through the city of New Orleans. The bill further states that the proceedings on the part of the defendants had taken such a vast and ramified proportion that, in consequence of the threats of the defendants, the whole business of the city of New Orleans was paralyzed, and the transit of goods and merchandise which was being conveyed through it from state to state, and to and from foreign countries, was totally interrupted. The elaborate argument and brief of the solicitors for the defendants presents six objections.

The defendants urge (1) that, the strike or cessation of labor being ended, and labor resumed throughout all branches of business, there is no need for an injunction. I know of no rule which is better settled than that the question as to the maintenance of a bill, and the granting of relief to a complainant, is to be determined by the status existing at the time of filing the bill. Rights do not ebb and flow. If they are invaded, and recourse to courts of justice is rendered necessary, it is no defense to the invasion of a right, either [996] admitted or proved, that since the institution of the suit the invasion has ceased. With emphasis would this be true where, as here, the right to invade is not disclaimed.

The question, then, is, what was the state of facts at the time of and prior to the filing of the bill? or whether, if the facts alleged in the bill were true at that time, there was need of an injunction.

The defendants urge (2) that the right of the complainants depends upon an unsettled question of law. The theory of the defense is that this case does not fall within the purview of the statute; that the statute prohibited monopolies and combinations which, using words in a general sense, were of capitalists, and not of laborers. I think the congressional debates show that the statute had its origin in the evils of massed capital; but, when the congress came to formulating the prohibition which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: "Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

The defendants urge (3) that, the answer being under oath, and denying all the allegations of the bill, the injunction cannot issue. Before the adoption of the amendment to the forty-first rule in equity, it was a rule in chancery practice that, where the answer was under oath, and denied all the equities of the bill, the injunction should be refused; but, since in this case the oath of the respondents is waived in the bill, their answer, under rule 41, can be used at this hearing with the probative force of an affidavit alone, and no longer has necessarily the effect claimed for it by the defendants' solicitors.

The defendants urge (4) that the proofs in the case are vague, and insufficient to establish the allegations of the bill. When I consider the affidavits of individuals, and the proclamations of the governor of the state of Louisiana and the mayor of the city of New Orleans, and the statements in the public journals, supported by testimony, and the affidavits filed in this cause, I find the material allegations of the bill fully sustained. Not only was the flow of commerce through the city of New Orleans purposely arrested, but even the transportation of the goods and merchandise from the government warehouses to the landings was forcibly stopped. The following exhibits in the case, consisting of proclamations of the governor of Louisiana and the mayor of New Orleans, taken from the official journals, manifestoes, and the recitals of the sayings of [997] the defendants, taken from the public newspapers, which have not been disproved by the respondents, show, as matter of history, the vast proportions of the interruption caused by the defendants to the prosecution of all the branches of business within the city of New Orleans, and the purpose with which it was done, to wit, that no business was to be transacted till the demands made by the employes of the warehousemen and the subordinate draymen were complied with:

"*A General Strike Ordered by the Amalgamated Council for To-Morrow, Unless the Merchants Recognize the Union this Evening.*

"PRESIDENT LEONARD'S STATEMENT.

"When the people of New Orleans awake to-morrow morning, they will probably find that one of the largest strikes that has ever taken place in this city has been inaugurated. To-day, at 12:30 o'clock, President Leonard, of the Amalgamated Council, made his promised statement to the members of the press relative to last night's meeting of the council. Mr. Leonard said that it had been decided at the meeting to order a general strike for to-morrow morning, unless the merchants ask for a conference this afternoon. The unions were determined to compel the employers to recognize them, and they took this step to force this recognition, if possible. Mr. Leonard further said that every trade and line over which the council has jurisdiction will go out, barring none. If at any time during the strike the merchants manifest a desire to recognize the unions, the men will be ordered to return to work, and a conference committee appointed to meet a similar committee from the merchants. The committee of fifteen of the Amalgamated Council will remain in session for some hours this evening, and the employers will thus be given their last chance to accede to the demands of the strikers."

"THE STRIKE ORDERED.

"HALL AMALGAMATED COUNCIL,
"*New Orleans, November 4, 1892.*

"At a meeting of presidents of the labor unions and organizations, held on Friday, November 4, 1892, at the Screwmen's Hall, the following manifesto was adopted and ordered submitted to all the members of labor unions and organizations in the city of New Orleans:

"'To All Union Men Wherever Found, Greeting: In view of the fact that in the difficulty existing between the board of trade, merchants, boss draymen, and weighers, and in view of the fact that they claim to represent the entire employing power in the city, and claim broadly and emphatically that they will not recognize unions or labor organizations in connection with their business, and endeavor by their acts to prevent other employers from either employing or recognizing union men, and believing it for the best interests of organized labor that we refrain from working for any employer until the board of trade and others recognize the rights of men to organize into labor unions throughout the city, calling them, as union men, to abstain from any work or assisting in any way in prolonging the existing difficulty. The gauntlet has been thrown down by the employers that the laboring men have no rights that they are bound to respect, and, in our opinion, the loss of this battle will affect each and every union man in the city; and, after trying every honorable means to attain an equitable and just settlement, we find no means left open but to issue this call to all union men to stop work, and assist with their presence and open support from and after Saturday noon, November 5, 1892, and show to the merchants and all others interested that the labor unions are united.

"'JAMES LEONARD, *Chairman.*
"'JOHN BREEN,
"'A. M. KEIR,
"'JAMES E. PORTER,
"'JOHN M. CALLAGHAN,
"'*Committee.*'"

[998]

"WILL THE STRIKE BE GENERAL?

"MEETING OF THE AMALGAMATED COUNCIL THIS EVENING.

"To the representative of a morning paper, Assistant State Organizer Porter said the outlook for successful strike was a most excellent, and promised that every union in the city would stand by the locked-out workmen. He said it was possible a general strike would be ordered, and that labor is determined to win this struggle. A union man who was with Mr. Porter is represented to have said that the strike will be made a victory of the laboring classes of the city, and, unless the unions are recognized, there will be more bloodshed than imagined. Mr. Porter is reported to have added: 'We propose to win by peace, if we can; but, if we are pushed to the wall, force will be employed.' There are ninety-seven unions in the city. The Amalgamated Council meets to-night to discuss the strike. The joint conference of the executive committees of the striking organizations met last night, and decided to pay no attention to the invitation of the merchants with respect to the proposed tribunal. Inasmuch as the merchants decline to recognize the unions, the unions refuse to appoint any members of the tribunal, and will only do so when they are given to understand that the men they may appoint are to be regarded as official representatives of their unions."

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"ANSWER TO PROPOSITION OF THE GOVERNOR.

"Nov. 8TH, 1892.

"To His Excellency, Gov. M. J. FOSTER.

"DEAR SIR: According to agreement, we were to give you an answer this morning in regard to certain propositions that you have submitted; but, after consideration by the committees, we found that the propositions would have to be first submitted to the executive committee of the merchants' body, and we have not, up to the present time, heard what action was taken in regard to the matter. In consideration of these facts, we now have these propositions to submit, and will have to stand on them: First. We are willing to arbitrate on wages. Second. We are willing to arbitrate on hours. Third. We want the question of 'none but union men to be hired when available, from and after the final adoption of tariff and hours,' to be accepted without arbitration.

"JAMES LEONARD, *Chairman.*
"JOHN BREEN.
"A. M. KEIR.
"JOHN CALLAGHAN.
"JAMES PORTER."

"PROCLAMATION.

"MAYORALTY OF NEW ORLEANS, *City Hall, Nov. 9, 1892.*

"CITIZENS OF NEW ORLEANS: The time has come when I, as your mayor, feel that the forces placed at my command are inadequate to further protect peaceable citizens and their property, owing to the many demands made on them. I am then compelled to call upon all good citizens desirous of the welfare and safety of the city. I, therefore, as your chief magistrate, do hereby issue this, my proclamation, commanding all law-abiding and law-loving citizens to attend at the city hall to-morrow, (Thursday,) Nov. 10, 1892, and then and there to be sworn in as special officers to aid and assist the organized police force of this city in their duties incumbent upon them.

"Given under my hand and seal of office, this ninth day of November, in the year of our Lord 1892.

"By the Mayor, "JOHN FITZPATRICK.
"CLARK STEEN, Secretary."

"PROCLAMATION OF THE GOVERNOR.

"NEW ORLEANS, LA., *Nov. 10/92.*

"*To the People of New Orleans:*

"The condition of affairs prevailing in your city during the past ten days; the danger to the peace and good order of this community arising from the paralysis of industry, trade, and commerce, and from the suspension of the usual means of trasportation; the insecurity of life and property caused by the perturbed state of the public mind, aggravated by the closing of the gas and electric light works, thus holding out an incentive to criminals to ply their vocation in darkness,—have not escaped my attention, and have caused me the deepest solicitude. I therefore request all peaceable citizens not to congregate in crowds upon the streets and thoroughfares, and I urge upon them to discountenance all undue excitement and acts of violence, and to make known to the officers intrusted with the administration of the law any breaches of the peace. I hereby declare that the people of this city must and shall be protected in the full enjoyment of all their constitutional rights and privileges. All the power [999]

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vested in me by the constitution and laws of this state shall be devoted to the preservation of the peace, the maintenance of good order, and the protection of the lives and property of the citizens.

"MURPHY J. FOSTER, *Governor of Louisiana.*"

"The governor said there were no further orders to communicate at the moment. It is understood, however, that orders are being issued to the militia, and that, after the railroad presidents' meeting is over, an effort will be made to start the street cars. The companies are expected to furnish the drivers, and the entire military force of the state, with the bodies that are being organized as recruits, will be used to furnish them with the necessary protection. That will settle the question very soon whether the rioters or the legally constituted authorities of the state are to be masters of the situation."

The defendants urge (5) that the corporations of the various labor associations made defendants are in their origin and purposes innocent and lawful. I believe this to be true. But associations of men, like individuals, no matter how worthy their general character may be, when charged with unlawful combinations, and when the charge is fully established, cannot escape liability on the ground of their commendable general character. In determining the question of sufficiency of proof of an accusation of unlawful intent, worth in the accused is to be weighed; but when the proof of the charge is sufficient,—overwhelmingly sufficient,—the original purpose of an association has ceased to be available as a ground of defense.

The defendants urge (6) that the combination to secure or compel the employment of none but union men is not in the restraint of commerce. To determine whether the proposition urged as a defense can apply to this case, the case must first be stated as it is made out by the established facts. The case is this: The combination setting out to secure and compel the employment of none but union men in a given business, as a means to effect this compulsion, finally enforced a discontinuance of labor in all kinds of business, including the business of transportation of goods and merchandise which were in transit through the city of New Orleans, from state to state, and to and from foreign countries. When the case is thus stated,—and it must be so stated to embody the facts here proven,—I do not think there can be any question but that the combination of the defendants was in restraint of commerce.

I have thus endeavored to state and deal with the various grounds of defense urged before me. I shall now, as briefly as possible, state the case as it is established in the voluminous record.

A difference had sprung up between the warehousemen and their employes and the principal draymen and their subordinates. With the view and purpose to compel an acquiescence on the part of the **[1000]** employers in the demands of the employed, it was finally brought about by the employed that all the union men—that is, all the members of the various labor associations—were made by their officers, clothed with authority under the various charters, to discontinue business, and one of these kinds of business was transporting goods which were being conveyed from state to state, and to and from foreign countries. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimidation springing from vast throngs of the union men assembling in the streets, and in some instances by violence; so that the result was that, by the intended effects of the doings of these defendants, not a bale of goods constituting the commerce of the country could be moved. The question simply is, do these facts establish a case within the statute? It seems to me this question is tantamount to the question, could there be a case under the statute? It is conceded that the labor organizations were at the outset lawful. But, when lawful forces are put into unlawful channels,—i. e. when lawful associations adopt and further unlawful purposes and do unlawful acts,—the associations themselves become unlawful. The evil, as well as the unlawfulness, of the act of the defendants, consists in this: that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country. What is meant by "restraint of trade" is well defined by Chief Justice Savage in *People* v. *Fisher*, 14 Wend. 18. He says:

"The mechanic is not obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair; but he has no right to say that no other mechanic shall make them for less. Should the journeymen bakers refuse to work unless for enormous wages, which the master bakers could not afford to pay, and should they compel all journeymen in the city to stop work, the whole population must be without bread; so of journeymen tailors or mechanics of any description. Such combinations would be productive of derangement and confusion, which certainly must be injurious to trade."

It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, in which the court finds their error and their violation of the statute. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well.

For these reasons I think the injunction should issue.

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[149] WATERHOUSE ET AL. *v.* COMER.

(Circuit Court, W. D. Georgia, S. D. April 8, 1893.)

[55 Fed., 149.]

RECEIVERS OF RAILROAD COMPANIES—DIFFICULTIES WITH EMPLOYES—ADJUSTMENT BY THE COURT.—Where the property of a railway or other corporation is being administered by a receiver under the superintending power of a court of equity, it is competent for the court to adjust difficulties between the receiver and his employes, which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership.

[150] SAME.—It follows, then, that it is in the power of the court, in the interest of public order and for the protection of the property under its control, to direct a suitable arrangement with its employes or officers, to provide compensation and conditions of their employment, and to avoid, if possible, an interruption of their labor and duty, which will be disastrous to the trust and injurious to the public.

COMMERCE—AGREEMENTS TO RESTRAIN—ACT JULY 2, 1890—COMBINATIONS OF EMPLOYES.—Rule 12 of an association of locomotive engineers, styled the "Brotherhood of Locomotive Engineers," which provides "that hereafter, when an issue has been sustained by the grand chief, and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of obligations if a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad run in connection with or adjacent to said

road, to handle the property belonging to said railroad or system in any way that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues or differences of any nature or kind have been amicably settled,"—is plainly a rule or agreement in restraint of trade or commerce, and violative of section 1 of the act of congress of July 2, 1890.

SAME—CONSPIRACY—REV. ST. § 5440.—Construing several clauses of the interstate commerce law recited in the opinion with section 5440 of the Revised Statutes, it follows that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate commerce law, inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade or commerce of the country, will be obnoxious to the penalties therein prescribed.

SAME—RECEIVERS—ADVICE OF COURT.—In this case, the movants having avowed their purpose, in open court, to submit to the construction to be made by the court relating to rule 12 of the brotherhood, the receiver is directed to enter into an appropriate contract with them, subject to the general operation of this decision with reference to said rule.

(Syllabus by the Court.)

In Equity. Petition by Waterhouse and others, styling themselves the "Committee of Adjustment of the Brotherhood of Locomotive Engineers," against H. M. Comer, receiver of the Central Railroad & Banking Company of Georgia, asking that the receiver be directed to make a contract with the locomotive engineers. Granted.

R. W. Patterson, for the motion.

Lawton & Cunningham and *Marion Erwin*, opposed.

SPEER, District Judge.

Cases are frequent where persons intrusted with corporate properties have applied to the courts for the prevention or redress of grievances threatened or inflicted by labor organizations. This is the first instance of which we have any information where members of such an association have by concerted action, in an orderly way, sought the arbitrament of a court to adjust a controversy relative to the wages and conditions of their employment. The recent application to this court of the Order of Railway Telegraphers, with similar

purpose, was an attempt of this character. It was defeated in limine. The telegraphers, as a body, had abandoned the service of the receiver before they presented their petition. In the mean time, other telegraphers, with equal **[151]** right to employment by the receiver, had been engaged, and were performing the functions the striking telegraphers had surrendered, and, notwithstanding the solicitude of the court to spare a large number of intelligent young men the distress resulting from their indiscreet action, it was found to be impracticable. The members of the Brotherhood of Locomotive Engineers, who have presented this petition, have a proper standing in court. There are 250 locomotive engineers in the employment of the receiver, upon the various divisions of the Central Railroad & Banking Company of Georgia. Of these 211 are members of the Brotherhood of Locomotive Engineers, and the petitioners are a committee from that membership. They recite in their petition the facts that they have been for several years working under contracts made between a general committee of the brotherhood and the officers of the railroad. Since the 1st day of December, 1891, they have been working under the contract, of which they attach a copy, and since that time the properties have been intrusted to the control of Hugh M. Comer, as the receiver of the court. This contract expired on the 1st day of December, 1892. A few days prior to that time they gave notice to George D. Wadley, general superintendent of the company, that they desired certain changes in the contract. They state further that they have remained in the service of the company, although the superintendent and receiver refused to enter into any new contract or consider the old contract longer in force, unless ordered so to do by the court.

Pending the adjustment of the controversy, which was postponed for 90 days by virtue of a clause in the contract, which entitled the receiver to notice for that period, and of which he claimed the benefit, the court has continued the contract in force.

We have also caused several conferences between the receiver and the engineers, with the hope that an amicable agreement might follow. This expectation has been de-

feated by a strike on the Savannah, Americus & Montgomery Railroad, the refusal of one of the engineers to haul a train to which a car of that company was attached, his immediate discharge, and the friction between the receiver and the engineers which resulted therefrom. The engineers then applied to the court. They set forth the objects of their order, the advantages of a contract with their employers, and that such contracts are of force upon a very large proportion of the principal railroads of the country. They state that since it has been shown to them that the properties in the hands of the receiver are embarrassed financially, they are content to work in his service without any increase of wages, although they insist that the rate is less than that paid by competing and connecting lines, and they pray that the receiver be directed to continue in force the contract under which they were working at the time the receiver was appointed, subject to such modifications and changes as may be made by the order of the court. They annex a copy of this contract.

The receiver answers: First. That the Grand National Brotherhood of Locomotive Engineers is not incorporated, and that many of its rules and regulations, which have a bearing upon any con- [152] tract its members might make, are withheld from the public. This places him at a disadvantage, and renders uncertain the attitude of the brotherhood in any difficulty which might arise in connection with the contract. Second. That a number of the locomotive engineers employed by him are not members of the brotherhood, and that it is not proper for him to contract in this way with certain employes, while others are employed without such a contract. Third. That such a contract renders it impossible for the officers charged with the operation of the property to have such freedom in its administration as is necessary to its prompt and efficient management. Fourth. As a common carrier, the railroad under his control is liable for damages which may result from the disorganization of its service. That the Brotherhood of Locomotive Engineers is bound by secret obligations to withdraw from the service of railroad companies in a body, causing great damage. Fifth. That he should be at full liberty to select the

best men and means of managing the business, without regard to organizations of any kind. That his superintendent has prepared a proper schedule of wages and conditions for the employment of engineers and firemen, a copy of which is attached. Sixth. If he should contract with the brotherhood, it would be holding out a premium for his employes to become members of that order, which respondent states is not to the interest of his trust. That the brotherhood renders it impossible for the officers of the railroad to come into direct contact with the employes, and prevents such free intercourse as is necessary to good and efficient service. That no contracts have been entered into with the Order of Railway Conductors and the Brotherhood of Locomotive Firemen, and that he has had no difficulty with the conductors and firemen. He denies that it is usual and customary for railroad companies of the United States to make such contracts with the Brotherhood of Locomotive Engineers.

It will be observed that much of the receiver's answer is an argument against the propriety and policy of contracts of any character between the officers of railway corporations and the representatives of labor organizations. The gravity and importance of the considerations thus presented are exceedingly great. The control, under any circumstances, by the courts, of contracts between representatives of the immense values invested with corporations engaged in the public duty of transportation, and the laborers employed in the same service, will doubtless appear to many as novel and dangerous. It is well, however, to consider if a proper provision, by appeal to the courts, in the frequent and destructive conflicts between organized capital and organized labor will not afford the simplest, most satisfactory and effective method for the settlement of such controversies. Is it not the only method by which the public, and, indeed, the parties themselves, can be protected from the inevitable hardship and loss which all must endure from the frequently recurring strikes?

It will not be wise for those engaged with the maintenance of public order to ignore the immensity of the changes in the relations of the employing and the employed classes,

occasioned by the phe- **[153]** nomenal development of commerce and the prevalence of labor organizations. We are in this case directly concerned with a corporation and a labor organization, and both engaged in railway transportation; and in this department of industry it is reported by the interstate commerce commission that there is invested, in the United States $9,829,475,015, or nearly eight times the entire national debt of the country. Last year the railroads transported 530,000,000 passengers, or more than eight times the entire population of the United States. The operatives employed by them number 784,000, and it is no trifling testimony to the faithfulness and efficiency of this mighty army of railroad employes that of the vast population transported under their care only 293, or less than one twenty-thousandth of 1 per cent. lost their lives. It is, moreover, true that no operatives of a railroad more than locomotive engineers are charged with the preservation of life and property, and when we are advised by the proof that 32,000 of the locomotive engineers of the United States, more than 80 per cent., belong to the brotherhood, it is difficult to believe that their membership lessens efficiency to employers or fidelity to their supreme duty to the public. But whether these facts and other facts equally significant will justify judicial control of contracts essential to the uninterrupted transportation of the country, in which the public is so vitally concerned, it is clear that where the property of railway or other corporations is being administered by a receiver, under the superintending power of a court of equity, it is competent for a court to adjust difficulties between the receiver and his employes, which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership. Indeed, the power of the court to direct a contract between its officers does not appear to be questioned. The power of the court has always, on proper occasions, been exercised to protect the properties from the damaging and unlawful results of a strike of the laborers in its employ.

In the case of *The Telegraphers* v. *Comer*,[1] (decided at

[1] Not reported, as the present case is controlling on the questions in issue.

this term,) while this court, as above stated, was prevented by their own conduct from according to the petitioners the practical relief they sought, they were enjoined from any interference with the property, operations, or employes of the receiver, and rules were issued against individuals who were charged with such interference. *In Re Higgins*, 27 Fed. Rep. 444, the learned circuit judge of this circuit, the Honorable Don A. Pardee, declared:

"It is well-settled law that whoever willfully interferes with property in the possession of a court is guilty of a contempt of that court, and I regard it as equally well settled that whoever unlawfully interferes with officers and agents of the court, in the full and complete possession and management of the property in the custody of the court, is guilty of a contempt of court, and it is immaterial whether this unlawful interference comes in the way of actual violence or by intimidation and threats. The employes of the receiver, although pro hac vice officers of the court, may quit their employment, as can employes of private parties or corporations, provided they do not thereby intentionally disable the property; but they must quit peaceably and decently. Where they combine and conspire to quit, with or without notice, with the **[154]** object and intent of crippling the property or its operation, I have no doubt that they thereby commit a contempt; and all those who combine and conspire with employes to thus quit, or, as officials of labor organizations, issue printed orders to quit, or to strike, with an intent to embarrass the court in administering the property, render themselves liable for contempt of court."

Certainly, it follows, then, that it is in the power of the court, in the interest of public order, and for the protection of the property under its control, to direct a suitable arrangement with its employes or officers, to provide compensation and conditions of their employment, and to avoid, if possible, an interruption of their labor and duty, which will be disastrous to the trust and injurious to the public. There is no reason why the receivership, in this respect, should be conducted in a manner differing from the large preponderance of the successful and prosperous railroads of the country. It appears from the proof that about 90 per cent. of the railroads of the United States make contracts or schedules of rates and regulations for the employment of their operatives, which are agreed to by the representatives of both parties. We are satisfied from these facts that such arrangements, under proper restrictions, are praiseworthy and beneficial to both parties, and we therefore shall not longer hesitate to direct the receiver to enter into an appropriate contract or schedule of rates and regulations with the engineers. This

contract, however, will not be restricted to members of the Brotherhood of Locomotive Engineers, although membership of that order is and will be no disqualification to service on railroads under the control of this court so long as the rules and regulations of the order are treated as subordinate to the law of the land. The contract will comprehend all engineers employed by the receiver, whether members or non-members of the brotherhood.

This brings us to the consideration—First, what is an appropriate contract; and, second, whether there is anything in the rules and regulations of the brotherhood and its relations to these properties which is inconsistent with the law, and which would make it improper for the court to place its receiver in a position where, in his exigent duty to carry on the business of transportation, for which the railroad was chartered by the state, he may find himself in the power of an organized body of his operatives who will be able to paralyze the operations of the properties. The appropriateness of the contract depends solely upon the arrangement of details. There is no difference between the engineers and the receiver upon the question of compensation. There is an apparent dispute about the effect of seniority of service of an engineer as affecting promotion. The court will provide, however, that, where merit and ability are equal, seniority of service shall prevail, and will arrange a fair tribunal for the purpose of testing the merit and ability of various candidates for promotion, with the privilege of either party in cases not reconcilable to appeal to the court. There are other instances of minor disagreement which the court will take time to adjust and to perfect the agreement.

We have noted with gratification the repeated statements made in judicio by the engineers and their counsel that they will accept [155] as final and satisfactory of every difference the conclusion and decision of the court. The receiver has also expressed more than once his purpose to abide the decision. This submission, so unlike the violent and irrational course pursued by either party, as their interests might prompt, and without the slightest regard to the rights of the public, in many conflicts between what are popularly called "capital and labor," is considerate, judicious, and strongly

argues that the engineers who are before the court are good citizens,—indeed, patriots who respect and confide in the constituted authorities of their country. Fortunate will it be for our country if future differences of a similar character may be settled by a method so simple and so safe. This submission of the engineers applies as well to the remaining and most important difference between the parties, and that is the effect upon the duty to the court and to the property of the rule of the brotherhood, which is understood by the court to be as follows:

"(12) That hereafter when an issue has been sustained by the grand chief and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of the obligations if a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad run in connection with or adjacent to said road to handle the property belonging to said railroad or system in any way that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues of difference of any nature or kind have been amicably settled."

This rule is understood to have been adopted by the brotherhood in Denver three years ago. In his testimony, Mr. A. B. Youngson, the assistant chief engineer, frankly admitted that the effect of this rule, as applied to the properties in the hands of the receiver and the engineers in his employ, would be as follows: If, in the pursuance of the business of a common carrier, with which the receiver is charged, it should become necessary to convey over the lines of the Central Railroad a car belonging to a railroad company on which there was a strike of the engineers, that it would be the duty of the brotherhood men in the employ of the receiver to refuse to haul the train containing such car, and, if the officers of the road insisted that the car should proceed, loyalty to the brotherhood required that the engineer should at once resign his station, and abandon his duty. He might, he stated, if he thought proper, carry the train to the terminal point.

An illustration of the effect of this rule is afforded by the evidence. A strike was recently pending on the Savannah, Americus & Montgomery Railroad, which runs in connection with and is adjacent to the Central. Engineer Arden of the Brotherhood of Locomotive Engineers, in the employ of the

receiver, was directed to carry a car of the Savannah, Americus & Montgomery road between two stations on the Central Railroad. He declined to do so, and was at once discharged. A committee of the brotherhood have insisted on his reinstatement. This the receiver has refused, and it is certain that but for the pendency of the proceedings now under consideration by the court, there would be, as a result of Engineer Arden's construction of his duty, and the receiver's action, a strike of the **[156]** engineers upon every line of the Central, with all the calamitous results to the public, to the road, and to the engineers which would inevitably ensue. The receiver relies upon this as the main and controlling reason why he should not be required to enter into a contract with the brotherhood, when this rule 12 will necessarily be written into the contract. Now, there can be not a doubt that this rule of the brotherhood is in direct and positive violation of the laws of the land, and no court, state or federal, could hesitate for a moment so to declare it.

It is plainly a rule or agreement in restraint of trade or commerce. Section 1 of the act of July 2, 1890, known as the "Sherman Anti-Trust Law," provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court."

Section 7 of the act of February 4, 1887, entitled "An act to regulate commerce," provides—

"That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated as, one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act."

Section 8 of the same provides—

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as a part of the costs in the case."

This is the interstate commerce law, and, as amended by the act of congress of March 2, 1889, provides:

"Sec. 3 (a) Undue Preference. That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (b) Facilities for Interchange of Traffic. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, **[157]** and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

"Sec. 10. Penalties for Violation of the Act. That any common carrier, subject to the provisions of the act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or who shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willfully suffer or permit any act, matter, or thing so directed or required by this act to be done, not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense: provided that, if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

The laws of the United States (section 5440 of the Revised Statutes) provide:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of conspiracy, all the parties to such conspiracy shall be liable to a penalty of not lesss than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not more than two years."

Construing these several enactments together, it will be seen that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate commerce law inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade and commerce of the country, will be obnoxious to severe penalties. This will apply with even greater force to persons in the employ of the railroads concerned.

Now, it is true that in any conceivable strike upon the transportation lines of this country, whether main lines or branch roads, there will be interference with and restraint of interstate or foreign commerce. This will be true also of strikes upon telegraph lines, for the exchange of telegraphic messages between people of different states in interstate commerce. In the presence of these statutes, which we have recited, and in view of the intimate interchange of commodities between people of several states of the Union, it will be practically impossible hereafter for a body of men to combine to hinder and delay the work of the transportation company without becoming amenable to the provisions of these statutes. And a combination or agreement of railroad officials or other representative of capital, with the same effect, will be equally under the ban of the penal statutes. It follows, therefore, that a strike, or "boycott," as it is popularly called, if it was ever effective, can be so [158] no longer. Organized labor, when injustice has been done or threatened to its membership, will find its useful and valuable mission in presenting to the courts of the country a strong and resolute protest and a petition for redress against unlawful trusts and combinations which would do unlawful wrong to it. Its membership need not

doubt that their counsel will be heard, nor that speedy and exact justice will be administered wherever the courts have jurisdiction. It will follow, therefore, that in all such controversies it will be competent, as we have done in this case, for the courts to preserve the rights of the operatives, to spare them hardship, and at the same time to spare to the public the unmerited hardship which it has suffered from such conflicts in the past. It will be also found that by such methods organized labor will be spared much of the antagonism it now encounters, and in its appeal to the courts it will have the sympathy of thousands, where, in its strikes, it has their opposition and resentment.

But, if there were no statutory enactments upon the subject, no court of equity could justifiably direct its receiver to enter into a contract with a body of men who hold themselves bound to repudiate their contract, and disregard a grave public duty, because of real or alleged grievances, which some other person or corporation, not a party to the contract, inflicts or is alleged to inflict, not upon a party to the contract, but upon somebody else. To compel the receiver to do this would be monstrous. The receiver may be wholly just, considerate, humane, and even indulgent, to the engineers in his employ. They may, with reason, regard him not only as their kindly employer, but as their friend. The people of Georgia may have afforded to them every needed evidence of sympathy; the compensation may be ample; their future as bright as possible for intelligent, energetic, and courageous manhood; and yet, because of a difficulty with or without cause which originates in Maine or Minnesota, they will abandon the service of their kind employer, and forego the realization of their own hopeful anticipations, and bring dismay, and it may be ruin, upon the kindly and sympathetic people among whom they live. This is almost the inevitable consequence of this rule. It is in evidence, and is generally known, that almost the entire business of transportation of freight is carried on in cars which, without breaking the bulk of their freight, are forwarded from one railroad to another. This is an absolute necessity. The interests of the public and the economies of cheap and rapid transit demand it. There are 1,200,000

cars upon the railroads of the United States. There are 168,400 miles of railroad, or more than seven cars per mile.

The Central Railroad, according to the recent report of the superintendent, has less than two cars per mile. It is therefore indispensable that it should use the cars of other lines; but, if it were otherwise, it would be impossible, under the present system, to deny to the cars and freight of other lines transit over the lines of the Central without violation of the law. The receiver cannot violate the law, and the engineers cannot compel him to do so without themselves becoming obnoxious to the criminal statutes. And the court [159] does not doubt, from their bearing and testimony in the case, that they only need to be advised of these facts, when they will immediately recede from the unlawful and most dangerous attitude in which this rule has placed them. It is, indeed, a rule which, more than all others, has given strength and comfort to the enemies of organized labor.

It is true, however, that the learned counsel for the petitioners, when his attention had been called by the court to the insuperable difficulty in the way of a mutually beneficial contract presented by this rule, while insisting that it ought not to stand in the way of a contract, hastened to afford additional evidence of the good faith of his clients, by stating unreservedly that upon this, as upon all subjects, they were willing and anxious to take the direction of the court. This declaration is authoritative, and the court will act upon it. It is binding upon the engineers of the brotherhood, who are officers of the receiver, and who were represented by the committee and their assistant chief engineer, Mr. Youngson, all of whom were in the presence of the court when it was made. It is accepted as made in good faith, and as a condition of the contract which the court will direct the receiver to make. While, therefore, any engineer may, at any time, exercise his right as an individual to leave the services of the receiver, he may not do so in such manner as to injure the properties or impede its proper management.

In case of any issue with the management in which the brotherhood or its members are concerned, and the members in the employ of the receiver shall desire to leave his services, in a body or otherwise, in such manner as may in any way

impede the operations of the road, they will be required to do so upon such terms and conditions as to the court may seem proper for the protection of the interest of the property and the maintenance of justice and fair play to all concerned. In the mean time the old contract will remain in force, always under the general operation of this decision with reference to rule 12 of the brotherhood, until the terms of the new contract are definitely settled by the court; and it will be specially directed that no engineer or other person in the employ of the Central Railroad shall be discharged or in any way injured in his station on account of this proceeding, or any step taken in regard to its inception or advocacy.

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[605] UNITED STATES v. PATTERSON ET AL.[a]

(Circuit Court, D. Massachusetts. February 28, 1893.)

[55 Fed., 605.]

MONOPOLIES—INDICTMENT—CONSPIRACY—ACT JULY 2, 1890.—St. U. S. 1890, c. 647, declares illegal contracts, combinations, or conspiracies in restraint of trade, and makes it a misdemeanor for any person to make or engage in them, or to monopolize, or attempt or conspire with others to monopolize, any part of the trade or commerce among the several states or with foreign nations. *Held*, that in an indictment under this chapter it is not sufficient to declare in the words of the statute, but the means whereby it is sought to monopolize the market must be set out, so as to enable the court to see that they are illegal.[b]

SAME.—Allegations of what was done in pursuance of an alleged conspiracy are irrelevant in an indictment under this statute, and are of no avail either to enlarge or to take the place of the necessary allegations as to the elements of the offense.

SAME—SCOPE OF THE STATUTE.—The words "trade and commerce," as used in the act, are synonymous. The use of both terms in the first section does not enlarge the meaning of the statute beyond that employed in the common-law expression, "contract in restraint of trade," as they are analogous to the word "monopolize," used in the second section of the act. This word is the basis and limitation of the statute, and hence an indictment must show a conspiracy in restraint by engrossing or monopolizing or grasping the market.

[a] Rehearing on general demurrer granted and demurrer overruled (59 Fed., 280). See p. 244.

[b] Syllabus, statement of the case, and abstracts of arguments copyrighted, 1893, by West Publishing Co.

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Statement of the Case.

It is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise.[a]

SAME—ACTS OF VIOLENCE.—Where counts in such indictment allege a purpose of engrossing or monopolizing the entire trade in question, acts of violence and intimidation may be alleged as the means to accomplish the general purpose.

At Law. Indictment in 18 counts against John H. Patterson and others for violating the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," (26 St. p. 209, c. 647.) Heard on demurrer to the indictment. Judgment overruling the demurrer as to counts 4, 9, 14, and 18, and sustaining it as to the others.

The sections of the statute immediately in question here are the following:

[606] "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The first ten counts of the indictment are for engaging in a conspiracy in restraint of trade and commerce among the several states in violation of the first section of the act. The last eight counts are for a conspiracy to monopolize a part of the trade and commerce among the several states, in violation of the second section of the act.

The first half of each set of counts allege the conspiracy, setting forth the means with various degrees of particularity,

[a] See, however, the case of *U. S.* v. *Workingmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 994, decided in the circuit court for the eastern district of Louisiana by Judge Billings, March 25, 1893, in which it was held that the statute included combinations of workmen, who, by means of a strike, combined with threats, intimidations, and violence, caused a cessation of business, which resulted in delaying, interrupting, and restraining interstate and foreign commerce.

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but without alleging overt acts. The second half of each set repeat the allegations of the first half, adding also allegations of overt acts.

In all the counts the conspiracy charged is described as being a conspiracy, (in the first set of counts in restraint of trade, and in the second set of counts to monopolize trade,) not by means of any contract or combination operating upon the parties to the conspiracy themselves, but by means of destroying or preventing the trade of others; so that the trade to be restrained was other people's trade, and the monopoly sought was to be secured by driving other people out of business.

The first count of each set charges that the object of conspiracy was to accomplish this end by fraud and misrepresentation, deceit, threats, intimidation, obstruction, and molestation, and other unlawful, oppressive, and vexatious means; the second charges that it was to be attained by preventing other persons from carrying on business; the third, that it was to be attained by preventing others from engaging in business by means of threats, intimidation, etc.; the fourth, that it was to be attained by preventing others from carrying on business by means of harassing and intimidating competitors, by threatening them, by causing them and their agents to be assaulted and injured, by inducing their agents and employes to leave their employment, by employing spies to obtain knowledge of their business secrets, by harassing and intimidating purchasers, by inducing purchasers to break their contracts and refuse to pay sums owing to competitors, by agreeing to maintain and maintaining persons so refusing to pay in the defense of suits against them, by delaying and impeding the progress of suits, by threatening prospective purchasers with annoyance, molestation, and injury in the event of their purchasing from competitors, by causing persons to call upon such purchasers repeatedly and unnecessarily to occupy their time, and dissuading and persuading them from buying from competitors, by causing great numbers of vexatious and oppressive actions for the infringement of patents to be brought against such [607] purchasers, by threatening intending purchasers from competitors with suits for infringement of patents, and

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thereby, and by other similar means, making it impossible for competitors to continue business; the fifth count of the first set gives the names of certain competitors who are engaged in interstate trade, and sets forth with still greater particularity the means by which it was the object of the conspiracy to destroy the business of those competitors.

Frank D. Allen, United States attorney.

FIRST.

MEANING OF THE ACT.

In *Heydon's Case*, 3 Coke, 7, the barons of the exchequer lay down the following rules: "For the sure and true interpretation of statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: (1) What was the common law before the making of the act? (2) What was the mischief and effect against which the common law did not provide? (3) What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth, and (4) the true reason of the remedy."

These questions will be discussed in their order as relating to the statute now under consideration.

(A) STATE OF THE LAW BEFORE THE PASSING OF THE ACT.

Two questions naturally present themselves here: (1) What was the common law in regard to the subject-matter of the statute? and (2) what was the relation of the United States government and of the United States courts to that law?

The terms in the statute which naturally call for comment in this case, are the following: (a) "Contract," (b) "combination," (c) "conspiracy," (d) "restraint of trade or commerce," (e) "trade or commerce among the several states or with foreign nations," (f) "monopolize."

(a) "Contract." The meaning of this word is elementary, and it is not necessary to discuss it, except in connection with the following words, "in restraint of trade."

(b) "Combination." This word is used in the statute in a broader sense than the words "contract" on the one hand and "conspiracy" on the other. It has no technical, legal signification; and the words, "combination in the form of trust or otherwise," are intended to cover broadly any sort of a union of different persons, even though such union may not be sufficient to answer to the technical term "conspiracy," and may not include a binding contract. As modified by the subsequent words, "in restraint of trade," it refers to that class of cases where there is no binding contract, and perhaps includes certain cases in which there are no legal means contemplated so as to make it a conspiracy, and no sufficient union or agreement to make either a monopoly or a contract.

(c) "Conspiracy." This is a word of well-known legal signification. It is sometimes used to indicate simply the coming together and agreeing of persons, but in a penal statute is clearly to be construed as including the idea of illegality, created either by the illegal character of the ultimate object sought to be attained, or by the illegal

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character of the means by which it is contemplated that the desired result shall be accomplished, or both of these together. It is well settled at common law, and has been from early times, that conspiracies to accomplish a thing illegal in itself, and also conspiracies to accomplish a thing lawful in itself by unlawful means, are criminal. In *U. S.* v. *Lancaster*, 44 Fed. Rep. 896, the court say: "A conspiracy is an unlawful confederacy or combination of two or more persons to do an unlawful act; or have accomplished an unlawful purpose." *Com.* v. *Hunt*, 4 Metc. (Mass.) 123; *Rex* v. *Gray*, 3 Harg. St. Tr. 519; *Spies* v. [608] *People*, 122 Ill. 212, 213, 12 N. E. Rep. 865, 17 N. E. Rep. 898; 3 Greenl. Ev. § 189; Washb. Crim. Law, (2d Ed.) 42, etc. It is unnecessary to enter with nicety into the question of just what ends or means are sufficiently unlawful to render a conspiracy criminal, since it is quite clear that a conspiracy which includes in the means for its accomplishment threats and intimidation, the committing of assaults, the maintenance of actions, and the inducing of parties under contract to break their contracts, is criminal in character. Nor is it necessary to endeavor to discriminate carefully between conspiracies which are civilly actionable and those which are criminal, since it is obvious that a criminal conspiracy is also civilly actionable if anything is done under it resulting in injury to the party complaining.

(d) "Restraint of trade or commerce." These words modify each of the words "contract," "combination," and "conspiracy." Taken in connection with the word "contract," they point to a well-known legal conception, viz. "contract in restraint of trade." A contract, the total effect of which is to restrain trade, is void; but if the restraint upon the trade of one party to the contract be no greater than is necessary to protect some interest of the other acquired by the contract, it is evident that the contract encourages the trade of one party as much as it restrains that of the other, and hence the public is not injured and the contract is valid. Upon this general principle it may be laid down that—

(1) An agreement for the restraint of the trade of one of the parties thereto is valid if limited, as regards time, space, and the extent of the trade, to what is reasonable under the circumstances of the case.

(2) An agreement for the restraint of the trade of one of the parties thereto is invalid unless so limited.

Gibbs v. *Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553; *Navigation Co.* v. *Winsor*, 20 Wall. 64. See, also, *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658; *Craft* v. *McConoughy*, 79 Ill. 346; *Western Union Tel. Co.* v. *Burlington & S. W. Ry. Co.*, 11 Fed. Rep. 1, and note; *Hilton* v. *Eckersley*, 6 El. & Bl. 47, 66; *Rousillon* v. *Rousillon*, 14 Ch. Div. 351; *Collins* v. *Locke*, L. R. 4 App. Cas. 674; *Mallan* v. *May*, 11 Mees. & W. 653; *Palmer* v. *Stebbins*, 3 Pick. 188, 193.

It will be obvious that in the case put the trade is restrained by the provisions of the contract itself, and is necessarily the trade of one or more of the parties to the contract. A contract between A. and B. cannot, in and of itself, restrain the trade of C. A. and B. may agree to restrain the trade of C., but such an agreement is a contract to restrain, not a contract in restraint of trade. As to such a contract three propositions may be laid down:

(1) If the parties to the contract have no business of their own similar to that to be restrained which the contract is intended to promote, the contract is illegal, and a conspiracy, not only because it restrains trade without the justification of promoting any other trade, but also because from the nature of the case it is an agreement to do another an injury maliciously and without cause.

(2) If A. and B. enter into an agreement for the principal purpose

of promoting and extending their own business by none but lawful means, and without any intention to create a monopoly, such agreement is valid, although it have for its natural and expected result the injury and destruction of the business of C.

Such a contract, even when carried out, does not, on the whole, and viewed in its entirety, restrain trade at all, since it only operates to restrain C.'s trade in so far as it operates to promote the trade of A. and B.

(3) If A. and B. enter into an agreement for the purpose of promoting and extending their own business by restraining and destroying the business of C. by the use of unlawful means, such agreement is illegal, and a conspiracy, whether said unlawful means be of a criminal nature or not.

Such a contract is illegal and a conspiracy, both because of the illegal means contemplated, and because it does, when viewed in its entirety, contemplate a restraint of trade. The restraint of C.'s trade in this case is not simply the [609] result of the promotion of the trade of A. and B., and coextensive with it, but the extent of the restraint is wholly independent of the extent of the promotion, and may be absolute and entire, without any promotion at all. This must be true whenever the means are other than such as are intended and calculated to increase the trade of the contracting parties. Hence it was properly decided in *Mogul Steamship Co.* v. *Macgregor, Gow & Co.*, 15 Q. B. Div. 476, 23 Q. B. Div. 598, [1892,] App. Cas. 25, that an agreement to drive a competitor out of business by lowering prices is not illegal. In this case shipping companies formed an agreement by which they endeavored to get the business of a certain port in China by placing their rates so low that another company could not compete with them, and was obliged to give up the business. The house of lords held that this was not an unlawful restraint of trade; that a trader could not be prevented from charging what he pleased, although he did it with a view of getting the trade himself, and of driving a competitor out of the business; but it was also laid down as unquestioned law that any such restraint effected by unlawful means would make the restraint illegal, and that a conspiracy to enforce restraint by such means would be criminal. In the queen's bench division, Bowen, L. J., (23 Q. B. Div. 614,) after stating that a merchant may lawfully compete with another by lowering his own prices to any extent, even with the intention of driving the other out of business, and then raising his own prices, says:

"No man, whether trader or not, can, however, justly damage another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden. So is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by a show of violence, the obstruction of actors on the stage by preconcerted hissing, the disturbance of wild fowls in decoys by the firing of guns, the impeding or threatening servants or workmen, the inducing persons under personal contracts to break their contracts,—all are instances of forbidden acts."

On page 616 he defines an "illegal combination" as "an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means," and cites two criminal cases in support of the proposition. On page 618, after stating that in cases where there is no intimidation, molestation, or other forms of illegality, acts may be done intentionally which will injure others in their business, provided they are done bona fide "in the use of a man's own property, in the exercise of a man's own trade," he continues: "But such legal justification would not exist when the act was merely done with the intention of causing

temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights."

Particular attention is called to the cases cited by Bowen, L. J., in support of that part of his opinion which has been quoted. These cases are all quoted again in the house of lords, and amply sustain the statements that have been quoted. These cases are: *Tarleton* v. *McGawley*, Peake, 270, (driving away customers by show of violence;) *Clifford* v. *Brandon*, 2 Camp. 358, and *Gregory* v. *Brunswick*, 6 Man. & G. 205, (preconcerted hissing of actors;) *Carrington* v. *Taylor*, 11 East, 571, and *Keeble* v. *Hickeringill*, Id. 574, note, (disturbance of wild fowl in decoys;) *Garret* v. *Taylor*, Cro. Jac. 567, (threatening to vex prospective purchasers with suits;) *Bowen* v. *Hall*, 6 Q. B. Div. 333, and *Lumley* v. *Gye*, 2 El. & Bl. 216, (injuring persons by inducing others to break contracts with them.)

It is fully recognized in the foregoing cases that a contract which contemplates the doing of any unlawful acts, either as a means or an end to the injury of another, is a criminal conspiracy. It is elementary law, however, that a conspiracy need not involve any binding contract. The mere agreement in a common purpose is sufficient. It is obvious, moreover, that the very fundamental idea of "conspiracy" involves the agreement in a common purpose to injure some one or something outside of the conspirators themselves. The conspiracy may contemplate the acquisition of a benefit by the conspirators, but this is not what makes it unlawful, but the fact that it also necessarily contemplates injury to another. A contract, or even a combination, may refer exclusively to the property or persons of the contracting or [610] combining parties, but a conspiracy necessarily involves contemplated action against the persons or property of some outside person.

It follows that, if the meaning of the words, "conspiracy in restraint of trade," is to be determined by the common-law meaning of the words separately considered, it means a conspiracy to restrain the trade of some person other than the conspirators. Such a conspiracy is illegal, and, under this statute, criminal, if it intends a restraint of such trade by any means which do not in the nature of the case tend to promote the trade of the conspirators in a degree equal to the restraint, especially if such means are in and of themselves unlawful. The existence of unlawful means is conclusive, both as to conspiracy and as to the restraint of trade being unjustifiable. Clearly, a conspiracy to restrain trade by threats, intimidation, molestation, violence, and the other means alleged in this indictment, falls within this definition.

The whole history of the law of conspiracies in restraint of trade confirms this conclusion. 3 Steph. Hist. Crim. Law, pp. 202–227, upon "Conspiracies in Restraint of Trade;" Wright, Crim. Cons. 144–181: Ray, Contract. Lim. 334–411. An examination of the statutes that have been passed upon the subject of conspiracies in restraint of trade shows that they are aimed at any and all restraint, whether by employes or employers, which is endeavored to be enforced by threats, intimidation, or other unlawful means. Thus 38 & 39 Vict. c. 86, § 7, makes it an offense to use violence or to intimidate to compel another to do or abstain from doing any act which he has a legal right to abstain from or to do. So in New York it is made a misdemeanor "to prevent another from exercising a lawful trade or calling, or doing any other lawful act by force of threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; and also to permit any act injurious to the public health, to the public morals, or to trade or commerce, or for the perversion or obstruction of justice or of the due administration of the law." See, also, the statutes of other states, collected in Ray, Contract. Lim., supra."

Argument for United States.

It is true that most of the cases in the books are cases of intimidation on the part of workmen against their employers or against other workmen, or of employers against their workmen. But the language of the statutes and the principles of decision apply with equal force to conspiracies by any persons against the trade of other persons.

(e) "Trade or commerce among the several states or with foreign nations." This subject will be discussed later.

(f) "Monopolize." "Monopolies are much the same offenses in other branches of trade that ingrossing is in provisions, being a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. They are said to differ only in this: that monopoly is by patent from the king, ingrossing by the act of the subject, between party and party, and have been considered as both equally injurious to trade and the freedom of the subject, and therefore equally restrained by the common law. By the common law, therefore, those who are guilty of this offense are subject to fine and imprisonment, the offense being malum in se, and contrary to the ancient and fundamental law of the kingdom; and it is said that there are precedents of prosecutions of this kind in former days. And all grants of this kind, relating to any known trade, are void by the common law." 1 Russ. Crimes, 350.

"It is said that all grants of this kind, relating to any known trade, are made void by the common law, as being against the freedom of trade, and discouraging labor and industry, and restraining persons from getting an honest livelihood by a lawful employment, and putting it in the power of particular persons to set what prices they please on a commodity; all which are manifest inconveniences to the public." Hawk. P. C. c. 79, p. 203. *East India Co.* v. *Sandys*, Skin. 224.

"Hence, also, it seems that the king's charter empowering particular persons to trade to and from such a place is void, so far as it gives such persons an exclusive right of trading and debarring all others; and it [611] seems now agreed that nothing can exclude a subject from trade but an act of parliament." Hawk. P. C. 293, note 2.

In the *Case of Monopolies*, 11 Coke, 84, it was held that a grant by the crown of the sole making of cards within the realm is void; and it is said that "there are three inseparable incidents to every monopoly against the commonwealth, i. e.:

(1) "That the price of the same commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases.

(2) "That after the monopoly granted the commodity is not so good and merchantable as it was before, for the grantee, having the sole trade, regards only his private benefit, and not the commonwealth.

(3) "It is done to the impoverishment of divers artificers and others, who before, by the labor of their own hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary."

See, also, *Proprietors of the Charles Rives Bridge* v. *Proprietors of the Warren Bridge*, 11 Pet. 607; *Slaughterhouse Cases*, 16 Wall. 102.

As used in the statute, however, the word "monopolize" clearly does not refer to grants by the government, but to the accomplishment of the same result by private endeavor; and the word "monopoly," in the meaning it had at the passing of the act, and has now, is not confined to grants by the government. The essential idea of an unlawful monopoly is found not so much in the creating of a very extensive

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business in the hands of a single control as in the idea of preventing all other persons from engaging in such business, and thereby stifling competition. The evil of the grants from the crown lay not in the fact that they gave to the grantee a right to manufacture and sell, but in the fact that they prevented other persons from manufacturing and selling the same article. The evil is not the enlargement of one person's trade, but the destruction of the trade of all other persons in the same commodity.

(1) If A. and B. enter into an agreement to restrain trade for the purpose of creating a monopoly by destroying all competition, either by buying out all competitors or by driving them out of business, such agreement is illegal and void.

(2) A fortiori, an agreement to restrain trade for the purpose of creating a monopoly which looks to the crushing out of all competition by an unlawful means, whether criminal or otherwise, is invalid.

It is clear that monopolies have always been unlawful at common law. The difficulty is to distinguish between such unlawful monopolies and lawful rivalry in business. The following cases point out this line of distinction: *Stanton* v. *Allen*, 5 Denio, 434; *Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *Craft* v. *McConoughy*, 79 Ill. 346; *Richardson* v. *Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102; *Handy* v. *Railroad Co.*, 31 Fed. Rep. 689; *Western Union Tel. Co.* v. *Burlington & S. W. Ry. Co.*, 11 Fed. Rep. 1; *Dolph* v. *Machinery Co.*, 28 Fed. Rep. 553; *People* v. *Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. Rep. 798; *Manufacturing Co.* v. *Klotz*, 44 Fed. Rep. 721; *More* v. *Bennett*, (Ill. Sup.) 29 N. E. Rep. 888.

SECOND.

RELATION OF THE UNITED STATES GOVERNMENT AND OF THE UNITED STATES COURTS TO THE SUBJECT-MATTER OF THE STATUTE.

(1) The congress of the United States is invested by the constitution with the power to regulate commerce between the several states, and with foreign nations, and with the Indian tribes. It has no power over commerce, except such as is thus given to it by the constitution, and the United States courts have, and can have, no jurisdiction over any offenses against commerce, unless it be such as congress is given the power to regulate and control. *In re Greene*, 52 Fed Rep. 104.

Interstate and foreign commerce being national in character, it has been [612] held that the power given to congress to regulate such commerce is exclusive, and implies a prohibition against any restraints upon such commerce. This prohibition has been enforced in many cases where the United States supreme court have held laws of the states unconstitutional and void, on the ground that they amounted to a restraint upon interstate or foreign commerce.

(2) There are no crimes at common law against the United States, and the criminal jurisdiction of the United States courts is limited to crimes created by statutes of the United States. Prior to the passage of the act here under discussion, there was no statutory provision of the United States making contracts, combinations, or conspiracies in restraint of or to monopolize interstate or foreign trade crimes against the United States, so that the United States courts could have no jurisdiction over that subject-matter even if such contracts, combinations, or conspiracies were criminal at common law or under state statutes.

(3) Prior to the passage of this act there was no provision giving to the United States courts even civil jurisdiction over contracts,

combinations, or conspiracies upon the sole ground that such contracts, combinations, or conspiracies affected interstate or foreign trade or commerce; and such courts, therefore, had only such jurisdiction over these matters as might vest in them by reason of other circumstances, such as differences in citizenship.

(4) Under the power to regulate commerce among the several states it has been held that congress has the power to regulate the transportation of individuals, of property, and of communications, and also all instruments of such transportation and communication; and that transportation of property begins when the property is delivered to a common carrier for transportation to another state, and does not end until such property has completed its transportation, and has become a part of the general property of the state to which it is sent. And a state may not, even for the purpose of supposed self-protection, interfere with transportation into or through the state beyond what is absolutely necessary for its actual self-protection, and within the scope of its police power. See *Henderson* v. *Mayor, etc.*, 92 U. S. 259; *Railroad Co.* v. *Husen*, 95 U. S. 465, 472. The extent of this grant to the federal government is further seen in the following cases: *Gibbons* v. *Ogden*, 9 Wheat. 1; *Welton* v. *State of Missouri*, 91 U. S. 275; *Walling* v. *People of Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *Robbins* v. *Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592; *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865; *Trade-Mark Cases*, 100 U. S. 96; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118.

It seems clear that what would be a regulation of commerce within the implied prohibition of the constitution, if attempted by a state, would be a sufficient object of a conspiracy by individuals to make it "in restraint of trade among the states." Clearly it would be obnoxious to the prohibition of the constitution for a state to pass a law that certain nonresident cash-register companies should not be allowed to sell cash registers in the state. If this would be unconstitutional when done by a state, clearly it would be a restraint of trade among the states when attempted by individuals so as to make a conspiracy to accomplish it a conspiracy in restraint of trade among the states. The conspiracy in the present case was to prevent certain corporations from carrying on the business of manufacturing and selling cash registers; and it is alleged that said corporations were carrying on this business among the several states, so that the prevention would operate necessarily and directly to restrain interstate trade in such cash registers in the same way that the state regulation did in *Leisy* v. *Hardin* and *Robbins* v. *Taxing Dist.*, *supra*. This, however, is a question to be determined at the trial.

(B) EVILS TO BE REMEDIED.

Undoubtedly a prominent evil to be remedied in the minds of the framers of the statute was the concentration of the entire business of the country in certain articles in such a manner as to prevent others from engaging in the same business, and thereby to prevent and stifle competition. As stated in the [613] title, it aims to "protect trade and commerce from unlawful restraints and monopolies;" and the evil of a monopoly lay in the prevention of others, either by prohibition from the sovereign power, or by power of individuals, from exercising the same trade. When, therefore, the statute made it criminal to conspire to monopolize, it did not intend to make it criminal for two or more persons to unite in developing their own business by lawful means, nor for one person to sell out his business to another or to others, provided that the prevention of others from engaging in the same business was not contemplated. It did, however, intend to make it criminal to conspire to obtain the sole control of any business by means of preventing others from engaging in that business, and, a fortiori, it is so intended where the means of prevention contemplated were of an unlawful character.

(C) THE REMEDY PROVIDED.

I. The most narrow effect that can be suggested for this act is that it makes certain acts which were criminal at common law crimes against the United States when such acts are directed to the restraint or monopolizing of trade or commerce among the several states or with foreign nations, and thereby gives to the United States courts jurisdiction of such crimes.

In this view the statute merely remedies the defect of the want of criminal jurisdiction at common law in the United States courts, which has been already pointed out. It is sufficient for the present case as regards several of the counts in the indictment, if this should be held to be the sole effect of the act. Thus a conspiracy to restrain trade by such unlawful means as are stated in this indictment would clearly be a criminal conspiracy at common law. *Crump's Case*, 84 Va. 927, 6 S. E. Rep. 620; *State* v. *Donaldson*, 32 N. J. Law, 157; *State* v. *Rowley*, 12 Conn. 112, 113; *State* v. *Crowley*, 41 Wis. 271. It is not necessary that each of the means alleged should be unlawful if taken alone, nor that they should all be proved. *Com.* v. *Meserve*, 154 Mass. 64, 27 N. E. Rep. 997.

Among the means set forth in the indictment that are clearly unlawful are the following:

(1) Personal violence and threats of personal violence against the agents of the Lamson Company. See *Crump's Case*, *supra*, and cases there cited; *U. S.* v. *Lancaster*, *supra*.

(2) Unlawfully inducing the employes of and purchasers from that company to break their contracts, and maintaining them in actions brought for such breaches. *Bowen* v. *Hall*, *supra*; *Lumley* v. *Gye*, *supra*; *Evans* v. *Walton*, 36 Law J. C. P. 307; *Smith, Mast. & S.* 155. As to maintenance, see *Ray, Contract. Lim.* 293 et seq., and cases cited.

(3) By bringing and threatening to bring vexatious suits against the purchasers and prospective purchasers of cash registers from the Kruse, Lamson, Boston, and Union Companies. *Garret* v. *Taylor*, Cro. Jac. 567; *Kelley* v. *Manufacturing Co.*, 44 Fed. Rep. 19; *National Cash Register Co.* v. *Boston Cash Indicator & Recorder Co.*, 41 Fed. Rep. 51.

(4) By falsely and fraudulently representing that the registers manufactured and sold by the Kruse, Lamson, Union, and Boston Companies contained defects that they did not in fact contain. See *Mogul Steamship Co.* v. *Macgregor, Gow & Co.*, *supra*.

(5) By frightening such purchasers and prospective purchasers from said companies by means of the acts, threats, and misrepresentations aforesaid. *Tarleton* v. *McGawley*, Peake. 270; *Crump's Case*, *supra*.

It needs no argument to show that a conspiracy to restrain or to monopolize trade by such means would be criminal at common law.

That the statute must be construed more broadly than this, however, is clear from the fact that contracts and combinations in unlawful restraint of trade were not criminal at common law, and this act is clearly intended to make them criminal.

II. The statute was intended to, and does, go further. It makes certain acts which are the subject of civil actions at common law, when directed to the restraint or monopolizing of trade or commerce

between the several states or with foreign nations, crimes against the United States, thereby giving the United States courts jurisdiction over them. This construction again, how- [614] ever, is not broad enough, since to suit the statute it also would practically eliminate the words "contract" and "combination," since neither a contract nor a combination in restraint of trade is civilly actionable at common law.

III. The act goes still further, and makes contracts and combinations which are illegal in the sense of nonenforceable at common law, crimes against the United States when directed to the restraint or monopolizing of trade or commerce among the several states or with foreign nations.

That all three of these effects were intended appears from the act itself, since in no other way can all the terms of the act be given effect, and may also be shown by a reference to the debates in congress when the bill was pending. In the debates in the senate a number of cases are cited as showing what was meant by "restraint of trade" and "monopoly," all of which were civil, and not criminal, cases, and include the principle of the third proposition above laid down. Among these cases were *Richardson* v. *Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102; *Craft* v. *McConoughy*, 79 Ill. 346; *Handy* v. *Railroad Co.*, 31 Fed. Rep. 689; *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658.

(D) THE TRUE REASON OF THE ACT.

It thus appears that the true purpose and effect of the act were to remedy the injurious effects of unlawful restraints and monopolies upon trade and commerce so far as congress had the power so to do; that is to say, so far as they were directed against interstate or foreign commerce, its purpose being correctly stated in the title of the act, namely, "An act to protect trade and commerce from unlawful restraints and monopolies."

SUFFICIENCY OF THE INDICTMENT.

I. So far as charging a conspiracy is concerned, the language follows the ordinary language used for that purpose, and is sufficient.

II. The general allegation of threats, intimidation, and molestation is sufficient. *Reg.* v. *Rowlands*, 17 Q. B. 671; *Com.* v. *Dyer*, 128 Mass. 70. When the charge was that the defendants "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud," it was held sufficient. *Rex* v. *De Berenger*, 3 Maule & S. 67; *Wood* v. *State*, 47 N. J. Law 461, 1 Atl. Rep. 509; *Com.* v. *Fuller*, 132 Mass. 563; *Com.* v. *Andrews*, Id. 263; *Rex* v. *Gill*, 2 Barn. & Ald. 204; *U. S.* v. *Stevens*, 44 Fed. Rep. 132; *U. S.* v. *Gardner*, 42 Fed. Rep. 829; *Sydserff* v. *Reg.*, 11 Q. B. 245; *Latham* v. *Reg.*, 9 Cox. Crim. Cas. 516.

The gist of the offense is the conspiracy. The unlawful object or means merely give character to the conspiracy itself, and show it to have been unlawful. *Rex* v. *Journeymen Taylors*, 8 Mod. 11; *State* v. *Glidden*, 55 Conn. 46, 8 Atl. Rep. 890. Hence the offense is complete though nothing be done in execution of the conspiracy. *Rex* v. *Spragg*, 2 Burrows, 993; *Rex* v. *Rispal*, 3 Burrows, 1321; *Collins* v. *Com.*, 3 Serg. & R. 220; *Com.* v. *Warren*, 6 Mass. 74; *The Poulterers' Case*, (1611.) 9 Coke, 55, Moore, 813; *Rex* v. *Edwards*, (1795.) 2 Strange, 707; *Rex v. Eccles*, (1783,) 1 Leach, 274; *Rex* v. *Gill*, (1818,) 2 Barn. & Ald. 204. Hence, also, it is unnecessary to set out the means when the end itself is unlawful. *People* v. *Barkelow*, 37 Mich. 455; *Com.* v. *Eastman*, 1 Cush. 190; *State* v. *Stewart*, 59

Vt. 273, 9 Atl. Rep. 559; Bish. Dir. & Forms, § 301. In the present case the means are set out, and in some of the counts with the utmost particularity.

The unlawful means set out show—

(1) That the conspiracy alleged was unlawful, and even criminal, at common law.

(2) That the restraint of trade was real and unlawful, since clearly such unlawful acts would not tend to encourage the trade of one party while discouraging that of the other. That they would tend to enable the party committing them to afterwards monopolize the trade by independent acts clearly only aggravates the offense.

(3) That the conspiracy was unlawful, and even criminal, "conspiracy in restraint of trade" at common law.

They thus show that the conspiracy alleged was the conspiracy intended by the statute, even if the narrowest construction be given to the language [615] of the statute. If there was, as the government contends, an offense at common law known as "conspiracy in restraint of trade," it was clearly exactly the offense set forth in this indictment. If, as contended by the defendants, there was no common-law offense of that name, precisely the same result is arrived at by considering the words of the statute separately, and giving to them their lawful common-law meaning. The defendants' argument that the words "conspiracy in restraint of trade" are to be limited so as to read "conspiracy in restraint of trade by contractual means," is wholly unwarranted by any principle of construction. In this view the word "conspiracy" adds nothing to the word "combination." The rule that every word of a statute is to be given effect, where possible, is too familiar to need a full citation of authorities. *U. S.* v. *Hartwell*, 6 Wall. 385,–395, 396; *Montclair* v. *Ramsdell*, 107 U. S. 147, 152, 2 Sup. Ct. Rep. 391.

III. The indictment sufficiently alleges that the object of this unlawful conspiracy was in restraint of trade.

It not only alleges this in all the counts, in the language of the statute, but in certain of the counts also alleges broadly that this object was to hinder and prevent certain named corporations from carrying on the business of manufacturing and selling cash registers; and in certain other counts alleges that it was the object of the conspiracy to ruin and destroy the business of said corporations, then being carried on by them; and in other counts that it was the object to hinder and prevent all corporations other than the National Cash Register Company from carrying on said business, and to ruin and destroy the business of such other corporations then being carried on by them. That the successful accomplishment of such objects as these would result in not only restraint of such trade, but also in the monopolizing of it, is clear; and such objects are sufficient to make the conspiracy criminal, even at common law, especially when, as is alleged in this indictment, they are intended to be accomplished by unlawful and criminal means.

IV. The indictment sufficiently charges that the trade or commerce which it was the object of the conspiracy to restrain and monopolize, was "trade or commerce among the several states." This is specifically alleged in the words of the statute in all the counts. In all the counts, also, it is either specifically alleged or necessarily implied that there was in existence at the time of the conspiracy a trade or commerce in cash registers among the several states, that the defendants knew this, and that the object of the conspiracy was to restrain this specific existing trade. Some of the counts go still further, and give the names of the corporations which were engaged in such

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trade, and charge that the object of the conspiracy was to restrain the trade then carried on by said named corporations in cash registers among the several states. This language is clear, and as definite as the nature of the case will allow.

The statute was intended to cover a conspiracy the object of which was a general restraint or monopolizing of any trade which was of an interstate character. The conspirators would not naturally in such a case specify, even to themselves, the specific interstate transactions which it would be their object to restrain or monopolize, but would formulate the general intention and plan to restrain and monopolize all the trade among the states in a certain given subject-matter; for example, cash registers. The allegations are sufficient to show that the restraint and monopolizing contemplated were unlawful; that is, that they contemplated the prevention and destruction of trade by means which would not involve the corresponding encouragement of the trade of others. It is not material whether it appears on the face of the indictment that the means alleged are naturally calculated to affect interstate trade or not. It is distinctly alleged that it was the intent of the conspiracy to restrain and monopolize interstate trade. The means are only alleged to show the unlawful character of the restraint contemplated, not to show the object of the conspiracy to have been against interstate trade. It is submitted, however, that the means alleged are such as would naturally affect interstate trade when directed, as in this case, against corporations engaged in interstate trade, and that the fact that they would also affect domestic trade is immaterial; and this upon the same principle upon which it is held that a state cannot tax interstate commerce even though at the same time it tax domestic commerce to the same extent. *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. [616] Ct. Rep. 681; *Robbins* v. *Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592. The means alleged are such as would necessarily prevent the corporations engaged in said cash-register business from transporting said registers from one state into another, and selling them in the latter state.

All the elements required by the statute are therefore sufficiently alleged.

Elihu Root and *John D. Lindsay*, (also in support of the indictment,) in the interest of certain private individuals.

FIRST.

In conspiracy the gist of the offense is the combination; and, when conspiring to do a particular thing is made criminal by statute, a charge of a conspiracy to do that thing is a complete and sufficient description of the offense. Neither the means by which the conspirators intend to do the thing nor overt acts towards the doing of it need to be alleged. Neither means nor overt acts enter into the description of the offense unless expressly made an element of the offense by the statute. If the statutory description of the crime is conspiring to do a thing by unlawful means, then the unlawful means must be set out. If the statutory description is a conspiring to do a thing and an overt act, then the overt act must be set out. In the one case the unlawful means, and in the other the overt acts, are elements of the offense which necessarily enter into its description, and must be averred; otherwise they need not be averred. The rules upon this subject are very fully discussed in *Com.* v. *Barger*, 37 Leg. Int. 274, July 2, 1880, by Hare, P. J. See, also, *Com.* v. *Hunt*, 4 Metc. (Mass.) 125; *Rex* v. *Gill*, 2 Barn. & Ald. 204; 2 Whart. Crim. Pl. (4th Ed.)

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625, 628; *U. S.* v. *Donau*, 11 Blatchf. 168; *Carew* v. *Rutherford*, 106 Mass. 1; *Com.* v. *Dyer*, 128 Mass. 70; *Reg.* v. *Rowlands*, 17 Adol. & E. (N. S.) 671; *U. S.* v. *Dennee*, 3 Woods, 47; *U. S.* v. *Milner*, 36 Fed. Rep. 890; *U. S.* v. *Dustin*, 2 Bond, 332; *Com.* v. *Eastman*, 1 Cush. 190; *Com.* v. *Shedd*, 7 Cush. 514.

It is also the rule, as shown by the foregoing authorities, among many that, where the character of the means to be employed is an element of the offense, only a general description of the means bringing it within the statutory requirement is necessary, and not a specific enumeration of particular means, e. g. false pretenses need not be set out.

SECOND.

It has been held, however, that this act does not describe the offenses which it denounces with such certainty and precision as to make a description of the offense charged in the bare words of the act sufficient. There must be included in the description of the offense such further averments of fact as to show that the conspiracy charged was, indeed, the conspiracy which congress intended to make criminal. See various decisions upon the indictment in *U. S.* v. *Greenhut*, in the northern district of Ohio, (51 Fed. Rep. 205;) in the southern district of New York, (Id. 213;) in the southern district of Ohio, *In re Greene*, (52 Fed. Rep. 104.)

This necessity of further averment, in addition to the words of the statute, arises from the fact that congress used in the statute terms which, taken in their most general sense, would include acts of the most innocent character, so conformable to the general principles of law that congress could not have intended to declare them criminal. Thus there is a great variety of contracts which are essential to the legitimate conduct of business, and which are uniformly enforced by our courts, both of law and of equity, and yet which are to some extent in restraint of trade. It is not to be supposed that congress intended to make them criminal. Thus, also, the essential element of private property is monopoly. Our whole system of law relating to property is designed to maintain and protect that monopoly. Congress, of course, did not intend to make it criminal.

In describing offenses under this statute it is, therefore, necessary to include such averments as will show that the restraint of trade, or the monopoly which is the object of the conspiracy, is the kind of restraint or the kind of monopoly which congress intended to denounce. To thus make apparent [617] the character of the object of the conspiracy and bring it within the class of objects which congress intended to make criminal is the sole function of all averments in the indictment in addition to the charge in the words of the statute; and, if the object thus described is the object which congress intended to include within the words used in the statute, the indictment is sufficient.

THIRD.

The fundamental question upon the first set of counts is whether the destruction of a competitor's trade in the manner described is a restraint of trade within the intent of the provision of the first section of the act which makes a conspiracy in restraint of trade criminal.

I. To ascertain what constitutes a contract, combination, or conspiracy in restraint of trade, recourse must be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. *In re Greene*, 52 Fed. Rep. 104.

II. The statute enumerates three distinct facts, viz.: (a) Con-

Root and Lindsay, in support of indictment.

tracts in restraint of trade; (b) combinations in the form of trusts or otherwise in restraint of trade; (c) conspiracies in restraint of trade.

Each one of these points to a separate and distinct class of cases in which, prior to the passage of the act, the courts of England and America had condemned acts injurious to the public interest, because of their effect upon trade. In all three the principle of decision and the ground of condemnation had been that they interfered with the public's right to have trade and competition in trade free and unrestricted.

(1) The first class of acts included the ordinary contracts which were declared to be void as against public policy, because some of the contracting parties thereby prevented themselves from pursuing their occupations, and the public was thus deprived of their contribution to the competition therein.

Judge Bradley states the rule regarding these cases in *Navigation Co.* v. *Winsor*, 20 Wall. 64, in these words:

"There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy: One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases, and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy."

(2) The second division of the statute, viz. combinations in the form of trusts or otherwise in restraint of trade, points to a class of cases which, while it may include the first class, includes also a great number of combinations distinguished from ordinary contracts in restraint of trade by a broad line of demarcation. These are combinations in which there is no contract, which either by its express terms or by implication binds the contracting party not to exercise his trade, or not to compete freely with others, but which are declared by the courts in violation of public policy, because they accomplish the effect of preventing freedom of trade and competition. As a rule the agreements and arrangements by which these combinations are formed are themselves, in their terms and requirements, of the most harmless and innocent character. It is the effect, and the effect alone, upon the public interest which causes them to be declared against public policy. The following are illustrations of this class: *Hooker* v. *Vandewater*, 4 Denio, 349; *Stanton* v. *Allen*, 5 Denio, 434; *Arnot* v. *Coal Co.*, 68 N. Y. 558; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *Clancey* v. *Manufacturing Co.*, 62 Barb. 395; *People* v. *North River Sugar Refinery Co.*, 54 Hun, 354, 7 N. Y. Supp. 406; *People* v. *North River Sugar Refinery Co.*, 121 N. Y. 582, 24 N. E. Rep. 834; *Hilton* v. *Eckersley*, 6 El. & Bl. 47; *Craft* v. *McConoughy*, 79 Ill. 346; *Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Richardson* v. *Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102; *U. S.* v. *Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *Biscuit & Manuf'g Co.* v. *Klotz*, 44 Fed. Rep. 721; *Hoff-* [618] *man* v. *Brooks*, 11 Wkly. Law. Bull. 258; *State* v. *Standard Oil Co.*, (Ohio Sup.) 30 N. E. Rep. 279.

So long as the arrangements or agreements in regard to trade made by a combination produce the injurious effect, no form of contract or devise to produce that effect indirectly avails to escape the consequences.

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(3) The third division of section 1—"conspiracies in restraint of trade"—refers us to a class of cases in which the effect upon trade is produced, not by contract obligations binding the parties not to compete, not by pooling arrangements which make it against the party's interests not to compete, but by preventing others from carrying on trade.

An essential element in these cases is that the prevention shall be, not by means of competition itself in the ordinary course of business,—one competitor driving out another by fair competition,—but that the prevention shall be by unfair means, which are themselves private injuries to the person whose trade is interfered with. Conspiracies to destroy or injure another's business by such means have always been actionable because of the private injury, and indictable because of the public injury, upon the same grounds and for the same reasons which have led the courts to declare contracts and combinations accomplishing the same effect void as against public policy. The law upon the subject is very fully presented in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, 23 Q. B. Div. 598, 605, (1892,) App. Cas. 25.

Conspiracies among laborers to boycott, to coerce their employers, to prevent other laborers from working, are familiar illustrations of this principle. See *Rex* v. *Eccles*, 1 Leach, 274; *Rex* v. *Bykerdyke*, 1 Moody & R. 179; *Reg.* v. *Hewitt*, 5 Cox, Crim. Cas. 162; *Reg.* v. *Duffield, Id.* 404; *Reg.* v. *Druitt*, 10 Cox, Crim. Cas. 592; *Reg.* v. *Rowlands*, 5 Cox, Crim. Cas. 436; *People* v. *Fisher*, 14 Wend. 11; *People* v. *Melvin*, 2 Wheeler, Crim. Cas. 262; *Master Stevedores' Ass'n* v. *Walsh*, 2 Daly, 1; *People* v. *Wilzig*, 4 N. Y. Crim. R. 403; *State* v. *Stewart*, 59 Vt. 273, 9 Atl. Rep. 559; Crump's Case, 84 Va. 927, 6 S. E. Rep. 620; *State* v. *Donaldson*, 32 N. J. Law, 157; *State* v. *Glidden*, 55 Conn. 76, 8 Atl. Rep. 890; *People* v. *Walsh*, 15 N. Y. St. Rep. 17; Steph. Dig. Crim. Law, 390; *People* v. *Everest*, 51 Hun, 19, 3 N. Y. Supp. 612.

(4) It appears from the foregoing review that at the time the act now under consideration was passed restraint of trade, as known to the law, was preventing any one from freely exercising his trade. That this prevention was held to be against public policy, because it deprived the public of the benefit of the prevented industry and of its competition with others; that all contracts which had that effect were held to be void, because they produced that public injury; that all combinations which had that effect, directly or indirectly, were held to be unlawful, because they produced that injury; that all conspiracies to produce that effect upon others by threats, intimidation, fraud, and other similar means were held to be criminal, because they produced that same public injury.

Clearly these were the conspiracies intended and aptly described in the language of the first section of the statute.

(5) The means described in general terms in the first count of the indictment, and particularly enumerated in the fourth and fifth counts, are the very means which have always been held to make interference with business unlawful, and to make a conspiracy to interfere with business through other instrumentality a criminal conspiracy. *Mogul Steamship Co.* v. *McGregor, Gow & Co. supra.*

(6) The prevention of competition by unlawful interference with the business of competitors was one of the ways of producing this kind of public injury, which was at the time this act was passed well known through judicial decisions, and it was present in the mind of congress when it passed the act. See 21 Cong. Rec. pt. 3, pp. 2456–2458, 2598. It is part of the judicial history of the country that, prior to the passage of the act, several of the directors of the

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Standard Oil Company had been convicted in the state of New York of a conspiracy to drive one of its competitors out of business by violent and dangerous methods, the conspirators going so far as to attempt the destruction of the competitor's property. See *People* v. *Everest*, 51 [619] Hun, 19, 3 N. Y. Supp. 612. The indictment in that case was for a conspiracy (under section 168 of the New York Penal Code) to commit an act injurious to trade.

It will be observed from the foregoing extracts that the cases therein referred to that congress had in mind as one of the evils at which this act was aimed the suppression of competition as well by means operating upon other persons than the guilty combiners as by the direct means of the agreement entered into between those combiners.

(7) Counsel for the defendants has referred to many state statutes which he says were designed to apply only to offenses by way of contract operating only upon the persons combining. He omits to observe that in all these states combination to produce the same effect by unlawful means operating upon others were already criminal at common law, and by already existing statutes; e. g. the statute of New York, making it a criminal "conspiracy to do any act injurious to trade or commerce." It was, therefore, unnecessary for the states which had existing statutes of this description, and which had a common law, to include in their acts designed for the protection of free competition in provisions affecting such conspiracies as are shown in the present indictments.

But when congress undertook to assert over interstate commerce the same protection which the common law and the statutes of the several states gave to commerce within their respective limits, there is no warrant whatever for saying that congress did not mean to cover the entire field as broadly as the whole body of common law, and legislation in the respective states covered it within their respective limits. The word "conspiracy" is appropriately added to the words "contract" and "combination in form of trust or otherwise," to accomplish this complete design.

(8) The idea that there is any distinction in substance between what counsel for the defendant calls "contractual restraint of trade" and the restraint charged in this indictment is wholly illusory, for conspiracy is a contract just as much as any illegal combination. The only element of contract in either is the agreement of the parties to accomplish a given result. That agreement may or may not include specifically the means by which they intend to accomplish it. This element of agreement is, indeed, common to all the offenses denounced in the first section of the act. It is to be found in the contracts, in the combinations, and in the conspiracies there described. It is, however, the only contractual element which is essential to any of the offenses described in that section, and this same contractual element must necessarily be shown in every case of criminal conspiracy. All the authorities which had declared the law of trusts and trust combinations at the time the act was passed agreed that in declaring that the illegal object to accomplish which the minds of the parties met together, made their agreement illegal, wholly irrespective of its form, or of the means by which they intended to accomplish the object. It seems quite absurd to contend that when congress struck at an evil which the courts had declared rendered every combination which produced it illegal, entirely irrespective of its form or avowed purpose, congress nevertheless meant to except combinations which produced that same evil by means already recognized as unlawful. The court is asked by the defendants to deprive an express substantive provision of the statute of all meaning whatever, to say that it adds nothing to the other provisions of the statute, for the purpose of inferring that

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congress meant to make it criminal to produce the given result of preventing competition by means otherwise lawful, and not to make it criminal to produce the same result by means otherwise unlawful.

FOURTH.

The fundamental question upon the second set of counts is whether a monopoly acquired by destroying the trade of competitors in the manner described is a monopoly within the intent of the provision of the second section of the act, which makes a conspiracy to monopolize criminal.

In the debate upon this act in the senate, Mr. Edmunds quoted from Webster's Dictionary the following definition of the verb "to monopolize:" "To engross or obtain by any means the exclusive right of, especially the right of trading to any place or with any country or district; as to monopolize the [620] India or Levant trade." 2 Pike, Hist. Crime, p. 102. And see St. 23, James I. cc. 331–333; 4 St. at Large, p. 734; *The Case of Monopolies*, 11 Coke, 85a.

The words of the statute are broad enough to include all appropriation of trade to the exclusion of others. It is equally manifest, however, that from the application of those words must be excluded all appropriation of trade to the exclusion of others which is done under warrant of law, such as the obtaining of a monopoly by letters patent, the obtaining of a monopoly by the ordinary purchase of property, the obtaining of a monopoly by the ordinary process of fair competition and trade as the result of superior intelligence, industry, or activity. Starting with the original well-understood and commonly received meaning of the word, and applying this process of exclusion, we find that there remains a class of monopolies with which the courts have of recent years become very familiar, which are created wholly without warrant of law, which have all the characteristics and all the injurious effects of the famous monopolies of Queen Elizabeth's time, and which are accomplished by a more or less direct violation of the rules above considered against restraint of trade. The judicial condemnation of such monopolies is an extension of the principles relating to restraint of trade. The monopoly is treated as the extreme evil resulting from restraint of trade upon a large scale.

This view of monopolies is illustrated and fully shown in the cases relating to combinations cited under the third head of this brief. Whatever else may or may not be included within the term "to monopolize," as used in the statute, it is safe to say that it does include the accomplishment of the effects above described by any acts which constitute an unlawful restraint or prevention of trade.

FIFTH.

The counsel for the defendants says that, unless the construction for which he contends is put upon the act, its range is almost unlimited; and he goes so far as to assert that, under the theory upon which this indictment is drawn, a very large proportion of all the serious crimes within the states could be brought within the federal jurisdiction. His argument for the assertion rests upon certain propositions of law relating to criminal responsibility for crimes resulting unintentionally from unlawful confederacies.

A conspirator is held equally guilty with his confederate for a murder (or other higher offense than the one contemplated) committed by the latter in the perpetration of a preconcerted offense by both only when the higher offense is the natural result of the crime intended, or is committed as a means of successfully effecting the

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intended purpose. So, where one of the conspirators deviates from the original plan, or undertakes to do something out of the range of the purpose contemplated, the other is not criminally responsible for this result. Our only purpose in referring to these propositions is to express our dissent from the view taken by the counsel for the defendants,—that, upon our construction, the commission of any act, however remotely affecting or interfering with interstate commerce, would render the perpetrator of such act liable to prosecution under the act of congress, no matter whether the interference was intentional or otherwise. It is not necessary to discuss this point.

We allege a conspiracy to do certain things which we contend do restrain trade. The question of whether the acts committed by the conspirators are intentional or not is one for the trial. If the acts the government proposes to prove as evidence of the conspiracy were unintentionally done, or were committed without any design of accomplishing a result that, in contemplation of law, would constitute a restraint of trade or monopoly, within the meaning of the act, proof to that effect would be proper matter of defense.

In answer to the remaining portion of defendants' argument on this head, it is only necessary to say that the jurisdiction of the federal courts is not necessarily exclusive. An act may be a violation both of the laws of the United States and of the state where it is committed; and it does not affect the question of federal jurisdiction that the defendants intended to use means themselves the subject of prosecution under the state laws.

SIXTH.

It is necessary that the restraint of trade charged should be a restraint of trade among the several states.

[621] Upon that point it seems sufficient to say that it is so charged. There is no doubt, uncertainty, or question in the language of the statute which describes that element of the offense. "Trade among the several states" has been described and defined by the supreme court of the United States in numerous cases. *Gloucester Ferry Co. v. State of Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826; *Lyng* v. *Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725; *Ficklen* v. *Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. Rep. 810. The language of the statute obviously and clearly applies to all trade coming within that description. There is not one kind of trade among the several states to which the statute was intended to apply, and another kind to which it was not intended to apply. As there is no uncertainty or indefiniteness in regard to this element of the offense, the charge, which states this element of the offense in the words of the statute, is sufficient.

In some of the counts, however, the indictment does go beyond the necessities of pleading, and charges not only that the conspiracy was in restraint of trade and commerce among the several states, but that it was to destroy that trade, and that it was to destroy that trade by practices which, under the principles above stated, would constitute the destruction,—the very kind of restraint of trade which congress had in mind.

There can be no question under this statute whether the means which the conspirators had in mind were adequate or appropriate to accomplish the destruction of trade among the states. As we have seen, the means are not an essential element of the offense. They have no relevancy to the charge, except as they may serve to characterize the nature of restraint proposed by the conspirators, and show that it is the kind of restraint which congress had in mind. So long as the restraint was of the kind which congress had in mind,

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then it is immaterial whether it was in fact possible that interstate trade could be destroyed by it. The offense of conspiring to destroy interstate trade by that particular kind of restraint was committed when the agreement of the conspirators took place, whether they ever have or ever can or could accomplish their object.

Each of the three elements of the offense is clearly and definitely charged. First, the conspiracy; second, the restraint, which is shown to be the kind of restraint which congress had in mind; and, third, the thing to be restrained, which is charged to be the thing which the act clearly and definitely described. 2 Bish. St. Crimes, (5th Ed.) § 202.

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COMMERCE AMONG THE SEVERAL STATES.

This act must rest on the constitutional power to regulate commerce with foreign nations and among the several states, and those sections which are pertinent to the present controversy must rest upon the power to regulate commerce among the states. The matter with which we are dealing is "commerce among the several states." It is important, at the outset, to consider, in a general way, the conventional meaning of that phrase in federal jurisprudence, the outline of the field, as fixed by federal decisions, and the way in which, and the extent to which, the federal government can deal with it.

The meaning of the phrase, "commerce among the several states," in the federal constitution, is a meaning quite different from the meaning of those words as mere English words. The word "commerce," it is not necessary here particularly to discuss. It includes intercourse of many, if not all, lawful kinds, and is broader than the word "trade." The constitutional phrase, however, "commerce among the several states," has a highly artificial, conventional, and refined meaning, fixed by principles of public policy and statesmanship, and in view of the complex character of our government, and the relative rights and duties of the states and general government.

Lewis, Federal Power Over Commerce, p. 10; *Paul* v. *Virginia*, 8 Wall. 168, 183; *Mobile* v. *Kimball*, 102 U. S. 691, 702; *Coe* v. *Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475; *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; *Gibbons* v. *Ogden*, 9 Wheat. 1, 4; *Kirkland* v. *Hotchkiss*, 100 U. S. 491; *Slaughterhouse Cases*, 16 Wall. 36, 75, 79; *License Tax Cases*, 5 Wall. [622] 462; *Mugler* v. *State of Kansas*, 123, U. S. 623, 8 Sup. Ct. Rep. 273; *Kidd* v. *Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6.

Moreover, it is true of most, if not all, of the grants of power in the federal constitution, that the definition of them is not only arbitrary, and fixed by principles of public policy, but that it is not fixed even by any generic distinction, even an arbitrary one, but is fixed merely by degree of proximity or remoteness to state and federal rights. *U. S.* v. *Dewitt*, 9 Wall. 41; *U. S.* v. *Fox*, 94 U. S. 315; *Trade-Mark Cases*, 100 U. S. 82; *Ficklen* v. *Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. Rep. 810; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 163; *Pullman's Palace Car Co* v. *Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876; *Coe* v. *Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475; *U. S.* v. *Hall*, 98 U. S. 343.

Every citizen of our states has a dual political status. In one aspect, he is a citizen of the United States. In another aspect, he is a citizen of his state. It does not follow from the fact that he is a citizen of the United States that congress can protect him against

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all forms of fraud or violence or other wrong; nor, from the fact that he is a citizen of the state, that the state can so protect him. Congress can protect him only in that range and field of his life and affairs in which he presents himself as a citizen of the United States, and not as a citizen of his state. His state can protect him only in that range and field of his life and affairs in which he presents himself as a citizen of his state, and not of the United States. The line between his federal and his state citizenship is an arbitrary line, and often a hazy and indefinite line, and it is always a line of degree of proximity or remoteness. Nevertheless, it is a constitutional line, which neither the federal government nor the state can cross. *U. S.* v. *Reese*, 92 U. S. 214; *U. S.* v. *Harris*, 106 U. S. 629, 1 Sup. Ct. Rep. 601; *U. S.* v. *Cruikshank*, 92 U. S. 542; *U. S.* v. *Fox*, 94 U. S. 315; *Logan* v. *U. S.* 144 U. S. 263, 12 Sup. Ct. Rep. 617.

Contractual Character of the Statute.

Trade statutes have at different times been passed in various jurisdictions. Some of them have been aimed at labor, some at capital, but the distinction between legislation against labor and legislation against capital has always been patent upon the face of the statutes. The ancient legislation against monopolizing and engrossing was legislation against capital.

The act of July 2, 1890, is directed at capital. It aims at dangers very generally supposed to have lately arisen out of enormous aggregations of capital. It aims at results effected, or to be effected, by combinations of capitalists and aggregations of capital. The evil aimed at in legislation against capital is evil of a contractual character, not an evil of mere fraud or violence. There was no general call for federal protection against an evil of the latter character. The act of 1890 was aimed at a growing tendency to combination by voluntary contract, in derogation of public right and public safety. It was at this, only, that the legislation was aimed; and it is this, only, which its words are to be construed to cover. Attacks upon commerce by mere fraud and violence, it is thus far left to the states to punish. This statute is not a Ku-Klux act. The "restraint" and the "monopolizing" of the statute are contractual restraint and monopolizing,—not mere interference with commerce, as by robbery, assault, champerty, bringing of suits, or other forms of violence, fraud or vexation.

The indictment proceeds upon the theory that the restraint and monopolizing of the statute, at least in the penal aspect of the act, are substantially equivalent to interference with trade, or at least to interference with the trade of rivals. Some of the counts allege conspiracy to interfere with or injure or ruin the business of persons apparently intended to be described as rivals, by mere fraud, violence, or other noncontractual means. The other counts do not specify the means. They therefore fail to allege contractual means. The pleader has completely missed the true scope and effect of the statute.

Contract Crimes.

The defendants' counsel think it proper to discuss, at the outset, the place which contract occupies in the criminal law, and to consider the characteristics of those crimes which may aptly be designated as contract crimes.

[623] A familiar instance of crimes of contract is the unlawful selling of intoxicating liquors. To make the offense, an actual contract of sale must have been made, and the questions where, when, and

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whether an alleged contract of sale was in fact made are determined, not by any rules of criminal law, but by the ordinary principles of the law of contracts. The questions of locus contractus, of principal and agent, of delivery, for example, are discussed and settled in liquor prosecutions precisely as in civil actions. *Com.* v. *Eggleston*, 128 Mass. 408; *Com.* v. *Burgett*, 136 Mass. 450.

A cash sale of liquors to a minor is not, under an ordinary selling statute, a "sale" to him, if in fact, although without the vendor's knowledge, he is buying for an adult. *Com.* v. *Lattinville*, 120 Mass. 385; *Com.* v. *Finnegan*, 124 Mass. 324; *St. Goddard* v. *Burnham*, Id. 578.

The element of true contract, in contract crimes, is well illustrated by cases upon English statutes aimed at the "putting off" of counterfeit money to a confederate. The offense of "putting off" is distinguished from the crime of uttering, in that an uttering, to be criminal, must be made to an innocent person, and does not necessarily imply a contract, while a "putting off" of forged paper implies a true contract of sale, gift, or barter, to be established like any other sale, gift or barter. In *Rex* v. *Joyce*, (MS., O. B.,) Car. Supp. 184, the indictment (framed on St. 8 & 9, Wm. III. c. 26, § 6, for "putting off" counterfeit money) charged that five counterfeit shillings were paid and put off for two shillings. The proof was that five bad shillings were sold for half a crown. "Thompson, C. B., and Heath, J., held that, as this was a contract, it must be correctly proved as laid, and directed an acquittal." See, also, *Rex* v. *Hedges*, 3 Car. & P. 410; *Rex* v. *Wooldridge*, 1 Leach, 307; 1 East P. C. 180.

The crime of "obtaining goods by false pretenses" is a crime of true contract. If I secure goods by false statements, my crime will be "false pretenses" or larceny, according as I do or do not effect a meeting of minds, which actually passes title. If, on the one hand, I represent to a vendor that I am rich, and thereby induce him to sell me goods upon credit, there is a true contract of sale between us,—voidable, indeed, at the vendor's option, for the fraud, but none the less a true contract until avoided,—and my offense is "obtaining goods by false pretenses." If, on the other hand, I get goods by representing that I am A.'s servant, and that A. has commissioned me to buy the goods for him, and get them as upon a sale upon credit to A., there is no meeting of minds between the vendor and A. There is no meeting of minds between the vendor and me, to the effect that I am to be the purchaser on credit. There is therefore no meeting of minds at all, in true contract, and the offense is larceny. It is immaterial, in such case, that the supposed vendor intends to pass title, or thinks that he is passing title. The question is, not what he or the supposed purchaser intends or thinks, but is there, or is there not, a meeting of minds in contract? No contract, no crime. No reported cases pursue into greater refinement the question of contract or no contract than false pretense and larceny cases, close on the dividing line.

This Statute a Statute of Contract Crime.

The act of 1890 is a statute of contract crime. Neither in its restraint nor in its "monopolize" provisions does it aim to punish anything else than (a) the making of contracts; or (b) the combining, conspiring, or attempting to make or to effect the making of contracts; or, possibly, (c) the combining or conspiring or attempting to support or enforce contracts. It is essential to guilt under it that a contract be made, or that contract results be the aim.

This is, in substance, the view which has been taken of the act in

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the judicial decisions which have thus far been made upon it, and is the logical result of the reasoning on which they are rested. If this were a small matter, the defendants' counsel would be quite well content to rest their argument upon those decisions. Since, however, no one of those cases is a decision of a court of last resort, or is a binding precedent upon this court, or is on all fours with the case at bar, the defendants' counsel, particularly in view of the importance of the present case, will proceed to consider various lines of [624] reasoning and authority which seem to them, independently of those cases, to require an exclusively contractual reading of the statute. The decided cases upon the statute will also be referred to at proper points in the discussion.

TECHNICAL TERMS IN THE STATUTE.

The use of technical words and phrases in the statute is such as necessitates the contractual construction. It is a familiar principle of statutory construction that, where a new statute uses words or phrases already having a settled technical signification in the law, these words or phrases in the statute are to be taken in such technical sense, unless the context makes such a reading impossible. E. g.

"Law of nations." *U. S.* v. *Smith*, 5 Wheat. 153.

"Utters." *U. S.* v. *Carll*, 105 U. S. 611.

"Embezzles." *U. S. v. Britton*, 107 U. S. 655, 669, 2 Sup. Ct. Rep. 512.

"Steal, take, and carry away." Id.

"Murder." *Ball* v. *U. S.*, 140 U. S. 118, 11 Sup. Ct. Rep. 761.

"Negotiable;" "indorsement and delivery." *Shaw* v. *Railroad Co.*, 101 U. S. 557.

This principle is but an application of a broader principle, which finds expression, also, in the rule that statutes are to be presumed to depart as little as possible from the common law. *Shaw* v. *Railroad Co.*, 101 U. S. 557; *Brown* v. *Barry*, 3 Dall. 365.

A similar conservative principle is found in the rule that statutory expressions borrowed from the statutes of another jurisdiction are to be taken in the meaning of their original domicile, as defined there by judicial construction. *Railroad Co.* v. *Moore*, 121 U. S. 558, 7 Sup. Ct. Rep. 1334. This latter rule has just been applied to the interstate commerce act. *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U. S. 263, 282, 284, 12 Sup. Ct. Rep. 844.

Such legislation is extremely common with congress, and is, indeed, a distinguishing peculiarity of its legislation. The greater part of what may be called federal "lawmaking" legislation consists in the adoption, from time to time, and upon different subjects, by a mere summary reference, and often by terse and elliptic designation, of a complete title or head of the common law, civil or criminal, or of some other body of jurisprudence. The chief part of the federal criminal law exists only in this way. See cases cited above, and *Moore* v. *U. S.*, 91 U. S. 270, 273, 274; *Smith* v. *Alabama*, 124 U. S. 465, at page 478, 8 Sup. Ct. Rep. 564, at page 569.

It is a feature of the operation of this principle that the summary adoption by federal statute of a particular head or title of law, civil or criminal, brings in that head of law, with all its details and all its exceptions, and that the statute has in law precisely the same reading which it would have, should it, as would a detailed Code, rehearse at length, and minutely, all those details and exceptions. In *U. S.* v. *Carll*, cited above, a statute punishing, in terms, the "uttering" of forged federal paper, "with intent to defraud," was held to incorporate into the federal jurisprudence the

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common law of uttering, with all its limitations, and to require, therefore, as an element of the crime, (although not expressed in the statute,) knowledge that the paper was forged.

It is an equally well-settled principle that where a word has a well-known, settled, and technical (though recent) meaning,—not in the law, but in the language of a trade, or in common speech,—the word, in a new statute, will be given that meaning. *Arthur* v. *Lahey*, 96 U. S. 112; *Arthur* v. *Morrison*, Id. 108; *Greenleaf* v. *Goodrich*, 101 U. S. 278.

EFFECT OF WORD "TRADE" IN THIS STATUTE.

The word "trade" would seem, in its meaning as an individual word, to be a narrower word than "commerce." (Marshall, C. J., *Gibbons* v. *Ogden*, 9 Wheat. 1, 189; Miller, Const. c. 9,) and therefore, in this statute, is either synonymous with "commerce," therefore, in this statute, is either synonymous with "commerce," it could not operate Even if it were a broader word than "commerce," in this statute, for the constitutional more broadly than "commerce" in this statute, for the constitutional power of congress stops with "commerce." [625] The word "trade," therefore, in this statute, is either synonymous with "commerce," or narrower than it, and in either view it is, as a mere individual word, surplusage in the statute. The word "trade" must, however, be given effect, if possible. *Platt* v. *Railroad Co.*, 99 U. S. 48; *Market Co.* v. *Hoffman*, 101 U. S. 112.

It will be unnecessary here to discuss the question how far the "restraint of trade" of the common law is enlarged in its field of operation by its application in this statute to "commerce," in so far as "commerce" may be broader than "trade;" for, if anything in this indictment comes under the head of "commerce," it also comes under the head of "trade." Nothing set forth in this indictment lies in those outlying zones, if any, of commerce, which extend beyond the confines of trade.

TECHNICAL MEANING OF "RESTRAINT OF TRADE."

The phrase "restraint of trade," therefore, upon the principles discussed above, operates to evoke from the common law, and to introduce into the federal jurisprudence, a complete head or title of the common law. We come, then, to the question of what is meant in the common law by "restraint of trade."

This phrase, like many others, has at the common law two technical meanings,—a broader and a narrower. The broader is generic, and includes all technical "restraint of trade." The narrower is specific, and includes only unlawful "restraint of trade." The broader conveys no obnoxious suggestion. The narrower is of obnoxious signification. In both its senses the phrase means contractual restraint, and only contractual restraint,—restraint by contract, and only by contract. Both the broader and the narrower meaning are well set forth by Greenh. Pub. Pol. 683.

The phrase, "in restraint of trade," is almost always used in the common law in connection with the word "contract," or, less frequently, "combination." In its less common connection with the word "combination," the phrase merely indicates the joinder of a considerable number of persons in a contract; limiting one or more, but usually all of them. When, as often happens, the parties to a considerable combination in "restraint of trade" do not trust each other, and do not wish to have the burden of suing each other to enforce the contract, they often put their trade assets and plants into the hands of a stakeholder, who is to carry out the restraining contract, either

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according to a detailed scheme, or according to his discretion, and so make the operation of the restraint, as it were, automatic. The stakeholder, in such case, becomes, by operation of law, a trustee. The result of the proceeding is, within the meaning of the law word, a "trust;" and to this peculiar form of trust the common speech now applies, in an exceptional sense, and with a hostile signification, the word "trust." As to combinations in restraint of trade, see Id. 442–459.

CONSPIRACY IN RESTRAINT OF TRADE IN THE CRIMINAL LAW.

It remains to be considered whether the phrase "in restraint of trade," either alone or in connection with the word "conspiracy," or any other word, had in the criminal law a technical meaning broader than, or different from, its technical meaning in the civil law.

Such separate technical meaning in the criminal law, to be effectual here, would have to be a meaning generally recognized, and not merely a matter of personal or occasional nomenclature. If such a meaning existed in the criminal law, it would appear in the approved text-books,—old and new. In the following text-books the words and phrases, "restraint of trade," and "conspiracy in restraint of trade," do not appear (unless in some editions which the defendants' counsel have not seen) in the index, nor does the title "Conspiracy," although it covers conspiracies dealing with trade, allude to "restraint of trade." No one of these books, it is believed, uses the phrase, "conspiracy in restraint of trade:" 4 Bl. Comm.; Hawk. P. C.; Archb. Crim. Pr. & Pl.; Chit. Crim. Law; Rob. Crim. St.; Wooir. Crim. Law; Paley, Conv.; Carr. Crim. Law; Bish. Crim. Law; Bish. Crim. Proc.; Whart. Crim. Law; Whart. Crim. Pl.; Russ. Crimes; Davis, Crim. Law; Maugh. Law; Lewis, [626] Crim. Code; Washb. Crim. Law; May, Crim. Law; Lewis, U. S. Crim. Law; Lipp. Crim. Law; Heard, Crim. Law; Gabb. Crim. Law; Fish. Crim. Dig.; Pike, Hist. Crime.

The only instances of the use of the phrase, "conspiracy in restraint of trade," or "restraint of trade," in criminal law books, as far as the defendants' counsel can learn, are in the seventh edition of Roscoe's Criminal Evidence, in Steph. Dig. Crim. Law, (1877,) and Erle, Trade Un. The chapter in Roscoe on "Conspiracies in Restraint of Trade" was prepared by Sir James Fitzjames Stephen, as he tells us in his "Digest of the Criminal Law," (1877, note 18, p. 383.) Sir James Stephen had then been engaged for more than 10 years in the study of the criminal law from a scientific point of view, and chiefly with reference to legislation. Steph. Hist. Crim. Law, (1883,) preface. What he wrote in Roscoe was subsequently elaborated by him in his "History of the Criminal Law," without material change. The nomenclature, "Conspiracies in Restraint of Trade," in Roscoe, is therefore a personal nomenclature of a broad and scientific student of criminal law, looking more to the future than to the present or the past, and of such public and scholarly position as to be entitled, if he so desired, to make a slight change of nomenclature. The propriety, however, of his change of nomenclature, if there was such, does not make his phrase a technical nomenclature of the common law.

In his "Digest of the Criminal Law," (1877,) all that he says in the text upon this head is included in articles 390–392, and note 18. But what he there says begs the question how far violence is to be considered in the matter of "restraint of trade."

Erle on the Law Relating to Trade Unions is not a text book at all. It does not profess to be written peculiarly for lawyers, and is perfectly at liberty to use popular nomenclature. Moreover, it is a book

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written in support of a theory as to freedom of trade at the common law,—a theory which, as Mr. Justice Stephen shows, is erroneous.

An examination of the English Statutes relating to offenses against trade fails, with the exception of one preamble, to detect the use, in a criminal sense, of the phrase, "in restraint of trade."

(1720,) 7 Geo. I. St. 1, c. 13; (1725,) 12 Geo. I. c. 34; (1749,) 22 Geo. II. c. 27; (1772,) 12 Geo. III. c. 71; (1777,) 17 Geo. III. c. 55; (1795,) 36 Geo. III. c. 111; (1800,) 39 & 40 Geo. III. c. 106, repealing 39 Geo. III. c. 81; (1824,) 5 Geo. IV. c. 95; (1825,) 6 Geo. IV. c. 129; (1844,) 7 & 8 Vict. c. 24.

Preamble: "Whereas, it is expedient that such statutes, [forestalling and regrating,] and other statutes made in hindrance and in restraint of trade, be repealed." (1859,) 22 Vict. c. 34; (1875,) 38 & 39 Vict. c. 86. Here "restraint" is plainly contractual.

TECHNICAL MEANING OF "MONOPOLIZE."

The word "monopolize," and its noun, "monopoly," have in the law, and had at the time of the passage of the act, a technical meaning. In so far as they implied any exclusive privilege not resting upon a government franchise, or upon individual ownership of property, they involve the idea of contract. 4 Bl. Comm. 159; Ray, Contract. Lim. 210–245; Greenh. Pub. Pol. 670 et seq.; Ricks, J., *In re Corning*, 51 Fed. Rep. 205.

It is not, in the legal sense, "monopolizing," to raise upon one's own ground all the corn or wheat for the subsistence of a community. Like the terms, "restraint of trade," and "contract in restraint of trade," "monopoly" has, in the common law, a broader and favorable sense, including just and rightful monopolies, such as patents or copyrights, and a narrower and obnoxious sense, embracing only monopolies counter to law or public policy. "Monopoly" is limited, in its broader or favorable sense, to public franchise, private ownership, or contract. In its narrower and obnoxious sense, it is limited to unlawful contractual means. It is not monopolizing for a band of desperadoes to invade an isolated community, and rob it of its winter's store. He only monopolizes, in the invidious legal sense of the word, who with wrongful intent buys up, or attempts to buy up, the whole, or substantially the whole, of a given commodity in a given locality, or at least contracts, or attempts to contract, for the control of it. Cases cited above. Section 2 of the statute, therefore, undertakes to punish nothing but the making of a particular form [627] of contract,—usually a contract of purchase,—and conspiracies, and attempts to make, or to promote the making of, or perhaps to enforce, such contracts. This effect of these technical words in the statute has been repeatedly recognized. *U. S.* v. *Greenhut*, 50 Fed. Rep. 469; *In re Corning*, cited above; *U. S.* v. *Greenhut*, 51 Fed. Rep. 205; *In re Greene*, 52 Fed. Rep. 104; *In re Terrell*, (*U. S.* v. *Greenhut*,) 51 Fed. Rep. 213.

The mere fact that England and the several states have varied in details, or upon the shades of meaning and the precise scope of technical expressions, does not make it improper for congress to employ them. At the times of enactment of the various federal penal statutes, England and the several states have differed somewhat upon the details of the various offenses. None the less, there was a generally understood crime of "murder," "forgery," "robbery," "piracy," etc., settled in its outlines, and in most of its details, to such a degree that the federal courts could have no difficulty in fixing by its definition the meaning of those words in the federal statutes. *Ball* v. *U. S.*, cited above; *Moore* v. *U. S.*, 91 U. S. 270.

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CONTRACTUAL CHARACTER OF THE STATUTE SHOWN BY SECTION 6.

Section 6 of the statute in question provides: "Any property owned under any contract, or by any combination, or pursuant to any conspiracy, (and being the subject thereof,) mentioned in section 1 of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law." The phrase, "property owned * * * pursuant to any conspiracy," does not refer to property of the character of burglars' tools or counterfeiters' dies; that is, mere vulgar implements of crime. It means commercial property. By the procedure referred to in the section, it is not property to be destroyed, like gaming implements, but property to be sold. Nor is it property merely in the possession of conspirators; that is, property which they may have got by intimidation or robbery or assault. It is property "owned" pursuant to a conspiracy; that is, title has vested pursuant to a conspiracy. The conspiracy in the statute, therefore, is conspiracy aiming to operate by the making or the furtherance of limiting contracts, or contracts of aggregation, or monopolizing contracts.

NARROWER MEANING OF "RESTRAINT OF TRADE" AND "MONOPOLIZE," THE MEANING OF THE STATUTE.

It has been remarked above that the phrases, "restraint of trade" and "monopolize," have each two significations in the common law,—a broader, including legal and illegal restraint and monopoly, and a narrow and invidious and highly elaborated meaning, including only certain forms of restraint and monopoly obnoxious to public policy. Such broader and narrower uses of a term in the law is very common. According to the case the court will apply the one or the other.

It is really immaterial to the defendants in this case to consider whether the broader or the narrower sense of these terms in the law is to be taken; whether the statute contemplates all restraints and all monopolies,—lawful or unlawful at the common law,—or only such restraint or monopoly as was unlawful at the common law,—since in either sense of the term the restraint or monopoly was contractual, and there is nothing of the sort in the indictment, and since he adoption of the broader meaning would justify, as will shortly be shown, the widespread popular suspicion of unconstitutionality of the act. The defendants could ask nothing better. They propose, however, to present their view of the statute. Their view is that the terms "restraint" and "monopolize" are used in the statute in their narrower and obnoxious meaning, and that the sole operation of the act, therefore, is to import into the federal jurisprudence, civil and criminal, the technical condemnatory principles of the common law (civil and criminal, respectively) in respect of restraint of trade and monopoly, in the narrower and invidious sense of those words, and pos- [628] sibly to extend those principles slightly beyond the realm of "trade" into the outlying zones of "commerce," or, in other words, that the statute operates precisely like most other federal illegalizing or penal statutes, merely to bring within the federal jurisdiction, to the extent of the federal constitution, principles of illegality and criminality already in full operation in the states and in the state courts.

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THE FOREGOING THE ONLY PRACTICAL CONSTRUCTION.

The statute, read literally, punishes all combinations, all contracts, in restraint of interstate or international commerce, without exception; all conspiracies in restraint of such commerce; all monopolizing, all attempts at monopolizing; all combinations and all conspiracies to monopolize any part of such commerce. Its language is sweeping and unqualified. But at the date of the passage of the act there existed, under constitutional protection, vested rights of property and of personal liberty, dependent for their existence upon a complete interstate monopoly and restraint. There were vested patent and copyright rights, not only the rights of patentees and copyright holders, but, as necessarily incident thereto, countless derivative rights of absolute monopoly and restraint. *Gaylor* v. *Wilder*, 10 How. 477, 494; *Machine Co.* v. *Morse*, 103 Mass. 73; Gray, J., *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 53, 11 Sup. Ct. Rep. 478.

Existing rights of this character, both principal and derivative, although born of federal statute, are none the less rights which congress cannot disturb. *U. S.* v. *Burns*, 12 Wall. 246; *Cammeyer* v. *Newton*, 94 U. S. 225; *James* v. *Campbell*, 104 U. S. 356. There are also common-law contract rights which it is beyond the power of congress to impair. *Railroad Co.* v. *Richmond*, 19 Wall. 589.

An attempt to disturb such rights would be unconstitutional; and a statute ought, if possible, to be so construed as to make it constitutional. *Presser* v. *State of Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 580; *Parsons* v. *Bedford*, 3. Pet. 433; *Brewer* v. *Blougher*, 14 Pet. 178; *Supervisors* v. *Brogden*, 112 U. S. 261, 5 Sup. Ct. Rep. 125; *U. S.* v. *Central Pac. R. Co.*, 118 U. S. 235, 6 Sup. Ct. Rep. 1038.

Congress could not, therefore, have intended to use the words of the statute in their broad, literal sense.

But a further exclusion must be made. Even in matters not protected by the constitution, as rights of property or liberty, there are nevertheless many forms of restraint of trade, and many forms of monopoly, which the law recognizes. Under this head come many legal and partial restraints, which, by reason of their legal and partial character, are viewed as not in conflict with the policy of the law, and therefore were, at the time of the passage of the act, legal. For example, traders may lawfully allot themselves exclusive territory, (*Wickens* v. *Evans*, 4 Car. & P. 359,) or otherwise agree to "equalize" business, (*Collins* v. *Locke*, L. R. 4 App. Cas. 674,) or to restrain an unreasonable and ruinous competition, (*Mogul Steamship Co.* v. *McGregor, Gow & Co.*, L. R. [1892] App. Cas. 25.)

The test, always, is whether a given restraint is reasonable or not. Assuming that congress had power to change this, and to make all such restraints and monopolies, in so far as they were not constitutionally protected rights of property, illegal and penal, it is perfectly plain that congress meant no such thing. If congress had power to make it illegal and penal for a small trader engaged in local interstate commerce to sell out his little business, and to bind himself not to renew it within 20 miles, congress certainly did not intend to do anything of the sort. Nor did congress intend to interfere at all with most of those restraints and monopolies which in the statutes have always been regarded as right and legal, such, for example, as an agreement of the publisher of an edition de luxe to limit the number of copies; or of an author not to publish a rival text-book; or of a partner, to give his exclusive attention to firm business; or of the owner of a trade secret, looking to the preservation of his secret. These

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and many other similar agreements would be prohibited by this statute if the broad construction were given to the term, "restraint of trade or commerce." It is patent that congress meant nothing of the sort.

[629] It is plain, then, that congress did not intend to cover all restraints and monopolies of interstate trade. Certain restraints and monopolies must be eliminated as being vested rights; and others, as plainly outside the intention of congress. But how is the line of elimination to be drawn? Not arbitrarily, by the courts, but by rules of law, if at all. The only rules of law that can be invoked are the foregoing rules of interpretation, limiting the statute (a) to contractual restraint and monopoly; and, (b) further, to such contractual restraint and monopoly as were already illegal or criminal at the common law.

THIS CONSTRUCTION ADOPTED IN THE LEGISLATION OF MANY STATES.

The act in question is the result of a popular agitation against the development of the modern "trust."—an agitation which, since 1888, has led to the passage of similar statutes in many states. It is proper to refer to these statutes, as throwing light upon the probable intent of congress in the passage of this act. *Platt* v. *Railroad Co.*, 99 U. S. 48. An examination of these statutes shows that they are in the main declaratory of the common law. As we have seen, at common law, contracts to limit competition, unduly raise prices, or reduce production, were illegal. These statutes, in terms, simply extend this principle to combinations or conspiracies to make such contracts, the object being to get around the practical difficulty of proving an actual binding contract to do these acts. In view of the secrecy surrounding "trusts," this difficulty had become a great obstacle in the way of justice. These acts simply make illegal any combination organized for the purpose of making such contracts, whether the contracts are completed or not. But in almost all it is expressly stated or implied that it is combinations proceeding by way of contract, not combinations using fraud or violence, that are within the contemplation of these statutes. The conspiracies to commit frauds or crimes were punishable by the common law of such states. The statutes referred to are: Laws Ala. 1890–1891, c. 202; Laws Ill. 1891, p. 206; Laws Iowa, 1890, c. 28; Laws Kan. 1889, c. 257; Laws La. 1890, No. 86; Laws Me. 1889, c. 266; Laws Mich. 1889, c. 225; Laws Minn. 1891, c. 10; Laws Miss. 1890, c. 26; Laws Neb. 1889, c. 69; Laws N. Y. 1892, c. 688, § 7; Laws N. C. 1889, c. 374; Laws S. D. 1890, c. 154; Laws Tenn. 1891, c. 218; Laws Tex. 1889, c. 117.

The act of July 2, 1890, intends, in its concise wording, to accomplish what the above statutes set forth at length, i. e. not to extend the range of contracts already illegal at common law as in restraint of trade, but to punish combinations aiming to restrain interstate trade by similar contracts.

EXCEPT ON DEFENDANTS' CONSTRUCTION, RANGE OF STATUTE ALMOST UNLIMITED.

It is a general rule of criminal law that one who is engaged in an undertaking unlawful in itself is criminally liable, not only for direct results of his action, but for results naturally flowing therefrom, indirect and uncontemplated. If A. joins B. in robbery, and B. uses such violence as to cause death, A. and B. are both liable for murder.

It is another general rule of criminal law that, where persons are guilty of a given offense, they are also guilty of a criminal conspiracy to commit that offense, and that the conspiracy is not merged in the completed offense.

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It follows from these two principles that, if two or more persons join in the commission of an act of an intrinsically unlawful character, they are criminally liable—First, for the act which they intend, and which they commit; second, for a conspiracy to commit that act; third, for indirect results; and, fourth, for a conspiracy to commit natural, although unintended, results. It follows that if two or more persons commit an act of murder, robbery, forgery, shop-breaking, store-burning, champerty, or maintenance, which in fact has a natural, although unintended, result of interference with interstate commerce, they are liable criminally for a conspiracy to interfere with interstate commerce, if the statute broadly covers conspiracy merely to interfere with it.

[630] In most serious offenses, more persons than one are involved, and a large proportion of the serious crime, more or less directly, and often quite closely, affects interstate commerce. If, therefore, "restraint" of interstate trade and commerce in this statute means broadly interference with it, it follows that this statute operates to bring within the federal jurisdiction, in the guise of "conspiracy," a very large proportion of all the serious crime within the states.

Furthermore, where congress takes jurisdiction of a given range of crimes, its jurisdiction is exclusive of that of the states. Where it takes jurisdiction, not strictly of the crimes, but of a federal aspect of the crimes, then acts may be punished twice,—once, as a breach of state law; again, as a breach of federal law. It follows, therefore, from the government's theory of this statute, either that this statute has divested the states of jurisdiction of conspiracy in a great field of the criminal law, relating to murders, etc., or else that ordinary offenders are now liable to be punished twice,—once in the state courts, for the completed act, or for conspiracy to commit it; a second time, under this statute, in the federal courts, for conspiracy to commit it.

These singular results of the government's theory of the statute sufficiently condemn that theory. For a similar course of reasoning by the supreme court upon a question of constitutionality, see *U. S.* v. *Harris*, 106 U. S. 629, 642, at page 643, 1 Sup. Ct. Rep. 601, at pages 612, 613.

QUESTION OF CONSTITUTIONALITY.

THE DEFENDANTS' FOREGOING CONSTRUCTION ESSENTIAL TO CONSTITUTIONALITY, FROM SEVERAL POINTS OF VIEW.

If a federal statute undertakes to include, in one indiscriminate condemnation, classes of acts which congress can constitutionally punish, and classes of acts which congress cannot constitutionally punish, it is unconstitutional and void as to both classes of acts. *U. S.* v. *Reese*, 92 U. S. 214; *U. S.* v. *Harris*, 106 U. S. 629, 642, 1 Sup. Ct. Rep. 601; *Baldwin* v. *Franks*, 120 U. S. 678, 7 Sup. Ct. Rep. 656, 763; *Trade-Mark Cases*, 100 U. S. 82; *Virginia Coupon Cases*, 114 U. S. 270, at page 304, 5 Sup. Ct. Rep. 921, 922; *Leloup* v. *Port of Mobile*, 127 U. S. 647, 8 Sup. Ct. Rep. 1380. "It would certainly be dangerous," say the supreme court, by Waite, C. J., in *U. S.* v. *Reese*, 92 U. S. 214, at page 221, "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside, and say who could be rightfully detained, and who should be set at large."

In other words, when congress enters a given field of legislation, over which it has partial power, it must specify in its legislation what part of the field it proposes to occupy, and the part so specified must be wholly within its constitutional reach.

It goes without saying that a statute cannot be saved from the

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operation of this rule by construction, merely by reading into it the words, "this statute to operate so far only as it can constitutionally operate." Such a construction would nullify the rule.

It is true that there may be a federal statute, in part constitutional, in part unconstitutional, of which the constitutional part may stand, while the unconstitutional part falls. It is necessary, however, to the operation of this rule, that the constitutional and the unconstitutional parts be capable of verbal separation, so that each may be read by itself. *Baldwin* v. *Franks*, 120 U. S. 678, at page 686, 7 Sup. Ct. Rep. 656, 763; *U. S.* v. *Reese*, 92 U. S. 214, at page 221.

At the date of the passage of this act, there existed numerous vested rights, of lawful restraint and monopoly, constitutionally protected,—among them, patent, copyright, and other monopoly rights, and their derivative rights of lawful restraint; particularly referred to above,—all requiring for their existence an interstate operation. The letter of the statute covers all these rights. If, when properly construed by the rules of statutory interpretation, it still covers them, it is unconstitutional and void. It cannot be construed down, as we have seen, by the easy device of reading into it the words, "this act to operate only so far as it is constitutional." Some other narrowing rule of construction must be invoked to save it. But the only rules which can [631] be invoked are the rules suggested above. The only way, therefore, to make this statute constitutional, is to read its words and phrases as including, in their civil aspect, only acts already unlawful in the states, and, in their criminal aspect, only acts already criminal in the states.

The defendants' counsel have no call to argue that the statute is constitutional. But it is familiar law that, when a statute lacks literal sufficiency merely by being terse and elliptical in expression, the courts may read words into it to narrow or enlarge it. *U. S.* v. *Kirby*, 7 Wall. 482; *U. S.* v. *Carll*, 105 U. S. 611, cited above. And a statute ought, of course, if possible, to be so construed as to make it constitutional. *Presser* v. *State of Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 580; *Parsons* v. *Bedford*, 3 Pet. 433; *U. S.* v. *Coombs*, 12 Pet. 72; *Brewer* v. *Blougher*, 14 Pet. 178; *Supervisors* v. *Brogden*, 112 U. S. 261, 5 Sup. Ct. Rep. 125; *U. S.* v. *Central Pac. R. Co.*, 118 U. S. 235, 6 Sup. Ct. Rep. 1038.

The defendants' foregoing construction is essential to constitutionality from another standpoint.

Throwing out of consideration, for the moment, those lawful monopolies and restraints which are vested, and constitutionally protected, there are, we have seen, numberless lawful restraints of trade, necessarily involving interstate trade and commerce, all of which it is absurd to suppose that congress intended to cut off. To interpret the statute as cutting them off would be to make a new statute. If, among those restraints, not all of which congress intended to cut off, the statute provides no line between those which it does and those which it does not mean to cut off, the statute is unconstitutional for vagueness in undertaking to delegate its legislative powers to the courts. *U. S.* v. *Cruikshank*, cited above.

From still another point of view the statute, except upon the defendants' foregoing construction of it, is unconstitutional.

Congress cannot punish all acts of interference with interstate commerce, however remote. It is only acts having a proximate relation to a head of constitutional power that congress can take cognizance of. But, as has been stated, the line between federal and state power is in almost every direction an arbitrary line. The question of proximity or remoteness to the federal right is a matter of degree. This is peculiarly true in interstate commerce. The

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line between the federal and the state jurisdiction is an arbitrary and fluctuating line, and the highest courts are constantly divided upon it. The line fixed by the breaking of an original package, although a practical line, is a purely arbitrary line. The constitutional power of congressional legislation in interstate commerce begins with a vanishing line which ends in state commerce. At some point upon that line, in each class of transactions, must be fixed an arbitrary point between interstate and state commerce. Technical "restraint of trade" and "monopoly," in the unfavorable senses of those words, would be within the interstate power of congress; but not all interference with interstate trade or commerce would be within the constitutional power of congress, because it would be at the state end of the vanishing line. If the statute, when properly construed, itself provides no way of fixing the field within which it proposes to act, but undertakes to cover all interference with interstate commerce, then it covers such interference as is too remote for federal action, as well as that which is proximate. It embraces, therefore, with matters which congress can constitutionally deal with, matters which it cannot constitutionally deal with, and therefore follows under the constitutional principle now being discussed. The statute can be interpreted out of vagueness, and too great generality of reach, into constitutionality, only by restricting it to technical, contractual restraint of trade, and technical monopoly, in the unfavorable senses of those words.

It is further essential to the constitutionality of the statute that there be read into it the requirement of a specific intent to invade interstate commerce, as such, and knowledge of its character as interstate commerce, in so far as such knowledge is essential to this conscious intent.

It has been stated above that, by the ordinary rules of the criminal law, persons are criminally liable, not only for direct, but for indirect, and even uncontemplated, natural results of their action, and also for conspiracy to commit such indirect and uncontemplated results. A mere provision in a statute, or allegation in an indictment, therefore, of a conspiracy to do a certain thing, [632] does not necessarily require or imply actual knowledge, or a conscious, specific intent to do that particular thing. If two men, engaged in a plan of robbery, commit murder, without intending to commit it, and murder is a natural, although uncontemplated, result of their plan of robbery, they are guilty, within the meaning of the law, of a conspiracy to commit murder. This statute, therefore, taken literally, covers all cases where persons (at least when engaged in an act malum in se) reach, without knowing it, and without contemplating it, a result which amounts to restraint or monopoly of interstate trade or commerce, in whatever sense "restraint" and "monopoly" be taken. But most acts of serious wrongdoing are committed by two or more participants, and a large proportion of the serious crime more or less closely affects interstate commerce. It follows, therefore, that unless there be read into the statute a requirement of a specific intent of discrimination or attack upon federal rights, as such, every instance of robbery, burglary, murder, theft, shop-burning, storebreaking, champerty, or other act malum in se, in which there are two or more participants, which has the result, although uncontemplated, of restraining or monopolizing interstate commerce, is brought, by the act within the federal jurisdiction, under the guise of conspiracy, since every such joint act implies a conspiracy to commit it, and the conspiracy is not merged in the completed act. Without the requirement of intent and knowledge, therefore, a large proportion of the serious crime of the country may be punished under this

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statute, and possibly is brought by it within the exclusive jurisdiction of the federal courts. Such a range of the statute would be enormously extended by the government's theory of the loose meaning of the phrase, "restraint of trade," and "monopoly." Under that meaning, and under the principles stated above, no limits could be set to the extension of federal criminal jurisprudence effected by this act.

This reasoning forces us to the conclusion, either that the statute is unconstitutional, or that a requirement of knowledge and specific intent to invade federal rights must be read into it. *U. S.* v. *Harris*, 106 U. S. 629, 1 Sup. Ct. Rep. 601; *U. S.* v. *Fox*, 94 U. S. 315; *U. S.* v. *Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35; *Logan* v. *U. S.*, 144 U. S. 263, 12 Sup. Ct. Rep. 617.

In order to save the act in question, we must then read "conspiracies in restraint of trade," etc., as if written, "conspiracies to restrain trade," etc., making an essential element of the crime an intention on the part of the criminal to restrain interstate commerce. It is evident that such was the intention of congress. Section 2 of the act reads, "conspiracy to monopolize," showing that an intention to monopolize is an element of the crime. It is not probable that congress intended to give a wider scope to section 1. The natural expression would be "conspiracy to restrain." The fact that congress has departed from this natural form of words, and has used the term, "conspiracy in restraint of trade," etc., is accounted for by the reasoning of the first part of this brief, namely, that the words, "in restraint of trade," were used because of their well-known technical meaning.

ASIDE FROM QUESTION OF CONSTITUTIONALITY, KNOWLEDGE ESSENTIAL.

A fifth limitation must be put upon the words of the statute. In terms, it covers acts of the character described, whether done with guilty knowledge or not. There are, indeed, petty police offenses in which a knowledge of the facts is not an essential to criminality, and occasionally a statute creating a serious crime has been held to dispense with the requirement of knowledge. Cases of the latter class, however, are few and exceptional, and have been made, as a rule, against a strong dissent, and against the weight of authority upon similar statutes; and invariably, where the requirement of guilty knowledge is held to be dispensed with by a statute, the decision is rested, not upon any principle of criminal law as to dispensing with knowledge, but upon a mere construction of the particular statute, in view of supposed requirements of public policy, and in all cases upon the feasibility, in the particular matter in question, of obtaining all necessary knowledge, and the propriety, therefore, in that particular field of action, of imposing upon one about to act the responsibility of inquiring into the facts, and of acting at his peril. See, in illustration of this, the decisions and the opinions in *Com.* v. *Mash*, 7 Metc. (Mass.) 472, as compared with *Squire* v. *State*, 46 Ind. **[633]** 467, and *Reg.* v. *Tolson*, 23 Q. B. Div. 168, 16 Cox, Crim. Cas. 629. See, also, *Reg.* v. *Bishop*, 5 Q. B. Div. 259, 14 Cox, Crim. Cas. 404, and the curious series of recent English cases upon the subject of knowledge of age in abduction. *Reg.* v. *Olifier*, 10 Cox, Crim. Cas. 402; *Reg.* v. *Hibbert*, L. R. 1 Cr. Cas. 184, 11 Cox, Crim. Cas. 246; *Reg.* v. *Mycock*, 12 Cox, Crim. Cas. 28; *Reg.* v. *Prince*, L. R. 2 Cr. Cas. 154, 13 Cox, Crim. Cas. 138; *Reg.* v. *Packer*, 16 Cox, Crim. Cas. 57.

The opinions, and the conflicts of opinion, in most of the cases cited above, afford a striking illustration of the subtleties into which one is necessarily drawn in contending for an exceptional dispensation from the general common-law requirement of at least constructive knowledge of fact. The foregoing cases (which are all exceptional, and avowedly stand upon highly exceptional grounds) only serve to emphasize the fact of the general, and almost universal requirement in the criminal law of knowledge of the facts. Opinions in support of a dispensation with the requirement of knowledge are invariably apologetic in language.

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To the effect that the common law (unless possibly in certain forms of nuisance, *Rex* v. *Medley*, 6 Car. & P. 292; *Reg.* v. *Stephens*, L. R. 1 Q. B. 702) invariably requires knowledge of the facts as an essential of guilt, and that in statute offenses, whether adoptive of common-law offenses, or creative of new crimes, a requirement of knowledge is to be read into the statute, if not there, see *U. S.* v. *Carll*, 105 U. S. 611; *Com.* v. *Filburn*, 119 Mass. 297, (cited with approval in *U. S.* v. *Carll*, cited above;) *Com.* v. *Stebbins*, 8 Gray, 492; *Reg.* v. *Twose*, 14 Cox, Crim. Cas. 327; *Rex* v. *Hall*, 3 Car. & P. 409; *Levet's Case*, 1 Hale, P. C. 42; *Reg.* v. *Langford*, Car. & M. 602, 605.

This statute was never intended to punish persons who join together, under an innocent mistake of fact, to enforce what they believe to be a rightful exclusive title in them. If the purchaser of an alleged trade secret believes it to be in fact a secret, and believes that an executor or trustee who sold it to him had a right to sell it, and, if he attempts thereunder to restrain trade by a limiting contract, or to monopolize it, he is not within this statute, even though mistaken in his facts. If he is within it, then an indictment will lie against every patentee who attempts to enforce his patent, if in fact his patent is invalid through priority or some other fact unknown to him; and no patentee can attempt to enforce his rights except at his peril, and at the risk of on infamous punishment in case he turns out to have been ignorant of some prior use, which he could not by the strictest diligence have ascertained, or have supposed to have been made.

It is to be observed that if the knowledge required under the statute now in question is almost necessarily a knowledge of a conclusion of fact, or of mingled law and fact, namely, a knowledge of right and title, or of a lack of right and title, knowledge of this character comes as fully within the general rule as to knowledge as does knowledge of pure and simple fact. In *Com.* v. *Stebbins*, *Reg.* v. *Twose*, *Rex* v. *Hall*, *Levet's Case*, all cited immediately above, the matter of "fact" was a conclusion of law and fact; namely, a question of title.

It is to be further observed that the knowledge required is not knowledge that the defendants are combining and acting in concert, but knowledge of the facts which make their combining or acting in concert penal. Persons acting in concert, but acting innocently, by reason of ignorance of facts, necessarily know that they are acting in concert; but that is not the knowledge which the law requires.

Knowledge, furthermore, under this statute, must comprise knowledge, also, that the trade or commerce proposed to be restrained or monopolized is of a lawful character, and lawful in the hands of the rivals who carry it on, or are to carry it on, and knowledge that the commerce to be interfered with exists, or is to exist.

ON GENERAL PRINCIPLES, WRONGFUL INTENT ESSENTIAL.

One thing more must be read into this statute; namely, intent to fix, control or raise prices to the injury of the public, or in some way to injure or defraud the public.

[634] In the case of the monopoly counts, the requirement would seem to flow from the very meaning of the word "monopolize," for that word, as used in the criminal law, it would seem, involves a wrongful intent, just as "uttering."

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As to the requirement of an intent to injure and defraud the public, and by raising of prices, in all trade offenses, see authorities.

Indeed, the requirement of a guilty intent, or, as it is technically characterized, the "mens rea," in all serious offenses, (not of a highly exceptional character, like *Rex* v. *Ogden*, 6 Car. & P. 631; *Reynolds* v. *U. S.*, 98 U. S. 145; *Reg.* v. *Downes*, 13 Cox, Crim. Cas. 111,) is so nearly universal, whether specified in a statute publishing the offense or not, that it is to be read, as a matter of course, into every statute, unless there are highly exceptional grounds of public policy, in a particular offense, for dispensing with it.

AN INTENDING BENEFICIARY ESSENTIAL.

It is a further essential, under the statute, that the contemplated restraint should be a restraint operating and intended to operate, by the very terms and operation of the restraint, to the benefit of some specific person or persons. The statute punishes, not interference with trade, but a "restraint" of trade, and "restraint of trade," ex definitione, implies a conscious beneficiary. So the crime of monopoly implies a person who is consciously to monopolize. He does not monopolize who exterminates trade, but only he who contractually gathers trade into his own hands, or into the hands of some one in concert with him. There can be no monopolizing without an intentional monopolizee.

SUMMARY OF THE ESSENTIALS OF THE CRIME.

The statute, when properly construed, requires, therefore, in conspiracy under it:

1. That the trade or commerce aimed at be technically interstate commerce.

2. That the persons or things dealt with consciously be dealt with in their federal, and not in their state, aspect.

3. That a contemplated restraint or monopoly be a contractual restraint or monopoly; that is, that the conspiracy must consist in contract, or aim at the making or the enforcement or the furtherance of contracts.

4. That the contemplated restraint or monopoly be a restraint or monopoly, excessive in degree, and unlawful at the common law.

5. That the trade or commerce proposed to be restrained or monopolized be a lawful trade or commerce.

6. That the defendants have (a) knowledge that they or their privies have no patent or other exclusive title or right to the trade or commerce proposed to be restrained or monopolized; (b) knowledge that the trade or commerce proposed to be restrained or monopolized is unlawful, and lawful to those carrying it on in the given instance; (c) knowledge that the commerce in question is interstate commerce.

7. An intent, by unduly raising prices or otherwise, to injure and defraud the public by the contemplated restraint or monopoly, and an intent to restrain interstate commerce, as such.

8. An intending and conscious beneficiary of the contemplated restraint or monopoly.

THE INDICTMENT.

The indictment avers none of the essentials of crime above set forth, and violates every one of the rules of pleading above cited.

1. The alleged contemplated restraint and monopoly was not contractual restraint or monopoly, but a mere rude and vulgar attack upon trade or traders by force, fraud, libel, and slander.

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2. No count sets forth such means of effecting the proposed conspiracy as, if carried out, would be, in any reading of the statute, a restraint or monopoly of interstate trade or commerce. Some of the counts set forth no means at all, or set forth means so vaguely and generally as to be patently [635] bad in this respect. Those counts which undertake to set forth means entirely fail to bring the persons, matters, and things alleged to have been proposed to be dealt with within the definition of "interstate commerce," or its subjects or instruments, or within the federal or interstate aspect of those persons, matters, or things, as distinguished from their state aspect. It does not follow, because one is engaged in interstate commerce, that every attack upon him, or upon any part of his business, is an attack upon interstate commerce. The attack may be upon him in his aspect as a subject of the state, and upon his matters or things only in so far as they are matters of mere state commerce. The indictment assumes that a person engaged in interstate commerce is exclusively engaged in it, and has no other aspect than that of a person engaged in interstate commerce, and that an interference with him, or with any part of his matters or things, is an interference with interstate commerce. Assuming it to be true that interferences with a person, or with matters or things, concerned in local commerce, may, by their necessary connection with certain interstate commerce, be proximate attacks upon interstate commerce, the connection must be established by specific allegations of the indictment. It is not to be inferred. The indictment in this respect is entirely based upon a fallacy upon which the statutes and indictments were based in *U. S.* v. *Cruikshank*, *U. S.* v. *Harris*, and *U. S.* v. *Fox;* namely, the fallacy that the having a federal aspect brings a person and his matters and things within federal protection in all their aspects.

3. It does not appear by any count of the indictment but that the defendants had, or were acting under some one who had, an exclusive right to all trade and commerce, or all interstate trade and commerce, among the states, at least as against the alleged rivals. The defendants may have had a patent covering the cash registers, if any, in which the corporations named as proposed to be attached dealt, if they did deal, or the defendants, or some one privy with them, may have had exclusive patent license for interstate trade in such registers from the various corporations, or from a patentee under whom all claimed title, or the defendants, or some one privy with them, may have bought out a good will or a trade secret from these corporations, or from some one under whom all parties claimed, covering the cash registers, if any, dealt in by said corporations. An indictment in the same terms as this indictment would lie to-day against every patentee in the country, and his agents; and against Emerson's publisher and legatees; against every one who has bought out a good will; against every owner of a trade-mark; in fact, against everybody who owns anything which is the subject of interstate commerce.

4. It is not averred that the commerce, if any, being carried on, or proposed to be carried on, by said corporations, other than the National Company, was a lawful commerce. It may have been in violation of a limited and lawful contract made by them, of restraint, or of division of territory.

5. The interstate commerce (an essential of this crime, and a jurisdictional essential) is alleged only as a conclusion of law. It leaves it for the prosecutor, and not for the court, to decide whether what the prosecutor considers interstate commerce is "interstate commerce," and of the statute's character, or not. But that "is a question of law, to be decided by the court, not the prosecutor." Waite, C. J., *U. S.* v. *Cruikshank*, cited above.

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6. It is in no count alleged, even as a conclusion of law, that the "trade and commerce * * * between and among the several states" alleged to have been aimed at (granting that it was such) was within that limited class of commerce among the several states which alone the statute covers. As has been suggested above, the phrase, "commerce among the several states," as an expression of language, accurately includes a great deal of commerce which is not within the meaning of the phrase, as used in the constitution, and is even less within the still more restricted meaning of the phrase in the statute. The indictment, therefore, runs counter, in this respect, to the rule of pleading that where a statute covers, in terms, a whole class of things, but really intends only a subdivision of the class, the indictment must bring the things which it alleges within the subdivision. The only way to allege interstate commerce in an indictment is the way attempted in the [636] first four counts of an indictment previously found in this district against these defendants, (No. 1209,) viz. by describing in detail the operations supposed to constitute interstate commerce. In that former indictment the pleader was in this particular on the right track, although his pleaded facts were insufficient to make out interstate commerce.

It is not open to the government to contend that the court can judicially know that there was, or was proposed to be, a commerce "among the several states," of the statutory character, in "cash registers." There are articles in which the court may, perhaps, be said to know, as matter of law, that there is at all times such commerce. With "cash registers" it is different. It is very doubtful if the court can be said to know what a "cash register" is. It is certainly difficult to see how the court can know in what sense the term is used in this indictment. Until lately the only meaning which the phrase would suggest is that of an account book for cash entries. Now, in so far as the indictment may be deemed to refer to books of cash entry, the court cannot know that there was at the time in question interstate commerce, or expected or proposed interstate commerce. Blank cash books may be all manufactured and sold within the legal limits of state commerce. The absence of a specific allegation of interstate commerce, therefore, in this meaning of the term "cash register," would be fatal. If the court should take the expression "cash register" in the indictment in a broader sense, as including both account books and also mechanical contrivances, then the indictment, as will be more particularly contended below, under an appropriate head of this brief, would fail, for indefiniteness; for the defendants ought certainly to be apprised whether it is a commerce in machinery, or a commerce in blank books, that they are charged with attacking. If the court should find, upon the face of the indictment, that the "cash registers" referred to in the indictment are the mechanical devices recently introduced into the market, the court will surely apply, as judicial knowledge, not a fraction, but the whole, of its actual knowledge, and will judicially know that these new mechanical devices profess to exist under letters patent; that the different manufacturers claim under patent rights; and that the questions of free or restricted commerce, and of monopoly or no monopoly, are mere questions of patent controversy,—a field of controversy never contemplated by the act of 1890.

If an indictment were to allege, on the part of the Bell Telephone Company and its officers and agents, a conspiracy to restrain the trade and commerce of all other persons, and to monopolize to themselves and their company the trade and commerce in "Bell telephones," would not the court, if it applied to the indictment judicial knowledge that there are such telephones, and that there is com-

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merce of the statutory character in them, also apply judicial knowledge of the fact of a lawful monopoly, and an exclusive right to commerce in them, or at least a bona fide claim thereto, not to be tried under a penal statute?

These counts present also the defect (which exists in the other counts) of failing to allege that the commerce was proposed to be continued. It is future transactions which a conspiracy contemplates, and there is no allegation that the commerce of these counts was proposed to be continued from and after the time of the alleged conspiracy. It is fatal to a conspiracy indictment that the object of the conspiracy may have been a myth.

7. No count of the indictment has any averment of knowledge or intent. If the offense necessarily involve knowledge and intent, they must be alleged. An indictment, for example, for conspiracy to commit burglary, must aver a conspiracy, not merely to break and enter a dwelling house in the nighttime, but a conspiracy to break and enter with intent to steal.

8. No count alleges a proposed contractual beneficiary of the contemplated restraint or monopoly. It does not appear that the defendants were in the business, or had any control of the business, or that the National Cash Register company was a party to the conspiracy, or knew of it, or would consent to profit by it. It is not made a defendant, although the statute contemplates corporations. It stands, upon the restraint counts, (counts 1 and 2,) as a mere unconscious, passive, proposed beneficiary, without whose acceptance and co-operation and indorsement there can be no restraint. It [637] is not alleged that the defendants conspired merely to extinguish the trade of the other corporations. It appears that they combined, if at all, merely to subordinate their trade to that of the National Company; but, in the absence of averments bringing in the National Company as a willing beneficiary, this restraint would be impossible. The averments of the restraint counts are therefore, in this respect, imperfect, absurd, and impossible.

The crime of monopoly implies a conscious monopolizing. A conspiracy of several men, without any knowledge, to drive all the trade in town into my shop, out of love for me, or out of hatred of my rivals, but without my knowledge, and without benefit to the conspirators, is an unlawful conspiracy, under state laws, against the right of my neighbor to live a peaceful life, but it is not a conspiracy to monopolize. It is not averred here that the defendants were in a position to or expected or intended to monopolize into their own personal pockets. There is a faint hint that the intended monopolizer was the National Company, but only a hint.

Acceptance of a benefit may indeed sometimes be presumed by law; but a corporation, any more than an individual, will not be presumed to have accepted itself into a criminal combination.

It is a universal rule, as to those crimes which consist in contract, or combination, or meeting of minds, that there must be, not a mere fictitious appearance of a meeting of minds, but an actual contract, or other meeting of minds, as in civil transactions.

Where the statute speaks of monopolizing "a part of the trade," it must mean the whole of a specific part; while the word "monopolize" is not to be taken in a mathematically exact sense, requiring that a monopolist of flour should have, or intend to have, every teaspoonful of flour in the United States, it does mean a substantial control of a great part of any one given article, or enough to enable him to dictate to the market. The monopoly alleged in counts 5 to 11 and 15 to 18 is merely a monopoly of the business of five corporations named. It does not appear how much business they did, or what

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proportion it bore to the whole business of the country in cash registers. It is consistent with the indictment that it was extremely trifling, and that to secure the whole of it would not constitute the offense of monopolizing. Men cannot be indicted for combining to monopolize wheat by a mere averment that they combined to monopolize certain wheat when owned by A. B. Nothing essential is to be assumed, in a criminal case. The names of the rival companies sound well, but the court does not know that they did any appreciable amount of business. The defendants, for all that appears in the indictment, are Mrs. Partingtons attempting to sweep back the Atlantic ocean. It should have been shown that the monopolizing the business of the alleged rival companies would have amounted to a monopolizing of the business in cash registers. Moreover, upon the language of these counts, a monopoly may well have been impossible. There is no averment that the National Cash Register Company was to be interfered with, and, for all that appears, it was not known to the transaction. It may well have been entirely vain for the defendants, if they left the National Company free, to attempt to monopolize the cash register business, even if they monopolized the business of the other companies. Perhaps it had 99 per cent. of the whole business. If so, without its co-operation, monopoly would be impossible.

9. This is a patent suit. Congress never intended, under this statute, to try patent controversies to a jury, in a criminal court. An indictment might undoubtedly be so drawn as properly to bring into a criminal case a plain and simple issue, to the effect that the defendants claimed under a patent, but had no pretense, color, or show of a patent, and held no letters patent, and no license under any letters patent. But here some of the counts aver that the defendants justify under letters patent. There is no averment that the patent claim is not valid, and the question raised by these counts must therefore resolve itself into a question of validity, or the construction, or both, of the letters patent. These counts, therefore, seem calculated to launch the court into a controversy before a jury over a complicated tissue of patent questions, which might occupy a long time in trial. This was never intended. When patents appear in an indictment, as an invalid pretense or justification, it **[638]** should be alleged that the claim set up under them is a mere sham claim, and only colorable.

10. The indictment is bad for vagueness and uncertainty. In no count does it approximate to the particularity and certainty required by the courts of the United States, and emphasized particularly in *U. S.* v. *Simmonds*, 96 U. S. 360; *U. S.* v. *Cruikshank*, cited above.

In some of the counts the defendants are simply charged with conspiring to restrain or to monopolize certain commerce. Among what states it was, by whom carried on, or proposed to be carried on, or where or how to be restrained or monopolized, these counts do not disclose. The other counts specify the trade or commerce as being carried on by four corporations named, but where, and among what states, these counts do not disclose. Nor does the character of the "cash registers" appear. Were they machines, or tally boards, or books? Tested by the requirement that the defendants must be sufficiently apprised of the details of the charge against them to enable them to prepare for trial, all the contents are bad. In *U. S.* v. *Simmonds*, cited above, one was charged having "caused and procured" a still to be used. It was held that he was entitled, under the requirements of criminal pleading, to know whom he was charged with having caused or procured to use the still.

11. It is not averred in any count to what extent trade was carried on. Can the court assume, in a criminal case, an appreciable amount of commerce of the statutory character?

Opinion of the Court.

PUTNAM, Circuit Judge.

I do not think there is any constitutional question in this case upon a view of this statute, or upon the face of the indictment. The right of free commerce granted by the constitution (*Crandall* v. *Nevada*, 6 Wall. 35, and the *Case of State Freight Tax*, 15 Wall. 232) permits broad legislation; and in no sense is this statute as broad as the Revised Statutes (section 5508) on the principle of construction applied to the latter in *U. S.* v. *Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35. See *Logan* v. *U. S.*, 144 U. S. 263, 12 Sup. Ct. Rep. 617. There may be practical difficulties in applying the statute in such way as to prevent conflicts with state jurisdiction, but these can only arise on the development of the facts at the trial of a particular case, and even then the court will have the guidance of the supreme court in *Re Coy*, 127 U. S. 731, 8 Sup. Ct. Rep. 1263; *Cross* v. *North Carolina*, 132 U. S. 131, 10 Sup. Ct. Rep. 47; and *In re Green*, 134 U. S. 377, 10 Sup. Ct. Rep. 586. Those cases show that there need not necessarily be a conflict of jurisdiction.

This statute is not one of the class where it is always sufficient to declare in the words of the enactment, as it does not set out all the elements of a crime. A contract or combination in restraint of trade may be not only not illegal, but praiseworthy; as, where parties attempt to engross the market by furnishing the best goods, or the cheapest. So that ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market. And by the well-settled rules of pleading it is not sufficient to allege the means in general language, but, if it is claimed that the means used are illegal, enough must be set out to enable the court to see that they are so, and to enable the defense to properly prepare to meet the charge made against it.

I regard the rule laid down by the supreme court in *U. S.* v. *Hess*, 124 U. S. 483, 8 Sup. Ct. Rep. 571, as applying to this case; and I **[639]** think the case of *U. S.* v. *Simmonds*, 96 U. S. 360, is easily distinguished. If it is not, the later case will, of course, control. In reference to the suggestion of

the counsel for the United States, as to cases at common law alleging conspiracy to prevent a man from pursuing his trade, it is sufficient to say that to conspire to prevent a man from pursuing a trade which he is entitled to pursue is in itself illegal. But the case at bar is not at common law, and the proceedings under this statute are peculiar to the statute. I think the rules laid down in *U. S.* v. *Hess* distinguish this indictment on this point from all the cases and principles of law relied on by the United States.

The allegations of what was done in pursuance of the alleged conspiracy are under this particular statute irrelevant, and cannot be laid hold of to enlarge the necessary allegations of the indictment, and are of no avail. I think it was so conceded at the argument. If not, there is no question about the law. The foregoing considerations dispose of counts 1, 2, 3, 6, 7, 8, 11, 12, 13, 15, 16, and 17.

That the means are alleged with "reasonable precision" in the remaining counts, appears from the practical application of the rules of pleading appropriate to this case made in *U. S.* v. *Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35. Some of the allegations in each count may be insufficient, but these are only surplusage.

Counts 14 and 18 seem sufficient under the second section of the statute, as will appear from what I have to say hereafter. The remaining counts, 4, 5, 9, and 10, are laid under the first section. Counts 4 and 9 allege an intent to hinder and prevent all persons and corporations, except the corporation controlled by the defendants, from engaging in the trade and commerce described in the indictment, while counts 5 and 10 only allege a purpose to destroy the competition of the four corporations named, without setting out any purpose of engrossing or monopolizing the business as a whole, or any like purpose.

The court does not feel at all embarrassed by the use of the words "trade or commerce." The word "commerce" is undoubtedly, in its usual sense, a larger word than "trade," in its usual sense. Sometimes "commerce" is used to embrace less than "trade," and sometimes "trade" is used to embrace as much as "commerce." They are, in the judgment of the court, in this statute synonymous. The

court is well aware of the general rule which has been several times (twice certainly) laid down by the supreme court of the United States, that in construing a statute every word must have its effect, and the consequent presumption that the statute does not use two different words for the same purpose; but this rule has its limitations, and it is a constant practice for the legislature to use synonyms. A word is used which it is thought does not perhaps quite convey the idea which the legislature intends, and it takes another word, which perhaps has to some a little different meaning, without intending to more than make strong the purpose of the expression in the statute.

In the legislation of congress analogous to this under consideration there is a marked case of the use of synonyms. Rev. St. § 5438, **[640]** uses the words "false, fictitious, or fraudulent;" then the words "any false bill, receipt, voucher;" then the words "agreement, combination, or conspiracy;" then the words "charge, possession, custody, or control," mainly synonyms; while section 5440 uses simply the word "conspire." There would be no question that the word "conspire," in section 5440, means all that the three corresponding synonyms, "agreement, combination, or conspiracy," mean in section 5438. Rather as a matter of curiosity than because they particularly impress my mind, I have taken off some other instances. The Massachusetts statute cited in *U. S.* v. *Britton*, 107 U. S. 670, 2 Sup. Ct. Rep. 512, uses the words "secular labor, business, or employment." The words "false, forged, and counterfeited" are used over and over again in *U. S.* v. *Howell*, 11 Wall. 436, 437; "peddler and hawker" are in constant use in criminal law; "drinking house or tippling house" is of frequent use in the statutes; so are "goods and chattels." These are all referred to in Bishop on Statutory Crimes as synonymous. There is also the very special case where the criminal statute contained the words "ram, ewe, sheep, and lamb;" and it was held in *Reg.* v. *McCulley*, 2 Moody, Cr. Cas. 34, that the word "sheep" covered the two preceding words, and they might be rejected as surplusage. Sutherland on Statutory Construction says that words which are meaningless have sometimes been rejected as redundant or surplusage. So in this statute I think

the words "trade or commerce" mean substantially the same thing. But the use of the word "trade" nevertheless is significant. In my judgment, it was probably used because it was a part of the common-law expression, "in restraint of trade," as has been carefully pointed out by the counsel for the defense. This has become a fixed, well-known, common-law expression; and by the rule of interpretation as given again in Sutherland on Statutory Construction (section 253) it has been here used in the sense in which it has been used generally in the law. And these words, "in restraint of trade," lead up directly to what I think is the true construction of this statute on this point.

I think it is useful to analyze the statute. Separating it into parts, we have—First, contract in restraint of trade; second, combination in restraint of trade; and, third, conspiracy in restraint of trade. There can be no question that the second and third parts, as thus put, receive color from the first. Moreover, it is important to note the rule that this whole statute must be taken together. The second section is limited by its terms to monopolies, and evidently has as its basis the engrossing or controlling of the market. The first section is undoubtedly in pari materia, and so has as its basis the engrossing or controlling of the market, or of lines of trade. The sixth section also leads in the same direction, because it provides for the forfeiture of property acquired pursuant to the conspiracy. Undoubtedly the word "conspiracy" in that section has reference to the same subject-matter as in the first. If the intention of the statute was that claimed by the United States, I think the natural phraseology would have been "to injure trade," "to restrain trade."

[641] We are now at the point where the paths separate. Careless or inapt construction of the statute as bearing on this case, while it may seem to create but a small divergence here, will, if followed out logically, extend into very large fields; because, if the proposition made by the United States is taken with its full force, the inevitable result will be that the federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, by strikes or boycotts, and by

every method of interference by way of violence or intimidation. It is not to be presumed that congress intended thus to extend the jurisdiction of the courts of the United States without very clear language. Such language I do not find in the statute. Therefore I conclude that there must be alleged in the indictment that there was a purpose to restrain trade as implied in the common-law expression, "contract in restraint of trade," analogous to the word "monopolize" in the second section. I think this is the basis of the statute. It must appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market, and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise.

Something has been said in this connection touching the debates in congress. It is apparently settled law that we cannot take the views or purposes expressed in debate as supplying the construction of statutes. In *U. S.* v. *Union Pac. R. Co.*, 91 U. S. 72–79, and elsewhere, the supreme court has laid down this rule. But this does not at all touch the question whether or not one can gather from the debates in congress, as he can from any other source, the history of the evil which the legislation was intended to remedy. The debates on this point are very instructive; but they fail to point out precisely what incidents or details of the great evil under consideration were to be reached by this legislation.

What I have already said disposes of counts 5 and 10, which do not allege any purpose except to destroy the competition of four corporations named; and they leave for consideration only the counts 4 and 9, which do allege a purpose of engrossing, monopolizing, or grasping the trade in question. Such being the case, acts of violence and intimidation may be alleged as means to accomplish the general purpose. Instead of lying outside of the statute, they may aggravate the offense. They are within the logic and spirit of the statute, which are not to be defeated by distinctions which its letter does not suggest to the ordinary mind. Violence and intimidation are as much within the mischief of the statute as negotiations, contracts, or purchases. The former are often used to compel the latter. This line of reasoning

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applies to both the first and second sections, and finds a sufficient place for every word in each. I find in all the counts which I allow to stand, allegations of an intent to engross, monopolize, and grasp, and of means clearly unlawful, and adapted to accomplish this intent.

[642] I have examined all the cases which have been cited to me as referring to this statute, and I believe that counsel have cited me every case which has been decided in connection with it; but none of them meet the issue which is raised here. Therefore all the expressions in them supposed to touch this case are to be regarded as mere dicta. The result is that counts 4, 9, 14, and 18 stand, and the others are quashed.

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[851] DUEBER WATCH CASE MANUF'G CO. *v.* E. HOWARD WATCH & CLOCK CO. ET AL.[a]

(Circuit Court, S. D. New York. May 22, 1893.)

[55 Fed., 851.]

COMBINATIONS IN RESTRAINT OF TRADE—ACTION FOR DAMAGES—PLEADING.—An action to recover damages alleged to have been caused by acts done in violation of the statute prohibiting monopolies and combinations in restraint of trade (26 Stat. 209) cannot be maintained when the complaint fails to show that plaintiff is engaged in interstate commerce, and no such showing is made by an averment that plaintiff is engaged in "manufacturing watch cases throughout all the states of the United States and in foreign countries."[b]

SAME—CONSTRUCTION OF STATUTE.—An agreement by a number of manufacturers and dealers in watch cases to fix an arbitrary price on their goods, and not to sell the same to any persons buying watch cases of plaintiff, is not in violation of the statute; and a complaint which, on the last analysis, avers only these facts, without averring the absorption or the intention to absorb or control the entire market, or a large part thereof, states no cause of action.

At Law. Action by the Dueber Watch Case Manufacturing Company against the E. Howard Watch & Clock Company and others to recover damages alleged to result from an illegal conspiracy to destroy plaintiff's trade. Defendants demur to the complaint. Demurrer sustained.

[a] Affirmed Circuit Court of Appeals, Second Circuit (66 Fed., 637). See p. 421.

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Statement of the case.

Statement by COXE, District Judge:

The complaint alleges that prior to November 16, 1887, the plaintiff was engaged in manufacturing watch cases throughout all the states of the United States and in foreign countries, employing a large number of skilled artisans who were and are able to produce 25,000 watch cases per month. That prior to said date the plaintiff had a ready market for its goods throughout the United States and Canada, and realized a profit of, at least, $175,000 per annum. That on November 16, 1887, the defendants, who were and are engaged in selling watches and watch cases, mutually agreed, and notified the watch dealers throughout the United States and Canada, including some of the plaintiff's customers, "that they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever who thereafter should buy or sell any goods manufactured by **[852]** this plaintiff." That upon being informed of said agreement a large number of dealers who had previously purchased plaintiff's goods withdrew their patronage and ceased to deal in plaintiff's goods. That the defendants refused to sell their goods to plaintiff's customers, giving as a reason that the said customers dealt in plaintiff's goods and defendants declined to have any business relations with them unless they would agree not to deal in the plaintiff's goods. That prior to November 16, 1887, the defendants agreed among themselves that they would maintain an arbitrary fixed price for their goods, and pursuant thereto they have fixed and maintained an arbitrary price which the public must pay for their goods. That said agreement of November 16, 1887, was for the sole purpose of compelling plaintiff to join with the defendants in their previous agreement to fix and maintain arbitrary prices for watch cases. That all of said acts of the defendants were for the purpose of establishing a monopoly in watch cases, their object being to crush competition and drive the plaintiff from the business, unless he joined the conspiracy. That the defendants by their agreements intended to injure and impoverish the plaintiff and deprive it of all profits and break up its business. That the defendants have used the extended influence acquired by reason of the combination formed between them to prevent persons who naturally would purchase plaintiff's watch cases from dealing with the plaintiff and have threatened said persons that if they bought plaintiff's goods they would sell them no goods and give them no credit. That such conduct and threats effected a complete boycott and resulted in the ostracism of plaintiff from the trade, preventing the lawful and ordinary competition in business which plaintiff had a right to enjoy. That after the passage of the act of July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," the plaintiff would have regained its customers and re-established its business had not the defendants since that date ratified, confirmed, renewed and continued in force the said contracts, agreements and combinations and served notice thereof upon all the dealers in plaintiff's goods. That by reason of said renewals and continued threats said dealers have been compelled to refuse to purchase plaintiff's goods to its damage in the sum of $150,000. Judgment is demanded for three times this sum, pursuant to section 7 of said act.

The defendant above named demurs on the ground that the court

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has no jurisdiction of the defendant or the subject-matter of the action, and, on the further ground, that the complaint does not state facts sufficient to constitute a cause of action. The sections of the act of July 2, 1890, which are drawn in question, so far as it is necessary to quote them, are as follows: "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc. "Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Wilber & Oldham and *Robert Sewell*, for plaintiff.

Sullivan & Cromwell, *W. J. Curtis*, and *Edward B. Hill*, for defendants.

COXE, District Judge, (after stating the facts as above.)

An examination of the complaint, in the light of the provisions of the act of July 2, 1890, and the decisions construing that act, leads to the conclusion that the complaint, in its present form at least, cannot be sustained. The statute makes it illegal to enter into [853] a contract or conspiracy in restraint of interstate trade and also to monopolize, or attempt to monopolize, or combine or conspire with others to monopolize, such trade. There is no allegation in the complaint that the plaintiff is engaged, or has at any time, since the passage of the act, been engaged in interstate trade and commerce. There is an allegation that the plaintiff is engaged in the business of manufacturing watch cases throughout all the states of the United States and in foreign countries. This allegation is probably a mistake of the pleader, but if it were true it would not be a compliance with the requisites of the law. A corporation may have an operating manufactory in every state of the Union and yet not be engaged in interstate commerce. There is no allegation that the defendants are, or that any of them is, or was, engaged in interstate trade, or that the articles made by them are used in such trade, or that the rights of the general public have been invaded, or

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interstate commerce injuriously affected by any of the acts of the defendants as described in the complaint. There is no allegation that the defendants absorbed or intended to absorb the entire trade in watch cases, or that they controlled the market, or any considerable part thereof, or that they were even a majority of the watch manufacturers of the United States, or that the prices fixed by them were more than the goods were worth or in any respect unfair. There is no statement that the goods made by the defendants were made by them exclusively, or that such goods were indispensable to plaintiff's customers; non constat, such goods could have been furnished by the plaintiff or dealers other than the defendants.

What, then, is the accusation? When analyzed it will be found that the illegal acts charged against the defendants are, first, that they agreed to maintain an arbitrary fixed price for their goods; second, that they agreed not to sell their goods to plaintiff's customers; and, third, that they notified plaintiff's customers of their determination. It is only necessary to examine the first and second of these allegations, for it is manifest that if the agreements made by the defendants were lawful it could not be unlawful to notify the world of their existence. Both of the alleged agreements were made before July 2, 1890, the result being that the plaintiff, before the passage of that act, lost its customers. The only acts of the defendants which by any possibility can be construed as a violation of the statute were the ratification and renewal of these agreements after its passage. The complaint alleges that but for such renewal the plaintiff would have regained all its old customers.

The first question then is, does it constitute a violation of the statute for two or more dealers to fix an arbitrary price for their goods? No authority has gone to the extent of holding that such a transaction, in the absence of other facts, is illegal.

The second question is: Is it an illegal act, within the provisions of the law in question, for two or more traders to agree among themselves that they will not deal with those who prefer [854] to purchase the goods of another designated trader in the same business? Many perfectly legitimate rea-

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sons might be suggested for such an agreement. It is not a combination to monopolize; at least there is no statement of facts tending to show that it produced a monopoly in the present case. Indeed, it would seem that it must have had a contrary effect. There was surely nothing to prevent the plaintiff from supplying its customers with those things which the defendants declined to sell them, and thus enlarge its trade and stimulate competition. The plaintiff was perfectly free to engage in every branch of the watchmaking business. So were all others. The plaintiff's customers were free to purchase of the plaintiff, of the defendants, or of any other manufacturer. The contract of 1887 was not one in restraint of trade within any of the definitions or authorities which have been examined, and it is thought that the defendants' acts are not reached by any section of the law in question. The construction contended for by the plaintiff would render each of the defendants liable to an indictment not only, but would make unlawful almost every combination by which trade and commerce seek to extend their influence and enlarge their profits. It would extend to every agreement where A. and B. agree that they will not sell goods to those who buy of C. It would strike at all agreements by which honest enterprise attempts to protect itself against ruinous and dishonest competition.

It is thought that these views are in conformity with the decisions of the courts construing the act of 1890. *In re Greene*, 52 Fed. Rep. 104; *U. S.* v. *Nelson*, Id. 646; *U. S.* v. *Trans-Missouri Freight Ass'n*, 53 Fed. Rep. 440; *In re Corning*, 51 Fed. Rep. 205; *In re Terrell*, Id. 213. The demurrer is sustained.

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[696] HAGAN ET AL *v.* BLINDELL ET AL.[a]

(Circuit Court of Appeals, Fifth Circuit. May 29, 1893.)

[56 Fed., 696.]

COMBINATIONS IN RESTRAINT OF TRADE—EQUITY JURISDICTION.—The jurisdiction of the circuit court to entertain a suit to enjoin a combination of persons from interfering with and preventing shipowners from shipping a crew may be maintained on the ground of preventing a multiplicity of suits at law, and for the reason that damages at law [697] for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural, and not susceptible of proof. 54 Fed. Rep. 40, affirmed.[a]

SAME—INJUNCTION PENDENTE LITE—EVIDENCE.—Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorize the court to enjoin interference with the business of the complainants by such combination pendente lite. 54 Fed. Rep. 40, affirmed.

[a] Injunction pendente lite granted by Circuit Court, Eastern District of Louisiana (54 Fed., 40). See p. 106.

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Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Bill of Blindell Bros. & Co. and others against Charles Hagan and others to enjoin interference with their business as shipowners. From a decree granting an injunction pendente lite, (54 Fed. Rep. 40,) defendants appeal. Affirmed.

John D. Grace and *J. Wara Gurley, Jr.*, (*Gurley & Mellon*, on the brief,) for appellants.

F. B. Earhart and *H. P. Dart*, for appellee.

Before PARDEE and MCCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge.

The only practical question presented by the record is whether the court below had jurisdiction of the case, as made by the bill. We concur in the conclusion reached by the learned judge who decided the case below, as expressed in his opinion, and which is made a part of the record, that the jurisdiction of the court is maintainable on general principles of equitable jurisdiction; and a careful examination of the

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case satisfies us that, under all the facts before it, there was no error in the court awarding a preliminary injunction.

The decree is therefore affirmed.

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[85] WORKINGMEN'S AMALGAMATED COUNCIL OF NEW ORLEANS ET AL. *v.* UNITED STATES.[a]

(Circuit Court of Appeals, Fifth Circuit. June 13, 1893.)

[57 Fed., 85.]

CIRCUIT COURT OF APPEALS—REVIEW OF ORDER GRANTING TEMPORARY INJUNCTION.—The circuit court of appeals will not reverse an interlocutory order granting or continuing a temporary injunction unless it is clearly shown that the same was improvidently granted, and is hurtful to the appellant.[b]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Suit by the United States against the Workingmen's Amalgamated Council of New Orleans, La., and others, to restrain the defendants from interfering with interstate and foreign commerce. An order was made in the court below granting a temporary injunction, (54 Fed. Rep. 994,) and defendants appeal therefrom. Affirmed.

M. Marks, (*A. H. Leonard* and *Evans & Dunn*, on the brief,) for appellants.

F. B. Earhart, for the United States.

Before MCCORMICK, Circuit Judge, and TOULMIN, District Judge.

MCCORMICK, Circuit Judge.

November 10, 1892, the district attorney for the eastern district of Louisiana, acting under the direction of the attorney general, in the name of the United States, exhibited in the circuit court for said eastern district of Louisiana a bill for

[a] Temporary injunction granted by the Circuit Court for Eastern Louisiana (54 Fed., 994). See p. 110.

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injunction under the act of congress to protect trade and commerce against unlawful restraint and monopolies. 26 Stat. 209. The circuit court exercised just caution, and gave respondents ample time to show cause why the preliminary injunction sought should not be granted. Respondents improved the time thus allowed them, and, in all the forms in use in such proceedings, submitted matters of law and fact in opposition to the granting of the temporary injunction. The motion for the temporary injunction continued pending, and the hearing of it was adjourned from time to time until the 27th March, 1893, when the circuit court passed the decree granting the temporary injunction, as prayed for in the bill, as to the appellants, and the respondents appealed.

The appellants assign as error the overruling by the circuit court of each of the grounds of objection urged in that court against the granting of said injunction. These are well summarized, discussed, and disposed of in the very able opinion of the judge of the circuit court who passed the decree now sought to be reversed. The matters of law presented to and considered by him were not well taken by the appellants, respondents below, and the circuit court's ruling to that effect was correct. The bill exhibited is clearly within the statute, and the pleadings of the respondents were not such as **[86]** to require the refusal of the prayer for a temporary injunction. The volume of assisting and counter affidavits was large, and the conflict of this testimony sharp and emphatic, such as must, in the nature of the case, make variant impressions on the minds of different judges as to the facts shown. The summary of the proof made in the opinion of the judge of the circuit court is fairly supported by the record, and shows that there was proof tending to support the allegations of the bill. The providing by law for an appeal from an interlocutory order granting an injunction certainly clothes the court of appeals with the power and charges it with the duty of reviewing, and in a proper case reversing, the action of the trial court in granting such injunctions; but as to issues of fact, presented as they only can be presented in such cases, the findings of the facts expressed or implied in the action of the trial court should be given due weight, and its action, so far as it rests

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on, or is affected by, the state of facts proved, should not be reversed unless it is made clearly to appear that it was improvident and hurtful to the appellant. In this case the most that can be urged against the order having relation to the state of the proof is that it was unnecessary. It only enjoined the appellants from doing, pending this suit, what the statute forbids and provides may be prevented by injunction. On this appeal from an interlocutory order, which we affirm, we deem it unnecessary to anticipate the further progress and final hearing of this case by an expression of our views as to the full scope and sound construction of this recent and important statute. The order of the circuit court is affirmed.

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[58] UNITED STATES *v.* TRANS-MISSOURI FREIGHT ASSOCIATION ET AL.[a]

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

[58 Fed., 58.]

STATUTES—CONSTRUCTION.—Every statute must be read in the light of the general laws upon the same subject in force at the time of its enactment.[b]

SAME—CRIMINAL LAWS—COMMON-LAW OFFENSE ADOPTED BY CONGRESS.—Where congress adopts or creates a common-law offense, and in doing so uses terms which have acquired a well-understood meaning by judicial interpretation, the presumption is that the terms were used in that sense, and courts may properly look to prior decisions interpreting them for the meaning of the terms and the definition of the offense where there is no other definition in the act.

MONOPOLIES—RESTRAINT OF INTERSTATE COMMERCE.—The contracts, combinations in the form of trust or otherwise, and conspiracies in restraint of trade declared to be illegal in interstate and international commerce by the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," (26 Stat. 209, c. 647; Rev. St. Supp. 762,) are the contracts, combinations, and conspiracies in restraint of trade that had been declared by the courts to be against public policy and void under the common law before the passage of that act.

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[a] Decision in the Circuit Court, Kansas (53 Fed., 440). See p. 80. Reversed by the Supreme Court (166 U. S., 290). See p. 648.

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SAME.—The test of the validity of such contracts or combinations is not the existence of restriction upon competition imposed thereby, but the reasonableness of that restriction under the facts and circumstances of each particular case. Public welfare is first considered, and, if the contract or combination appears to have been made for a just and honest purpose, and the restraint upon trade is not specially injurious to the public, and is not greater than the protection of the legitimate interests of the party in whose favor the restraint is imposed reasonably requires, the contract or combination is not illegal. Shiras, District Judge, dissenting, on the ground that this rule is not applicable to corporations charged with public duties.

[59] SAME—COMMON-LAW RULE.—The ground on which certain classes of contracts and combinations in restraint of trade were held illegal at common law was that they were against public policy.

PUBLIC POLICY—HOW DETERMINED.—The public policy of the nation must be determined from its constitution, laws, and judicial decisions.

SAME—INTERSTATE COMMERCE.—The act of February 4, 1887, entitled "An act to regulate commerce," demonstrates the fact that from the date of the passage of that act it has been the public policy of this nation to regulate that part of interstate commerce which consists of transportation, and to so far restrict competition in freight and passenger rates between railroad companies engaged therein as shall be necessary to make such rates open, public, reasonable, uniform, and steady, and to prevent discriminations and undue preferences.

EQUITY—HEARING ON BILL AND ANSWER—EVIDENCE.—When a suit is heard on bill and answer, the allegations of fact in the bill that are denied in the answer are to be taken as disproved, and the averments of fact in the answer stand admitted.

SAME.—Where the contract is admitted, but the allegations tending to show its sinister purpose, tendency, and effect contained in the bill are denied by the answer, and averments tending to show a just and honest purpose, tendency, and effect are made, the latter averments contained in the answer stand admitted, and the contract will be presumed to have been made for an honest and legitimate purpose, unless the provisions of the agreement clearly show the contrary. In the examination of such a contract, fraud and illegality are not to be presumed.

CONTRACTS—PUBLIC POLICY.—Freedom of contract is as essential to unrestricted commerce as freedom of competition, and one who asks the court to put restrictions upon the right to contract ought to make it clearly appear that the contract assailed is against public policy.

SAME—RESTRAINT OF TRADE—ANTI-TRUST ACT.—A contract between railroad companies forming a freight association that they will

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establish and maintain such rates, rules, and regulations on freight traffic between competitive points as a committee of their choosing shall recommend as reasonable; that these rates, rules, and regulations shall be public; that there shall be monthly meetings of the association, composed of one representative from each railroad company; that each company shall give five days' notice before some monthly meeting of every reduction of rates or deviation from the rules it proposes to make; that it will advise with the representatives of the other members at the meeting relative to the proposed modification, will submit the question of its proposed action to a vote at that meeting, and, if the proposition is voted down, that it will then give ten days' notice that it will make the modification notwithstanding the vote before it puts the proposed change into effect; that no member will falsely bill any freight, or bill any at a wrong classification; and that any member may withdraw from the association on a notice of thirty days,—appears to be a contract tending to make competition fair and open, and to induce steadiness of rates, and is in accord with the policy of the interstate commerce act. Such agreement cannot be adjudged to be a contract or conspiracy in restraint of trade under the anti-trust act when it is admitted that the rates maintained under the same have been reasonable, and that the tendency has been to diminish, rather than to enhance, rates, and there is no other evidence of its consequences or effect. Shiras, District Judge, dissenting. 53 Fed. Rep. 440, affirmed.

SAME.—No monopoly of trade or attempt to monopolize trade within the meaning of the anti-trust act is proved by such a contract.

[60] SAME.—The railroad companies who are parties to such a contract do not thereby substantially disable themselves from the discharge of their public duties

Appeal from the Circuit Court of the United States for the District of Kansas. Affirmed.

Statement by SANBORN, Circuit Judge:

This is an appeal from a decree of the circuit court dismissing a bill brought by the United States against the Trans-Missouri Freight Association and 18 railroad companies, under the provisions of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Anti-Trust Act," (26 Stat. 209, c. 647; Rev. St. Supp. 762,) to dissolve the association, and enjoin the railroad companies from fulfilling an agreement with each other to have and maintain joint rules, regulations, and rates for carrying freight between competing points upon their several roads. The case was heard on the bill and the answers of the several defendants.

The bill alleges that the defendant railroad companies were corporations and common carriers, and that they owned independent and competing lines of railroad in that part of the United States west of the Mississippi and Missouri rivers; that they were engaged in transporting freight among the states and to and from foreign nations, and that they had been encouraged to construct and maintain these competing lines of railroad independent of each other by subsidies and grants of lands from the United States and the people of the states and territories west of these great rivers. The bill then alleges that, not being content with the rates of freight they were receiving, intending oppressively to augment those rates, to counteract the effect of free competition upon them, to establish and maintain arbitrary rates, and to procure large sums of money from the people of those states and territories engaged in interstate commerce, they entered into an agreement on March 15, 1889, which, as subsequently modified, reads thus:

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"Memorandum of agreement, made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz.: Atchison, Topeka & Santa Fe Railroad, Chicago, Rock Island & Pacific Railway, Chicago, St. Paul, Minneapolis & Omaha Railway, Burlington & Missouri River Railroad in Nebraska, Denver & Rio Grande Railroad, Denver & Rio Grande Western Railway, Fremont, Elkhorn & Missouri Valley Railroad, Kansas City, Ft. Scott & Memphis Railroad, Kansas City, St. Joseph & Council Bluffs Railroad, Missouri Pacific Railway, Sioux City & Pacific Railroad, St. Joseph & Grand Island Railroad, St. Louis & San Francisco Railway, Union Pacific Railway, Utah Central Railway, and such other companies as may hereafter become parties hereto. Witnesseth, for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

"ARTICLE I.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

"1. All traffic competitive between any two or more members hereof passing between points in the following described territory, commencing at the Gulf of Mexico, on the 95th meridian; thence north to the Red River; thence via that river to the eastern boundary line of the Indian territory; thence north by said boundary line and the eastern line of the state of Kansas to the Missouri river, at Kansas City; thence via the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the international line,—the foregoing to be known as the 'Missouri River line;' thence via said international line to the Pacific coast; thence via the Pacific coast to the international line between the United States and Mexico; thence via said international line to [61] the Gulf of Mexico, and thence via said Gulf to the point of beginning, including business between points on the boundary line as described.

"2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri river line.

"EXCEPTIONS.

"(a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business via their lines between points in Colorado and points in Utah.

"All local business between Denver and Trinidad and intermediate points; all local business of the A., T. & S. F. between Pueblo and

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Canon City, Colo.; all stone traffic having both origin and destination within the state of Colorado.

"The jurisdiction of this association, in so far as the business of the Denver & Rio Grande and the Denver and Rio Grande Western Railway Companies is concerned, covers the following traffic, namely:

"All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian Territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad.

"All freight traffic between Ogden, Spanish Fork, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand.

"Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver and Rio Grande Western Railway.

"(b) Traffic included in the Trans-Continental and International Association.

"(c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern states east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers.

"(d) Traffic passing between Missouri river points and points in the territory east of said river.

"(e) All traffic to points on the Northern Pacific and Manitoba Railways.

"(f) Traffic to points in Arkansas.

"(g) Coal, stone, and gravel from Colorado, Wyoming, and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Mo.

"(h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado.

"(i) Business to and from Florence, Colorado, by all lines.

"ARTICLE II.

"Section 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two-thirds vote of the members.

"Sec. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting, regular or special, is convened, it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents.

"Sec. 3. A committee shall be appointed to establish rates, rules, and reg- [62] ulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be

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made effective when they so order; but if they differ the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree it shall be arbitrated in the manner provided in article 7.

"Sec. 4. At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates, or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah.

"Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed of which due notice has been given, and all parties shall be bound by the decision of the association so expressed, unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association: provided, that, if the member giving notice of the change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of said majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates, to take effect upon the same day. By unanimous consent any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"Sec. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman upon investigation shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate it shall be reported to the association, and, if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: provided, however, that when one road has a proprietary interest in another the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction

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or change in rates, or change in the rules or regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said com- [63] pany that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

"ARTICLE III.

"The duties and power of the chairman shall be as follows:

"Section 1. He shall preside at all meetings of the association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association.

"Sec. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties hereto on business covered by this agreement, and each of the parties hereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require.

"Sec. 3. He shall construe this agreement and all resolutions adopted thereunder, his construction to be binding until changed by a majority vote of the association.

"Sec. 4. He shall publish in joint form all rates, rules, or regulations which are general in their character and apply throughout the territory of the association, and shall also publish in the manner above such rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest.

"Sec. 5. He shall be furnished with copies of all waybills for freight carried under this agreement when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof.

"Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on members for the different amounts thus shown to be due.

"Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violations as provided for herein.

"Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

"Sec. 9. Only parties interested shall vote upon questions arising

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under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 3 of article 3 of the agreement.

"ARTICLE IV.

"Any willful under-billing in weights or billing of freight at wrong classification shall be considered a violation of this agreement, and the rules and regulations of any weighing association or inspection bureau as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

"ARTICLE V.

"The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at [64] its first regular meeting thereafter, determine the matter, which may be done by a two-thirds vote of the members.

"ARTICLE VI.

"There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employes, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

"ARTICLE VII.

"In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association: provided, however, that, in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

"ARTICLE VIII.

"This agreement shall take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from or amend the same."

The bill further alleges that this agreement took effect April 15, 1889; that under it rules, regulations, and rates for carrying freight over the railroads of the defendant companies were fixed by the association, and have since been maintained by them; that since that date these railroad companies have declined and refused at all times to fix or give rates for the carriage of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and that the people engaged in interstate commerce have been compelled to pay the arbitrary rates of freight, and to submit to the arbitrary rules and regulations established and maintained by the association formed under the agreement, and have been and are de-

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prived of the benefits that might be expected to flow from free competition between the several lines of railroad of the defendant companies, and that in this way the defendant companies have combined in restraint of trade and commerce among the states, and have attempted to monopolize, and have monopolized, a part of this commerce.

Three of the railroad companies were not members of the association, and will not be further noticed. The answers of the 15 companies who were members of the association are substantially the same. The first defense in these answers is that the interstate commerce law of February 4, 1887, entitled "An act to regulate commerce," (24 Stat. 379, c. 104; Rev. St. Supp. 529,) and the acts amendatory thereof, constitute a complete code of laws regulating that part of commerce among the states and with foreign nations which relates to transportation, and that the act of July 2, 1890, is not applicable to, and does not govern, them or their actions.

Coming to the merits of the suit, these defendants admit that they are common carriers; that, with some exceptions not important here, they owned independent and competing lines of railroad in that part of the United States west of the Missouri and Mississippi rivers, and that they were engaged in the transportation of freight among the states and territories, and to and from foreign nations, in that region, but they deny that they owned the only through lines of railroad engaged in that business there; and allege that there were several others, to wit, the Northern Pacific Railroad Company, the Great Northern Railway Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company. They admit that some of them were assisted and encouraged to construct and maintain through competing lines of railroad, independent of each other, by subsidies, land grants, and donations from the United States, and from the people of the various states and territories west of the great rivers. They admit that they entered into the agreement March 15, 1889, and that rules, regulations, and rates of freight have since been fixed and changed by the association thus formed, and that they have complied **[65]** with and maintained them. They deny, however, that at the time they entered into the agreement they were dissatisfied with the rates of freight they were receiving. They deny that they intended, in connection with the formation of the association or otherwise, to unjustly or oppressively augment such rates, or to counteract the effect of free competition on prices or facilities of transportation, or to establish or to maintain arbitrary rates, or to prevent any one of the defendants from reducing rates, or to procure unreasonably great sums of money from the people of the states and territories west of the great rivers engaged in interstate commerce. They deny that the formation and operations of the association have had any such effects, but aver that they have tended to decrease rates, and to benefit the people and the roads. They deny that they had any intention by the formation of the association to monopolize or attempt to monopolize the freight traffic of the region affected by it, and deny that it has had any such effect. They allege that they were subject to the provisions of the act of congress of February 4, 1887, entitled, "An act to regulate commerce," and the acts amendatory thereof. They aver that under that act they were required to make all charges reasonable and just; that they were prohibited from making any unjust discriminations, or any undue or unreasonable preferences, or from giving any undue advantages, and that they were required to establish a classification of freight and rates of freight, and to publish and file with the interstate commerce commission schedules showing this classification and these rates, and then to abide by and maintain them; that, in order to comply with this law, consultation between

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and concerted action of the railroad companies conducting the transportation business west of the great rivers was essential; and that they made this agreement and formed this association in order that they might more effectually comply with the provisions of this law than they could do acting independently. They allege that the rates they have established and maintained have been reasonable and just; that since the organization of the association more than 200 reductions of rates have been made through its action; that their agreement forming the association was filed with the interstate commerce commission under the act, and that the rules, regulations, and rates they have established and maintained have been in strict conformity to the provisions thereof. They deny that the people have been deprived of the benefits which might be expected to flow from free competition in the business of transportation, and allege that the utmost freedom compatible with obedience to the interstate commerce act and with the preservation of the existing agencies of competition prevails, and they insist that their association and action under this contract constitute no combination or conspiracy in restraint of interstate or international commerce.

The opinion filed by the court below when the bill was dismissed is reported in 53 Fed. Rep. 440.

J. W. Ady, for appellant.

George R. Peck and *Joel F. Vaile*, (*A. L. Williams*, *N. H. Loomis*, *R. W. Blair*, *John M. Thurston*, *O. M. Spencer*, *C. A. Mosman*, *J. D. Strong*, and *W. F. Guthrie*, on the briefs,) for appellees.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Contracts between competing corporations, commonly termed "pooling contracts," to divide their earnings from the transportation of freight in fixed proportions, have long been held void by the courts as against public policy. Such contracts do not simply restrict competition, they tend to destroy it; and, if they do not effect that result, it is only because they do not completely accomplish their **[66]** main purpose. When acting independently, the spur of self-interest drives each corporation to furnish the people with the best accommodations and the safest and most rapid transportation at the lowest profitable rates, in order that it may attract larger patronage and gather increased gain. But under the operation of a pool this incentive to exertion is

withdrawn. Each carrier finds it to its interest to enhance the price of carriage, and finds that its profits are not sensibly diminished by furnishing poor facilities for transportation and inexpensive and mean accommodations. In 1887 congress recognized and adopted this rule of public policy, and by section 5 of "An act to regulate commerce," commonly called the "Interstate Commerce Act," (24 Stat. 379, c. 104; Rev. St. Supp. 529,) prohibited such contracts between common carriers engaged in interstate or international commerce. That act, however, prohibited contracts for the pooling of freights of different and competing railroads only; it prohibited contracts that thus destroyed competition; it did not prohibit all contracts that in any way restricted or regulated competition. By the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly called the "Anti-Trust Act," (26 Stat. 209, c. 647; Rev. St. Supp. 762,) congress provided that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act."

The government bases this suit on these provisions of the latter act. It claims that the contract in question, and the association formed under it, are illegal on three grounds: First, because the contract prevents free and unrestricted competition between competing lines of railroad; second, because it tends to create a monopoly; and, third, because the railroad corporations have through this contract abandoned the discharge of some of their duties to the public.

The first ground stated is chiefly relied on, and it presents questions of deep interest, the decision of which must have a far-reaching and important influence on the transportation system of the nation. The government does not claim

that the contract and association assailed effected a pooling of freights, or that they tend to retard improvement in the facilities afforded for safe, quick, and convenient transportation, or that they are obnoxious to any of the provisions of the interstate commerce act; but it insists that the anti-trust act prohibits all contracts and combinations between competing railroad corporations which in any manner restrict free competition. The argument is, the anti-trust act prohibits any contract between competing railroad companies that restricts com- [67] petition. This contract restricts competition; therefore it is illegal. Is, then, every contract between competing railroad companies that in any manner imposes a restriction upon competition a "contract in restraint of trade" and illegal within the meaning of the anti-trust act? Is the existence of restriction upon competition the standard by which the legality of these and all other contracts must be measured under that act? and, if not, by what standard shall their legality be determined? These are questions that the position of the government compels us to consider before we can determine whether or not this contract is void. Their determination demands a careful examination and construction of that part of the anti-trust act which declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," is illegal. No definition of these terms is found in this act, but the terms are not new. For more than 200 years before it was passed the courts of England and America had from time to time declared that certain classes of contracts in restraint of trade were against public policy, and therefore illegal and void under the common law. The line of demarcation between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions, and had been repeatedly pointed out by the supreme court of the United States. *Gibbs* v. *Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. Rep. 553; *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658. Two years before its passage congress had enacted the interstate commerce law. They had there provided a code of rules and established a commission for the express purpose

of regulating that part of interstate and international commerce which relates to transportation. Under these circumstances, three well-settled rules of construction must be applied to ascertain the meaning and scope of the act:

(1) It must be read in the light of all general laws upon the same subject in force at the time of the passage of the act.

(2) Where words have acquired a well-understood meaning by judicial interpretation, it is to be presumed that they are used in that sense in a subsequent statute, unless the contrary clearly appears.

(3) Where congress creates an offense, and uses common-law terms, the courts may properly look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common-law offense, for the definition of the offense if it is not clearly defined in the act adopting or creating it. *U. S.* v. *Armstrong*, 2 Curt. 446; *U. S.* v. *Coppersmith*, 4 Fed. Rep. 198; *In re Greene*, 52 Fed. Rep. 104, 111; *McCool* v. *Smith*, 1 Black, 459, 469; *McDonald* v. *Hovey*, 110 U. S. 619, 628, 4 Sup. Ct. Rep. 142.

Thus we are brought to a consideration of the statutes in force and the decisions that had been rendered when this act was passed to determine what contracts in restraint of trade were then illegal, for it is clear both from the rules to which we have referred and from the title of the act, viz. "An act to protect trade and commerce against unlawful restraints and monopolies," that it was [68] such contracts, and such contracts only, that congress intended to declare unlawful and criminal in interstate commerce.

Under the common law, the ground on which contracts in restraint of trade were declared unlawful was that they were against public policy. But when it becomes necessary to consider grounds of public policy in the determination of a case, it is well to bear in mind the oft-quoted remarks of Justice Burrough in *Richardson* v. *Mellish*, 2 Bing. 252, that public policy "is a very unruly horse, and when you once get astride of it you never know where it will carry you. It may lead you from the sound law." Public policy changes with the changing conditions of the times. It is hardly to be expected that a people who are transported by

steam with a rapidity hardly conceived of a century ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph while separated by thousands of miles, will entertain precisely the same views of what is conducive to the public welfare in commercial and business transactions as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads, and hampered by an almost impassable ocean. In 1415 a writ of debt was brought on an obligation by one John Dier, in which the defendant alleged the obligation in a certain indenture which he put forth, and on condition that if the defendant did not use his art of a dyer's craft, within the city where the plaintiff, etc., for half a year, the obligation to lose its force, and said that he did not use his art within the time limited. Hull, J., said: "In my opinion, you might have demurred upon him that the obligation is void, inasmuch as the condition is against the common law; and, per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the king." Y. B., 2 Hen. V. fol. [illegible], pl. 26. In 1841, Lord Langdale, master of the rolls, held that a contract made by a lawyer not to practice his profession in Great Britain for 20 years was not against public policy, and that it was valid. *Whittaker* v. *Howe*, 3 Beav. 383. In 1843, the court of exchequer held that an agreement not to practice as a surgeon dentist in London or in any other town where the plaintiffs might have been practicing was reasonable and lawful so far as it related to London, but against public policy and void as to the other towns. *Mallan* v. *May*, 11 Mees. & W. 652, 667. In 1869, Vice Chancellor James sustained a contract by vendors not to carry on or allow others to carry on in any part of Europe the manufacture or sale of certain kinds of leather so as in any way to interfere with the exclusive enjoyment by the purchasing company of the manufacture and sale thereof, and issued an injunction to enforce it. *Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345. In 1889 the supreme court of New York sustained a contract not to manufacture or sell thermometers or storm glasses throughout the United States for 10 years. *Ther-*

mometer Co. v. *Pool*, 51 Hun, 157, 163, 4 N. Y. Supp. 861. And in 1891 the supreme court held that a contract of a railroad corporation giving the Pullman Southern Car Com- **[69]** pany the exclusive right to furnish all drawing room and sleeping cars required by that road during a period of 15 years was not an illegal restraint of trade, and sustained it. *Chicago, etc., R. Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. Rep. 490. It is with the public policy of to-day, as illustrated by public statutes and judicial decisions, that we have now to deal. In considering that subject, we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its constitution, laws, and judicial decisions. So far as they disclose it, it is our province to learn and enforce it; beyond that it is unnecessary and unwise to pursue our inquiries. *Vidal* v. *Girard's Ex'rs*, 2 How. 127, 197; *Swann* v. *Swann*, 21 Fed. Rep. 299.

Turning first, then, to the decisions, we find that it has long been settled that contracts or combinations of the producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts, or combinations between such producers or dealers to divide their profits in certain fixed proportions, and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void; while contracts or combinations between employers or workmen to fix and abide by certain prices for labor or services may be valid in their inception, but become illegal restraints of trade whenever the associations formed under them interfere with the freedom of those who are not members to refuse to abide by their prices, or to employ or be employed at other rates, or whenever such associations undertake to prevent nonmembers from using their property or their labor as they see fit. The main purpose of contracts of these classes that are thus held illegal is to suppress, not simply to regulate, competition; and, if

suppression is not effected, it is because the contracts fail to accomplish their purpose. It is evident that there is a wide difference between such contracts and those the purpose of which is to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this purpose. It does not necessarily follow that contracts of the latter class constitute illegal restraints of trade because those of the former classes do.

To maintain his proposition that any contract between common carriers that restricts competition in any degree is an illegal restraint of trade, the counsel for the government has cited numerous cases where such expressions as the following are found in the opinions of the courts: "The people have a right to the necessaries and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition." *De Witt Wire-Cloth Co.* v. *New Jersey Wire-Cloth Co.*, (Com. Pl. N. Y.) 14 N. Y. Supp. 277. **[70]** "It is against the general policy of the law to destroy or interfere with free competition, or to permit such interference or destruction." *Stewart* v. *Transportation Co.*, 17 Minn. 372, (Gil. 348.) "Combinations and conspiracies to enhance the price of any article of trade and commerce are injurious to the public." *People* v. *Fisher*, 14 Wend. 9. "Whatever destroys, or even restricts, competition in trade is injurious, if not fatal, to it." *Hooker* v. *Vandewater*, 4 Denio, 349, 353. A careful and patient examination of the cases cited, however, discloses the fact that the contracts considered in those cases, which are not of doubtful authority, were of one of the classes to which we have referred, or rest upon some other ground than the existence of restriction upon competition. They were cases involving contracts of competing producers or dealers to limit the supply and enhance the price of, or to monopolize, staple commodities, like *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *India Bagging Ass'n* v. *B. Kock & Co.*, 14 La. Ann. 168; *U. S.* v. *Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *Lumber Co.* v. *Hayes*, 76 Cal. 387, 18 Pac. Rep. 391; *De Witt Wire-Cloth Co.* v.

New Jersey Wire-Cloth Co., (Com. Pl. N. Y.) 14 N. Y. Supp. 277; *Salt Co.* v. *Guthrie*, 35 Ohio St. 666; and *People* v. *North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. Supp. 406; or cases involving pooling contracts, like *Craft* v. *McConoughy*, 79 Ill. 346; *Hooker* v. *Vandewater*, 4 Denio, 349; *Stanton* v. *Allen*, 5 Denio, 434; *Anderson* v. *Jett*, (Ky.) 12 S. W. Rep. 670; *Gibbs* v. *Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553; *Morrill* v. *Railroad Co.*, 55 N. H. 531; *Denver & N. O. Ry. Co.* v. *Atchison, T. & S. F. R. Co.*, 15 Fed. Rep. 650; and *Woodruff* v. *Berry*, 40 Ark. 252; or cases involving combinations of workmen which compelled nonmembers to abide by the prices for labor which they had fixed or to abandon their employment, like *People* v. *Fisher*, 14 Wend. 9, and *U. S.* v. *Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, 1000; or cases where the contracts were ultra vires the corporations, and their purpose and effect was to monopolize trade, like *Railroad Co.* v. *Collins*, 40 Ga. 582; *Hazlehurst* v. *Railroad Co.*, 43 Ga. 13; and *W. U. Tel. Co.* v. *American Union Tel. Co.*, 65 Ga. 160; or cases of questionable authority, like *Com.* v. *Carlisle*, Brightly, N. P. 36, 39. See, contra, *Snow* v. *Wheeler*, 113 Mass. 179, 185; *Bowen* v. *Matheson*, 14 Allen, 499; *Skrainka* v. *Scharringhausen*, 8 Mo. App. 522; and *Carew* v. *Rutherford*, 106 Mass. 1, 14. It was natural that in the discussion of contracts of these classes the courts should condemn in unmeasured terms the suppression of competition, but in none of these cases were they required to hold, and in none of them did they hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal. These decisions rest upon broader ground,—on the ground that the main purpose of the obnoxious contracts was to suppress competition, and that they thus tended to effect an unreasonable and unlawful restraint of trade: they rest on the well-settled rules, and come within the well-defined classes, to which we have above referred.

[71] A more extended view of the authorities strengthens this conclusion, and makes plain the line of demarcation which separates legal contracts that incidentally restrict competition from illegal contracts in restraint of trade. The

decision in the leading case upon this subject, (*Mitchel* v. *Reynolds*, 1 P. Wms. 181, 1 Smith, Lead. Cas. [7th Amer. Ed.] pt. 2, p. 708,) the case which Chief Justice Fuller says is the foundation of the rule in relation to the invalidity of contracts in restraint of trade, (*Gibbs* v. *Gas Co.*, 130 U. S. 409, 9 Sup. Ct. Rep. 553,) held that a contract that clearly restricted competition was not an illegal restraint of trade. The action was upon a bond the condition of which was that the obligor, who was the assignor of a lease of a bakehouse and messuage in the parish of St. Andrews, Holborn, would not exercise his trade of a baker within that parish for three years. The contract was held valid, and the action sustained. This decision was rendered in 1711. Chief Justice Parker, in delivering it, declared that contracts in partial restraint of trade were valid if made upon sufficient consideration, but that contracts in general restraint of trade were illegal, because they deprived the party restrained of his livelihood and the subsistence of his family, and the public of a useful member. The point actually decided, that contracts in partial restraint of trade may be sustained, has been uniformly approved, but in the development of the law applicable to this subject there has been added to it the further condition that the restriction imposed must be reasonable in view of all the facts and circumstances of each particular case. The remark of Chief Justice Parker that contracts in general restraint of trade are illegal—a remark that was not necessary to the determination of the question before him—has been, to say the least, greatly modified by subsequent decisions. There is a plain tendency in the later authorities to repudiate the proposition that there is any hard and fast rule that contracts in general restraint of trade are illegal, and to apply the test of reasonableness to all contracts, whether the restraint be general or partial. In *Tallis* v. *Tallis*, 1 El. & Bl. 391, the court of queen's bench held, in 1853, that a covenant restricting competition, which bound the covenantor not to exercise his trade of a canvassing publisher in London or within 150 miles of the general post office, or in Dublin or Edinburgh, or within 50 miles of either, or in any other town where the covenantee or his successors had an establishment or might have had one within six

months preceding, was not an illegal restraint of trade, and enforced it. In *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, 21 Q. B. Div. 544, certain shipowners engaged in the carrying trade between London and China had formed an association for the purpose of keeping up the rate of freights in the tea trade, and securing that trade to themselves. They accomplished this purpose by allowing a rebate of 5 per cent. on all freights paid by shippers who shipped in their vessels only, and thus partially or entirely excluded the plaintiffs, who were competing shipowners, from the tea-carrying trade. The latter brought suit for an injunction and damages, but notwithstanding the obvious restriction upon free competition, Lord Coleridge held that the associa- **[72]** tion was not an unlawful combination in restraint of trade, and gave judgment for the defendants. This decision was rendered in 1888. It was sustained on appeal, (23 Q. B. Div. 598,) and finally affirmed by the house of lords, (App. Cas. 1892, p. 25.) In *Perkins* v. *Lyman*, 9 Mass. 522, the supreme judicial court of Massachusetts held, in 1813, that a contract by a merchant not to be interested in any voyage to the northwest coast of America was not invalid as in restraint of trade. In *Match Co.* v *Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419, a contract of a match manufacturer never to manufacture or sell any friction matches in the District of Columbia, or in any part of the United States except Idaho and Montana, was sustained and enforced. In *Navigation Co.* v. *Winsor*, 20 Wall. 64, decided in 1873, a contract between two steam navigation companies engaged in the business of transportation on the rivers, bays, and waters of California, and on the Columbia river and its tributaries, respectively, was declared by the supreme court not to be in restraint of trade, although it prohibited the use of a certain steamer in the waters of California for 10 years. And in 1890 the supreme court of New Hampshire in an exhaustive and persuasive opinion held that contracts by which a railroad corporation leased its road and rolling stock to a competitor for many years were not necessarily against public policy or void at common law, when the purpose of the contracts and combinations did not appear to be to raise the rate of transportation above the standard of fair compensation, or to violate any duty owing to the public

by noncompeting companies. *Manchester, etc., R. Co.* v. *Concord R. Co.* (N. H.) 20 Atl. Rep. 383. If further authority is wanted for the proposition that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade, it will be found in *Fowle* v. *Park*, 131 U. S. 88, 97, 9 Sup. Ct. Rep. 658; *Gibbs* v. *Gas Co.* 130 U. S. 396, 9 Sup. Ct. Rep. 553; *In re Greene*, 52 Fed. Rep. 104, 118; *Horner* v. *Graves*, 7 Bing. 735, 743; *Hubbard* v. *Miller*, 27 Mich. 15, 19; *Rousillon* v. *Rousillon*, 14 Ch. Div. 351, 363; *Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345, 354; *Wickens* v. *Evans*, 3 Younge & J. 318; *Ontario Salt Co.* v. *Merchants Salt Co.*, 18 Grant, Ch. 540; *Mallan* v. *May*, 11 Mees. & W. 652, 657; *Whittaker* v. *Howe*, 3 Beav. 383; *Kellogg* v. *Larkin*, 3 Pin. 123, 150; *Beal* v. *Chase*, 31 Mich. 490; *Skrainka* v. *Scharringhausen*, 8 Mo. App. 522, 525; *Wiggins Ferry Co.* v. *Chicago & A. R. Co.*, 73 Mo. 389; *Gloucester Isinglass & Glue Co.* v. *Russia Cement Co.*, 154 Mass. 92, 94, 27 N. E. Rep. 1005; *Thermometer Co.* v. *Pool*, 51 Hun, 157, 163, 4 N. Y. Supp. 861; *Association* v. *Walsh*, 2 Daly, 1; *Hodge* v. *Sloan*, 107 N. Y. 244; 17 N. E. Rep. 335; *Brown* v. *Rounsavell*, 78 Ill. 589; *Jones* v. *Clifford's Ex'r*, 5 Fla. 510, 515.

From a review of these and other authorities, it clearly appears that when the anti-trust act was passed the rule had become firmly established in the jurisprudence of England and the United States that the validity of contracts restricting competition was to be determined by the reasonableness of the restriction. If the main purpose or natural and inevitable effect of a contract was to suppress **[73]** competition or create a monopoly, it was illegal. If a contract imposed a restriction that was unreasonably injurious to the public interest, or a restriction that was greater than the interest of the party in whose favor it was imposed demanded, it was illegal. But contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some

extent to check competition. The public welfare was first considered, and the reasonableness of the restriction determined under these rules in the light of all the facts and circumstances of each particular case.

But it is said that railroad corporations are quasi public corporations, and any restriction upon their competition is against the public policy of the nation. It is not to be denied that there are some expressions to be found in adjudged cases, notably in *Gibbs* v. *Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. Rep. 553; *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.*, 22 W. Va. 600, 625; *Chicago Gaslight & Coke Co.* v. *Peoples Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169; and *W. U. Tel. Co.* v. *American Union Tel. Co.*, 65 Ga. 160,—to the effect that where a business is of such character that it cannot be restrained to any extent whatever without prejudice to the public interests, the courts decline to enforce or sustain contracts imposing such restraint, however partial. But the language employed by the courts in these cases should be read in the light of the circumstances under which it was uttered, and with due reference to the point actually adjudicated. Thus in the earliest of these cases (*W. U. Tel. Co.* v. *American Union Tel. Co.*) it was held that a contract between a railroad company and a telegraph company by which the former granted to the latter the exclusive right to construct a telegraph line along its right of way, necessarily excluded all other telegraph lines from the use of a right of way that by condemnation had been devoted to public uses, and was void, because it was in restraint of trade, and tended to create a monopoly. In *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.* it was held that an owner of 2,000 acres of oil land could not grant to one pipe line company an exclusive right to lay a pipe line across said lands, because the legislature, by authorizing pipe line companies to condemn lands for the construction of such lines, had thereby declared that the public had an interest in their construction, and that a contract which precluded such companies from laying a line across an extensive tract of land was necessarily opposed to public policy. In *Chicago Gaslight & Coke Co.* v. *People's Gaslight & Coke Co.* the court held that a gas company, which had accepted a charter authorizing it to lay pipes and to supply gas throughout the entire limits of the city, could not disable itself from the performance of the public duty it had undertaken by entering into a contract with another company not to lay pipes and supply gas in a large section of said city. And in *Gibbs v. Gas Co.* a like contract by one gas company with another to abandon the discharge of public duties which had been devolved upon it by its charter was [74] held, on that account, to be against public policy, and void, and to be void on the further ground that the contract was in open violation of a statute which prevented the company from "entering into a * * * contract with any other gas company whatever."

No doubt can be entertained that the contract involved in each of the cases last referred to was against public policy for its marked tendency to create a monopoly, and to suppress healthy competition. Two of the contracts were also vicious in the respect that the corporation had attempted to disable itself from exercising powers which had been conferred upon it for the public advantage. But we think, in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy, and an unlawful restraint of trade. No case, we believe, has yet gone to that extent, or has declared that the business of transporting freight and passengers by rail is of such character that no restraint whatever upon competition therein is permissible. On the contrary, contracts between common carriers which imposed some restrictions upon competition have been frequently sustained by our highest courts, and the rule has been often applied that the test of their validity was not the existence, but the reasonableness, of the restriction imposed. *Navigation Co.* v. *Winsor*, 20 Wall. 64; *Chicago, etc., R. Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. Rep. 490; *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, 21 Q. B. Div. 544; *Manchester, etc., R. Co.* v. *Concord R. Co.*, (N. H.) 20 Atl.

Rep. 383; *Wiggins Ferry Co.* v. *Chicago & A. R. Co.*, 73 Mo. 389. But even if such an extreme view, as is above indicated, was once tenable, we fail to see how it can well be maintained since the passage of the interstate commerce law, and the action that has been taken thereunder by the government commission which was created to enforce its provisions. The interstate commerce law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and congress has thereby expressed its conviction that unrestrained competition between carriers is not, at the present time, and under existing conditions, most conducive to the public welfare, but that other things are quite as essential to the public good. Mark the difference in public policy towards merchants and railroad companies exhibited by the common law and by the interstate commerce act. Merchants may refuse to sell their wares at all, they may refuse to transact any business; but railroad companies are common carriers; they must furnish transportation when requested; they must operate their roads or forfeit their franchises; merchants may charge any price they see fit for their wares, but railroad companies are restricted to reasonable and just charges for transportation, (Interstate Commerce Act, § 1;) merchants may sell articles of like character and value for as many different prices **[75]** as they have different customers, but railroad companies are restricted to the same charges to all their customers for like services, (Id. § 2;) merchants may give to any customers or any localities any preference or advantage they choose over other customers or localities, but railroad companies are prohibited from giving any undue preference or advantage to any party or place, (Id. § 3;) merchants may sell articles of inferior value for higher prices than those they charge and receive for those of greater value, but railroad companies are prohibited from charging or receiving a greater compensation for a short haul than for a long haul, (Id. § 4;) merchants may keep their prices secret; railroad companies must publish their rates for transportation, and are prohibited from charging or receiving a greater or less compensation than that specified in the published schedules, (Id. § 6;) merchants

may change their prices instantly and without notice, railroad companies are prohibited from increasing their rates except after 10 days' public notice or from decreasing them except after three days' public notice, (Id. § 6;) merchants may transact their business free from the supervision or interference of the government; but railroad companies are subject to the supervision of a commission, established by the government, authorized to take the necessary proceedings for the enforcement of these restrictions, (Id. § 12.) These restrictions relate almost exclusively to rates for the transportation of freight and passengers. They are numerous, radical, and effective. They became operative by an act of congress three years before the anti-trust act was passed, and they establish beyond cavil that from that date the public policy of the nation was that competition between railroad companies engaged in interstate commerce should not go wholly unrestricted.

If we turn now to the published reports of the interstate commerce commission, whose opinion on such matters is certainly entitled to great consideration, we find the view even more clearly expressed that it was the purpose of congress to place important restraints upon competition, that uncontrolled struggles for patronage by railway carriers are frequently detrimental to the public welfare, that rate wars are especially injurious to the business interests of the country and contrary to the spirit of existing laws, that the interstate commerce act invites conferences between railway managers, and that concert of action in certain matters by railway companies is absolutely essential to enable it to accomplish its true purpose.

In the fourth annual report of the commission, at page 19, we find the following statement:

"It is thus seen at every turn that the regulation of rates on a consideration of the pecuniary or other situation of any single road, and without a survey of the whole field of operations whereby its business may be affected, and under a supposition that what is done in respect to that road may be limited in its consequences, is entirely antagonistic to all principles of railroad transportation. The railroad managers have perceived this from the very first, and it is because they have perceived this that they have been compelled to organize themselves into railroad associations, for the purpose **[76]** of agreeing upon classifications and rates, and upon a great

variety of other matters pertaining to the methods of conducting interlocking and overlapping business, and all business affected by competitive forces."

And on page 21 of the same report the following:

"In former reports the commission has referred to the undoubted fact that competition for business between railroad companies is often pushed to ruinous extremes, and that the most serious difficulties in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of the existing law is against them."

In the second annual report on page 25, when speaking of the unity of railroad interests, the commission uses this language:

"But the voluntary establishment of such extensive responsibility would require such mutual arrangements between the carriers as would establish a common authority, which should be vested with power to make traffic arrangements, to fix rates, and to provide for their steady maintenance, to compel the performance of mutual duties among the members, and to enforce promptly and efficiently such sanctions to their mutual understandings as might be agreed upon."

And in the same report, on page 23, we find the following:

"A short road may sometimes make itself little better than a public nuisance by simply abstaining from all accommodation that could not by law be forced from it. It would not be likely to do this unless for some purpose of extortion from other roads, but the existence of a power to annoy and embarrass is a fact of large importance. The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibilities, just as far as may be possible, so that the public may have, in the services performed, all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers as well as to the public, and their voluntary extension may be looked for until, in the strife between roads, the limits of competition are passed, and warfare is entered upon. But in order to form them, great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

In the first annual report, on page 33, the commission further said:

"To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements and interchange of cars, and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and, even if they were

not, could be best settled, and all the incidents and qualifications fixed, by the voluntary action of the parties in control of the roads respectively. Agreement upon these and kindred matters became, therefore, a settled policy, and short independent lines of road seemed to lose their identity, and to become parts of great trunk lines, and associations were formed which embraced all the managers of roads in a state or section of the country. To these associations were remitted many questions of common interest, including such as are above referred to. Classification was also confided to such associations, it being evident that differences in classification were serious obstacles to a harmonious and satisfactory interchange of traffic. But what perhaps more than anything else influenced [77] the formation of such associations, and the conferring upon them of large authority, was the liability, which was constantly imminent, that destructive wars of rates would spring up between competing roads to the serious injury of the parties and the general disturbance of business. Accordingly, one of the chief functions of such associations has been the fixing of rates, and the devising of means whereby their several members can be compelled or induced to observe the rates when fixed."

It would extend this opinion to an unreasonable length if we assumed to state the reasons which probably influenced congress to impose some restrictions upon competition in the matter of railway transportation, and to place railway carriers under the operation of a law which, for its successful execution, as pointed out by the interstate commerce commission, seems to some extent to invite conference and concert of action. It is likewise unnecessary for us to state the reasons why railroad companies should be accorded the privilege of entering into arrangements with other companies which may, to some extent, regulate competition. Reasons to that effect have been stated with great ability and persuasive force in some of the cases to which we have already referred, notably in *Manchester, etc., R. Co.* v. *Concord R. Co., supra.* But, without entering into that discussion, it is sufficient to say that, in our judgment, there was no hard and fast rule in force when the anti-trust act was enacted which made very contract between railroad companies void on grounds of public policy if it in any wise checked competition. In our judgment, the more reasonable doctrine then prevailed, especially in view of the recent passage of the interstate commerce act, that such contracts were void, if, judged in the light of all the circumstances and conditions under which they were made, they unreasonably restricted competition.

In view of the foregoing principles, it remains for us to

examine the contract which is alleged to be in violation of the anti-trust act, but before doing so a preliminary observation will not be out of place. The anti-trust act is a criminal statute, and it should not be so construed as to subject persons to the penalties thereby imposed unless the contract complained of is one that is clearly within the provisions of the statute. It is also well to note that the case comes before us simply on bill and answer. The bill alleges that its purpose, and that of the association formed under it, was to suppress competition, enhance rates of freight, and monopolize the traffic. The answers deny these averments, and allege that the purpose of the contract and association was to carry into effect the provisions of the interstate commerce act, and to make rates public and steady. The bill alleges that the effect of the contract and association has been to raise the rates of freight above those which the public might have reasonably expected to obtain from free competition. The answers deny this allegation, and aver that the effect has been to maintain reasonable rates, and that more than 200 reductions of rates have been effected through the association. Upon a hearing on bill and answer the averments of fact contained in the bill are overcome by the denials **[78]** of the answer, and the averments of fact in the answer stand admitted. *Tainter* v. *Clark*, 5 Allen, 66; *Brinckerhoff* v. *Brown*, 7 Johns. Ch. 217; *Perkins* v. *Nichols*, 11 Allen, 542.

The result is that the government's right to relief here rests upon the contract itself, and the fact that the rates maintained under it have not been unreasonable, and that many reductions have been made under its operation. The ordinary rules of interpretation must then be applied to the language of this contract, and, if it appears that its purpose and tendency were to unreasonably restrict competition, it must be declared illegal. *Dillon* v. *Barnard*, 21 Wall. 430, 437; *Interstate Land Co.* v. *Maxwell Land Grant Co.*, 139 U. S. 569, 577, 11 Sup. Ct. Rep. 656.

In construing the contract it must also be remembered that fraud and illegality are not to be presumed, and that the purpose of the contract is that which is clearly manifest by its terms. In *Mitchell* v. *Reynolds*, *supra*, the unfortunate remark "that wherever such contract stat indifferenter, and

for aught appears, may be either good or bad, the law presumes it prima facie to be bad," fell from Chief Justice Parker. This seems to be the reverse of the proposition that every man is presumed to be innocent until he is proved to be guilty. It has long been repudiated by the courts of England and America. The burden is on the party who seeks to put a restraint upon the freedom of contract to make it plainly and obviously clear that the contract is against public policy, and the true rule of construction is that neither fraud nor illegality is to be presumed, but the contract is to be assumed to have been made in good faith for the purpose which appears on the face of it, and not colorably for any other. *Registering Co.* v. *Sampson*, L. R. 19 Eq. 462; *Tallis* v. *Tallis*, 1 El. & Bl. 391; *Rousillon*, v. *Rousillon* 14 Ch. Div. 351, 365; *Stewart* v. *Transportation Co.*, 17 Minn. 372, 391, (Gil. 348;) *Marsh* v. *Russell*, 66 N. Y. 288; *Phippen* v. *Stickney*, 3 Metc. (Mass.) 384, 389.

Proceeding, then, to an examination of the contract, we find it to be substantially as follows: In the preamble there is a declaration that the association is formed for "mutual protection by establishing and maintaining reasonable rates, rules, and regulations, both through and local." Article 1 declares that substantially all traffic competitive between two or more members in that part of the United States between the Mississippi and Missouri rivers and the Pacific ocean shall be governed by the association. It is provided by article 2 that the association shall choose a chairman by unanimous vote; that there shall be regular monthly meetings of the association, in which each member must be represented by some responsible officer authorized to act definitely on all questions to be considered; that a committee shall be appointed to establish rates, rules, and regulations for the traffic, and that these shall be put into effect; that any railroad company may give five days' written notice prior to any monthly meeting of any proposed reduction of rates or change of rules, and eight days' notice as to the traffic of Colorado or Utah; that thereupon the reduction or change shall be considered and voted upon by the association at **[79]** the next monthly meeting, and all members shall be bound by the decision of the association "unless then and

there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification notwithstanding the vote of the association;" that any member may without notice, at its peril, make any rate, rule, or regulation necessary to meet the competition of outside lines, subject to a liability to pay a penalty of $100 if the association decides by a two-thirds vote that the rate, rule, or regulation was not necessary for that purpose; that all arrangements with connecting lines for the division of through rates relating to traffic covered by the agreement shall be made by authority of the association, and that the chairman of the association shall punish violations of the agreement by fines not exceeding $100 in any case. Article 3 makes the chairman the executive officer of the association, requires him to publish and furnish to the members of the association the rates, rules, and regulations established, and all changes in them, and requires him to enforce the provisions of the contract. Article 4 prohibits under-billing or billing at a wrong classification. Articles 5 and 6 provide for the appointment of the necessary employes and the payment of the necessary expenses of the association. Article 7 provides for arbitration in case the managers of the parties to the agreement fail to agree upon any question arising under it; and article 8 provides that any member may withdraw from the association on 30 days' notice.

It is obvious at a glance that this agreement is not affected by any of the vices of an ordinary pooling contract. The income of each member of the association under the terms of the agreement is still measured by the amount of freight and the number of passengers it carries, and it is still to the interest of each member of the association to make that patronage as great as possible, by affording to the public superior facilities for safe, speedy, and convenient transportation. Under the operation of the agreement, each company must still compete with its associate members in the character of its roadbed, quality of its equipments, length of route, convenience of its terminal facilities, and in the efficiency of its management, for all of these considerations will necessarily have a marked influence upon the amount of its patronage.

In other of its features, also, the contract is not subject to

criticism. In these days, when persons engaged in many other callings and avocations are in the habit of meeting at intervals, as associations, for the purpose of cultivating more friendly relations and establishing regulations conducive to the general welfare of the trade, it is difficult to see upon what just grounds representatives of railway companies can be denied the right of forming associations for the purpose of friendly conference and to formulate rules and regulations to govern railway traffic. The fact that the business of railway companies is irretrievably interwoven, that they interchange cars and traffic, that they act as agents for each other in the delivery and receipt of freight [80] and in paying and collecting freight charges, and that commodities received for transportation generally pass through the hands of several carriers, renders it of vital importance to the public that uniform rules and regulations governing railway traffic should be framed by those who have a practical acquaintance with the subject, and that they should be promulgated and faithfully observed. The advisability of establishing such rules and regulations in the mode above indicated, particularly for the uniform classification of freight, has been frequently pointed out in the reports of the interstate commerce commission. Indeed, the benefits that would result from uniform rules and regulations, and from uniformity in the classification of freight, seem to us so obvious that we need not stop to enumerate them.

We are of the opinion, therefore, that the stipulations of this agreement enjoining a monthly conference between representatives of the various members of the association, and the appointment of a committee to formulate rules and regulations governing the traffic embraced by the agreement, are not only not opposed to public policy, but, if faithfully carried out, will tend to promote the public interests. It is also obvious, we think, that the stipulation requiring five days' written notice of a proposed reduction in rates does not, in and of itself, render the contract unlawful. It is certain that a contract not to reduce established rates without a public notice of three days, and not to increase them without a notice of ten days, would not be against public policy, because the interstate commerce act has prohibited such changes

with less notice. The plain object of this provision was to prevent competitors from resorting to secret, unfair, and ruinous methods of warfare, to make competition fair and open, and to enable shippers to modify their action to suit the coming changes. There is no purpose of the provision, or of the policy that dictated it, that would not be as well, if not better, served by a notice of fifteen or forty days, as one of three days.

But it is urged that the contract in question restrains competition in rates, and is therefore unlawful. That it does have some tendency to check competition in that respect will not be denied; but that the restraint imposed is slight, that there is abundant room within the terms of the agreement for the play of all the healthy forces of competition, and that it has a pronounced tendency to prevent sudden and violent fluctuations in rates, commonly termed "rate wars," seems to us to be equally manifest. It is not reasonable to suppose that any member of the association which, by virtue of its situation, can really afford to transport freight or passengers between any two competitive points for a substantially less sum than its competitors, will be likely to forego the advantage that its situation gives it, even under the operation of the agreement. It is much more probable that under the operation of the agreement, as under the influence of free competition, the rates between competitive points will be largely, if not entirely, based upon the rate which the road having the shortest line and best facilities esteems fair and reasonable compensation.

[81] It will be observed that under the terms of the agreement no member of the association has bound itself to be governed by a rate fixed by a vote of the majority for a longer period than 10 days after the monthly meeting next succeeding its notification of a proposed change in rates; and for that reason the limitation imposed by the contract upon the right of a member of the association to adopt such a rate as it sees fit is very slight, and the power reposed in the association is correspondingly small. We fail to see, therefore, that the natural or probable effect of this contract will be to sensibly raise either freight or passenger rates above the level which they would attain under the influence of

what is termed "unrestricted competition." On the other hand, it seems highly probable that the contract in question will prevent sudden and violent fluctuations in freight rates, such as often upset the business calculations of entire communities, and that this was one of the main reasons which led to the formation of the association. We are also persuaded that it will have a sensible tendency to induce a more uniform system of classification throughout the great region where the association operates, and also to induce the establishment of a more perfect code of rules and regulations governing freight traffic. It may also tend to prevent stealthy, secret, and unfair methods of warfare, and to make the strife for patronage among the members of the association open, fair, and honorable. All of these are objects that are in line with the true spirit of the interstate commerce act and an intelligent public policy.

The result is that this contract, in view of all the circumstances of the case and the situation of the parties thereto, does not impose such unreasonable restraints on competition as will warrant us in holding that it is one of those contracts or conspiracies in restraint of trade and commerce among the several states which fall within the inhibition of the anti-trust act of July 2, 1890.

Nor is there any monopoly of trade, or any attempt to monopolize trade, within the meaning of that act, evidenced by this contract. So far as can be learned from it, the association has never intended to have, and never has had or attempted to have, any trade. It has not held or attempted to obtain or hold any property except the moneys necessary for the bare expenses required to pay its officers and employes. It has been and is a mere adviser with its members upon disputed questions submitted by the contract to its consideration. So far as can be learned from the contract, each member of the association is striving with every other in its territory, whether a member of the association or not, to divert from the latter and gather to itself all possible trade. There are provisions in the contract that the chairman may authorize members to meet the rates of competitors who are not members of the association, and that any member may meet the rates of such competitor at its

peril; but these provisions were necessary for the protection of members of the association against the attacks of nonmembers. Without such provisions unreasonably low rates established by the latter would draw away the busi- [82] ness of the members, and deprive them of the opportunity to compete on equal terms. These provisions give no company any higher right or greater power than it had before the contract was made, but simply reserved to each the privilege of exercising its original right to meet competition without giving the 15 days' notice in case of a warfare upon it by a nonmember.

A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. There is nothing in this contract indicating any purpose or attempt to obtain such a monopoly. The great transportation systems of the Great Northern Railway Company, the Northern Pacific Railroad Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company were operated in the region subject to the regulation of this association, but none of these companies were members of it; and, even if they had been, there would still have been no evidence of any attempt to monopolize trade here, because each member is left to compete with every other for its share of the traffic. *In re Greene*, 52 Fed. Rep. 104, 115.

The position that these railroad companies have so far disabled themselves from the performance of their public duties by the execution of this contract as to give ground for the avoidance of the contract, and for a forfeiture of their franchises, cannot be successfully maintained. It is well settled upon principle and authority that, where a corporation by a contract entirely or substantially disables itself from the performance of the duties to the public imposed upon it by the acceptance of its charter, the contract is void, and its franchise may be forfeited. The reasons for this rule, and some of the limitations of it, were stated by this court in *Union Pac. Ry. Co.* v. *Chicago, R. I. & P. Ry Co.*, 51 Fed. Rep. 309, 317–321, 2 C. C. A. 174, 230–235; and it is unnecessary to repeat them here. It goes without saying

that this rule in no way limits the power of a corporation to discharge its duties through agents of its own selection. There is no doubt that each of these corporations could lawfully appoint an expert or a committee of experts upon the subject of classification and rates of freight upon its road, empower him or them to fix the rates, and then maintain them for 40 days unchanged. Practically the 15 representatives of these companies, at a meeting of the association, their chairman, and their committee that originally fixed the rates and rules, together constitute an advisory committee on rates and rules of traffic, composed of men whose intimate knowledge of the needs of the shippers, and of the character and quantities of the commodities transported through the different portions of the wide area traversed by these railroads, and whose wide experience in the effect of various rates upon the accommodation of the public and the business of the companies fit them well to carefully consider and wisely establish just and reasonable rates throughout this territory. Such a committee each company acting independently might have appointed, and it is not per- [83] ceived that the fact that two or more companies appoint the same men to establish rates and rules for the traffic upon their respective roads in any way invalidates the appointment of either.

Moreover, the power delegated to the association, its committee and chairman, is so limited in extent and so restricted in time that it is hardly worthy of serious consideration as the ground for the avoidance of a contract and the forfeiture of a franchise. The power granted to the committee originally chosen to establish the rates and rules expired by limitation upon a 30-days notice of withdrawal from the association; the power of the association itself to prevent modifications and changes in the rules and rates established ceases after 15 days' notice of an intention to make the modifications and changes notwithstanding its action. It is true that there is a provision in the second article of the agreement that regular meetings of the association shall be held, "unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together," but the remark of the counsel for the govern-

ment that this gives the chairman power to prevent the consideration of proposed changes in rates, and thus to maintain them indefinitely by preventing a meeting of the association, cannot be seriously considered. The effect of the contract is that, when a company gives notice of a proposed change of any importance, the meeting shall be held. Such a notice presents business to be transacted that does warrant calling the members together. If, under such circumstances the chairman gives notice that there is no such business, he violates the contract. The presumption is that he will not violate it; and, if he does do so, that is no ground for an avoidance of the contract.

The result is that neither this contract nor the association formed under it can be held to be obnoxious to the provisions of the anti-trust act in view of the facts admitted by the pleadings in this suit, and in the absence of other evidence of their consequences and effect.

Many of the considerations to which we have referred are presented upon the argument of the question whether or not the anti-trust act applies to or in any way governs transportation companies that are engaged in that part of interstate and international commerce which consists solely of the transportation of persons and property, in view of the very substantial regulation of this part of commerce provided by the interstate commerce act. The views we have expressed render it unnecessary to determine this question, and we express no opinion upon it. We rest this decision on the ground that, if the anti-trust act applies to and governs interstate and international transportation and its instrumentalities, the contract and association here in question do not appear to be in violation of it.

The decree below is affirmed, without costs.

THAYER, District Judge, concurs.

[84] SHIRAS, District Judge, (dissenting.)

I am unable to concur in the conclusion reached by the majority of the court in this case, and propose to state the reasons for such nonconcurrence.

Assuming that the anti-trust act of July 2, 1890, is applicable to interstate railroad companies and the business transacted by them, it seems to me entirely clear that the contract entered into by the railway companies forming the Trans-Missouri Freight Association is in contravention of the statute, in that it deprives the public of the benefit of free competition between the associated railway companies, and thereby subjects the commerce of the regions tributary to these lines of railway to the possibility, if not the certainty, of paying increased rates for the transportation of freight over the same.

It is doubtless entirely true that at the present time a more liberal rule prevails than in the earlier days in regard to contracts affecting the business carried on by private citizens or corporations, when the same is essentially of a private nature, and only indirectly affects the public at large. As is pointed out in the opinion of the court, the use of steam and electricity in connection with the mercantile and commercial business of the world has so greatly increased the facilities for commercial intercourse that contracts which a century ago would have been in fact an unreasonable restriction upon trade in its then condition would not now produce the same result, and hence would not fall within the condemnation of the principle which declares unlawful all contracts or combinations which work an unreasonable restriction upon trade and commerce. The principle itself, however, remains in force at the common law even in regard to business enterprises which deal only with matters of private interest, and only incidentally affect the community at large. At an early day a distinction was recognized at the common law between the rules applicable to business pursuits of a purely private nature and those connected with matters directly affecting the community at large; as, for instance, the dealing in commodities forming the necessaries of life. Contracts or combinations tending to create a monopoly in the latter articles were condemned as contrary to public policy, when like contracts affecting other kinds of property were held to be valid; and the same principle holds good at the present time. Another distinction which is now firmly established and en-

forced grows out of the nature of the business contracted about, and the relation the contracting parties bear thereto. An individual or a private corporation engaged in a purely private enterprise may lawfully enter into contracts or combinations in regard thereto which would be invalid and illegal if the business was of a public nature, and the corporation was created for the purpose of engaging therein. Thus in *Gibbs* v. *Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553, the supreme court, speaking by Mr. Chief Justice Fuller, declared that—

"The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual [85] effort. * * * Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, (*Registering Co.* v. *Sampson*, L. R. 19 Eq. 462,) yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited, in *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.*, 22 W. Va. 600; *Chicago Gaslight & Coke Co.* v. *People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169; *Western Union Tel. Co.* v. *American Union Tel Co.*, 65 Ga. 160. * * * Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interest, cannot be upheld."

In *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.*, 22 W. Va. 600, it is said:

"If there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

In *Chicago Gaslight & Coke Co.* v. *People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169, it is declared that—

"The ordinary rule that contracts in partial restraint of trade are not invalid does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city."

It is not necessary to extend the citation of authorities upon this general proposition, but it is of vital importance to bear in mind the distinction that exists in this particular between private individuals or corporations engaged in ordinary business avocations and public corporations engaged in the performance of a public or governmental duty, like that of building and operating a public highway in the form of a railway line.

From the earliest days the duty of constructing and maintaining the public roads of a country has been recognized as one incumbent upon the government. To secure the construction of a railway running over the property of many individuals, the right of eminent domain must be called into exercise, and thus the character of a public enterprise is impressed upon it both by reason of the purpose it is intended to subserve and by reason of the governmental power exercised in its creation and maintenance. So, also, corporations created for the purpose of building and operating public highways in the form of railroads are of necessity public, not private, corporations, because they are formed for the purpose of engaging in the public work of constructing and operating a highway for the use of the people at large, and because they are authorized to call into exercise the governmental right of eminent domain, a right which cannot be lawfully conferred upon a private corporation engaged solely in enterprises private in their nature. The failure to recognize the distinction existing between private enterprises [86] carried on by individuals or private corporations, and public duties performed through the agency of public corporations, in my judgment has misled the court in reaching the conclusion announced in the majority opinion.

As applied to private associations, the modern authorities undoubtedly sustain the proposition therein laid down, "that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade;" but that, in my judgment, is not the test of validity when the action of public corporations relative to public duties is brought in question.

Parties engaged in the manufacture or sale of lumber, dry goods, or other like articles primarily owe no duty to the

public in connection therewith. They may limit or enlarge, continue or discontinue the business, as they please, and may charge exorbitant prices or the contrary. In these particulars they owe no special duty to the public, for they are not exercising any sovereign or public powers in carrying on such private enterprises, nor are they charged with the performance of a public duty. Hence they are at liberty to enter into contracts with other private parties engaged in like pursuits which may tend to regulate or restrict the business carried on by them, subject, however, to the rule that restrictions unreasonably affecting the freedom of trade and commerce cannot be sustained, because thereby the public interests are affected. Touching contracts between private parties in regard to pursuits essentially private in their nature, the test of validity we thus find to be the actual effect thereof on the public welfare. In regard to such private enterprises the public has no voice in the management thereof, nor any right of dictating what shall or shall not be done by the owners thereof, nor have the latter become bound to carry on the business in the interest or for the benefit of the public primarily. The contrary is true with regard to public corporations, clothed with the power to fulfill public duties, and engaged in enterprises the purpose of which is to discharge a governmental duty, and which require in their performance the exercise of the sovereign right of eminent domain.

Such public corporations owe primarily a duty to the community, and the relations existing between them and the public are in many particulars radically different from those pertaining to private corporations. Neither extended argument nor the citation of authorities is needed to show that the business of railway transportation is one of a public character, and which reaches and affects the business interests of the entire community. When a highway in the form of a railroad is constructed and put in operation, all parties living in the regions adjacent thereto are dependent upon the railroad for the carrying on of all business which involves the transportation of persons or property in connection therewith. The farmer is compelled to use the railway for the transportation of the products of his farm to market.

The merchant must use the same agency in bringing to his place of business the merchandise in which he deals. Practically the business of the community, whether [87] in connection with articles of prime necessity, like food or fuel, or the other articles which are produced or dealt in by the people at large, becomes of necessity wholly dependent upon the facilities for transportation furnished by the given railway. As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact the action of the corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer, and the merchant from the sale of the products of the farm, the workshop, and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country.

Certainly, if it be true, as held in *Gibbs* v. *Gas Co.*, *supra*, that the supplying of gas for illuminating purposes is a business of a public nature, because it supplies a public necessity, and that it is of such a character that contracts between companies engaged therein, looking to a regulating of competition, cannot be sustained because inimical to the public welfare, then it must also be true that the furnishing facilities for the transportation of the products of the country by means of railways is likewise a public business, and one of such character that contracts or combinations between the corporations engaged therein, intended to limit the effect of free competition upon the rates charged the public, must be held to be prejudicial to the public interests, and therefore to be invalid. It is said in the opinion of the court that—

"We find that it has long been settled that contracts or combinations of producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts or combinations between such producers or dealers to divide their profits in certain fixed proportions and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void."

Are not railway companies engaged in the transportation of articles of prime necessity to the people? Do they not handle the food products of the country, the fuel, and all the other necessaries of life? Do not the rates charged for the transportation of these articles have as much to do with determining the prices paid by the community as the rates charged by those engaged in buying and selling the same upon the open market? If combinations among the dealers in such articles to avoid competition and enhance the cost to the consumer are illegal and void, why are not combinations among common carriers engaged in the transportation of the same articles, tending to enhance the cost to the consumer by avoiding the effect of competition upon the rates of transportation, equally void?

If I correctly understand the opinion of the majority, it is therein admitted that it is the settled law that contracts or combinations between producers or dealers in staple commodities of prime neces- [88] sity to the people, tending to monopolize the supply or enhance the price, are contrary to public policy and therefore void; and yet it is maintained that public corporations like railway companies may combine to fix the rates to be charged for the transportation of the like commodities, which of necessity affects the cost to the consumer, as well as the value to the producer, and that contracts thus arbitrarily establishing the rates to be charged, and avoiding the effect of competition thereon, cannot be held to be invalid, unless it be clearly shown that the rates thus fixed are unreasonable. It seems to me the two propositions are clearly at variance.

The right to freely contract and combine possessed by private parties engaged in private pursuits is limited and denied when they come to deal with staple commodities, because the whole community is interested in these articles of prime necessity, and any contract affecting them affects the public; and clearly public corporations are under a more stringent rule in this particular.

Unlike private parties engaged in private pursuits, which only incidentally, if at all, affect the public welfare, corporations created for the purpose of constructing and operating the modern form of public highways owe primarily a duty to

the public. They are created to subserve a public purpose, to wit, to furnish the means for the transportation of the people and property of the country, and they are under constant obligation to use their corporate powers in the interest of and for the benefit of the community from which these powers have been derived.

The right to demand transportation for one's self or property over such highways belongs to every member of the community, and the rate to be paid for such service is a question which affects every one using the highway, and, in addition, every member of the community is affected by the rates charged, for the amount thereof enters into and affects the price of every article that is bought and sold in the community. The duty of transporting persons and property over a line of railway is a public duty, assumed by the corporation operating the particular line, and in the proper performance thereof the public has a direct interest. The proper performance of this duty includes the rate of compensation to be charged for the services rendered, and this is a question in which the public has a direct and most important interest, and all contracts or combinations intended to affect the rate to be charged directly affect the public welfare. Clearly, therefore, railway transportation of persons and property comes within the classes of business, which, in the language of the supreme court in *Gibbs* v. *Gas Co.*, *supra*, are of such a public character that presumably they cannot be restrained to any extent whatever without prejudice to the public interest.

In the opinion of the majority it is practically assumed that the same freedom to contract or combine with others is possessed by the public corporations engaged in railway transportation as belongs to private parties engaged in private pursuits. It does not so seem to me, either upon principle or authority. Private corporations are not created for the primary purpose of furthering the public [89] interests, nor do they assume the performance of a public duty. Conducting private enterprises for private gain, there is no presumption that their acts will affect the public welfare, and hence their freedom of contract and action is not to be limited or denied, unless it clearly appears that the in-

terests of the community will be injuriously affected by the action proposed to be taken. On the other hand, in the case of public corporations engaged in carrying on a public enterprise, it is apparent that every course of action intended to affect the business transacted by the corporation must of necessity affect the public interests.

A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business, which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations, intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public, and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein.

In the case of railway companies engaged in the public business of transporting persons and property from state to state over the highways of the country, it is, in my judgment, clearly contrary to the public welfare, and therefore illegal, for these public corporations to enter into contracts and combinations intended to limit or nullify the effect of free and unrestrained competition upon the rates to be charged the public for the services rendered in the transportation of persons or property over the public highway. So far as the national government has dealt with this question, it has as yet not undertaken to declare by statute what rates shall be charged by the railway companies, nor has it established a fixed maximum or minimum limit. In this

particular the public has relied upon the effect of competition in keeping the rates charged within reasonable bounds. Hence it is that all sections of the country have so eagerly striven to secure the construction of competing lines of railway. There is scarcely a town or city in the community that has not felt the need of securing access to rival lines of transportation, in order that it might enjoy the benefits of competition in reducing the freight and passenger tariffs of the railway companies. If, after a community has by donations or taxation expended a large sum in securing the construction of a second line of railway for the purpose of thereby enjoying the benefits of competition, it is open to the two railway corporations to combine together, and by contract [90] establish a tariff of rates which neither company is at liberty to depart from, it is clear that the community is thereby deprived of its only protection against unfair charges.

In my judgment, the community is absolutely entitled to the protection against unfair rates which is afforded by free and unrestrained competition between the companies engaged in the transportation business of the country, and any contract or combination which is intended to restrict competition in this particular is inimical to the public welfare, and is therefore illegal.

In the opinion of the majority of the court it is urged, in substance, that it is lawful to place a reasonable restriction upon competition, and that, therefore, the question in each case is whether the restriction placed upon competition results in the imposition of unreasonable rates for the services rendered. This is the rule in regard to private parties engaged in private pursuits, because as to such pursuits a restriction upon competition does not affect the public unless it is unreasonable, and the public has no right of complaint until its interests are unfavorably affected; but, as I have endeavored to maintain, in the case of public railway corporations, the work they are engaged in is inherently of a public nature, and any contract or combination entered into between them, intended to affect the rates to be charged, must of necessity affect the entire community. In view of the public interest in the rates charged for transportation over the public highway, and in the absence of legislation afford-

ing other means of protection, the community cannot be deprived of the safeguard secured by free and unrestricted competition between the different lines of railway without placing the welfare of the public in subjection to the interests or supposed interests of those managing these corporations, which certainly cannot be lawfully done.

But it may be argued that due protection in this particular is afforded by holding that reasonable restriction upon competition as to rates will be sustained, and unreasonable restrictions will be held invalid. I apprehend that no other meaning can be given to this proposition than that, if the rates established under a given restriction upon competition are reasonable, then they will be sustained; otherwise not. The reasonable rates which the community is entitled to enjoy are those which result from free and unrestrained competition, and not those which are agreed upon by the railway companies in the absence of competition. In the absence of lgislation establishing a standard for reasonable rates, and in the absence of rates fixed by free competition, what practicable criterion is there for determining whether a tariff of rates agreed upon by railway companies is or is not reasonable with reference to the public? If it be the law that railway companies may combine together, and by contract agree upon the schedule of rates to be charged, and bind themselves under penalties not to depart from the schedule thus established, and if the individual citizen can obtain no relief against the exaction of rates thus fixed, unless he can in each instance prove to a court and jury that the rate charged is unreasonable, then he is in fact wholly without remedy. The great [91] cost and other evils of litigation of this character would ordinarily deter the private citizen from the effort to maintain his rights by an appeal to the courts.

But if the citizen should assume these burdens, and should contest the rightfulness of the charges complained of, he would, under the view advanced in the majority opinion, be compelled to establish by competent evidence that the rate complained of was unreasonable. By what criterion is the question of the reasonableness of the rate charged to be determined? The article shipped is perhaps a car load or two of live stock or of wheat or other like products. Is the

citizen to be compelled to attempt to prove what it really costs the railway company to transport these cars? Is the inquiry to embrace an investigation into the cost of the construction of the road, of the equipping the same, and of operating the road on the one hand, and into the total amount and character of the business done by the road, and of the amounts received therefrom, so as to ascertain whether a due relation exists between the income and expenditure? It must be apparent to any one that it would be wholly impracticable to enter upon such an investigation, and, if it was entered upon, the citizen would be at such a disadvantage as to amount to a total denial of justice to him.

If it be said that the reasonableness of the rate charged is to be ascertained by comparison with the rates charged for like services by other railroads, then the rates accepted as the standard of comparison must be such as are the result of free competition, because it would not do to accept as a standard rates fixed by a combination, for it could not be known that these rates are reasonable, and the proposed standard would be without value as evidence. The difficulties that would of necessity be encountered by any citizen in establishing the unreasonableness of a particular rate charged him are such as to render a remedy by that method of no value, and hence it is that at all times the citizen is entitled to the protection afforded him by absolutely free competition between railway companies. Any contract or combination which tends to deprive the citizen of the protection thus afforded him is contrary to public policy.

In the opinion of the majority a very full and careful analysis is made of the various provisions of the contract entered into by the defendant companies, and the benefits to be derived therefrom are pointed out. I do not doubt that in many respects the provisions of this contract, if carried out, would operate beneficially for the companies and without injury to the public; but the illegality of the contract, in my judgment, lies in the fact that its main purpose is to protect the companies from the effects of free competition in reducing the rates to be collected for the transportation of freight over the lines of railway operated by the contracting corporations. Certainly the defendants, if they

considered themselves bound by this agreement, were no longer at liberty to compete with each other in the matter of rates to be charged the public.

[92] The rates are to be established by a committee, and are to be observed by all the contracting parties, with a liability to a penalty for any breach of the contract. It is clearly evident that the defendants entered into this contract in the expectation that thereby a schedule of rates would be fixed which would differ from those which would prevail in the absence of such concerted action.

The several companies are no longer left free to fix rates based upon considerations pertaining to their own lines of railway, the cost of operating the same, and the facilities possessed for handling the business. If the making and enforcement of this contract would not have the effect of establishing a schedule of rates other and different from what would obtain in the absence of the contract, what induced the companies to enter into it?

I can place no other construction upon this contract than that its main object was to remove the question of rates from the field of competition. In my judgment, it is not necessary to enter upon a minute examination of the averments made in the bill and denied or admitted in the answer. The bill charges and the answer admits that the defendant companies entered into the contract in question, and the main issue in controversy is as to the validity of the contract. As I construe it, the invalidity thereof is apparent upon its face, in that it clearly appears that the purpose of the contract was to establish by agreement a schedule of rates which was to bind all the contracting companies, and which each company was bound to enforce as against its patrons; thus depriving the public of the protection resulting from free and unrestrained competition between these public corporations. It matters not that the particular rates now enforced under this contract may be wholly reasonable. That is not the question. The point to be decided is whether these public corporations, engaged in a public enterprise, have the right to agree that they will cease to compete with each other.

Whether these corporations shall or shall not be relieved from the effects of free and fair competition in the carrying

on of the public work they are engaged in is a question to be decided by the people, acting through the proper governmental agency. It is not for the railway companies to decide when they will compete with each other and when they will not. The public welfare demands that they should remain always subject to the operation of this principle of free competition, unless they are freed therefrom by legislative action, whereby other safeguards are substituted for that afforded the public by the operation of the principle named.

If I correctly apprehend that portion of the majority opinion which deals with the effect of the interstate commerce act, it is therein argued that this act radically changes the rights of the railway companies and the public in this particular, and that it was intended thereby to free the companies from the effects of free competition. With all due deference to my brethren, I must yet be permitted to say that it seems to me that the opinion always [93] loses sight of the distinction existing at the common law between parties following private pursuits and public corporations engaged in public enterprises.

The interstate commerce act did not materially change the rights pertaining to the public. It created certain machinery for the better enforcement and protection of the public interests, but the rights to be protected were already in existence, and the statute in this respect is only declaratory of common law principles. Before the enactment of that statute, railway companies were recognized to be public corporations, charged with the duties and obligations pertaining thereto. As common carriers they were under legal obligation to deal with the public, and to afford equal facilities to every citizen, and they were only entitled to demand reasonable, and not exorbitant, compensation for the services rendered by them. The purpose of the interstate commerce act was not so much to change the legal rights of the common carriers and of the public as it was to compel a change in the practices of the railway companies, and to enforce compliance on their part with the duties and obligations which rested upon them under the principles of the common law. The line of argument followed by the majority seems to assume that the main purpose of the interstate commerce

act is to regulate the relations between the competing lines of railway, and to protect the weaker lines of railway and the capital invested therein from being absorbed by the stronger competitor. That there are evils of this nature of great magnitude is not to be denied, but the interstate commerce act was not enacted for their eradication.

The primary purpose of that act was to deal with the relations existing between the common carriers and the public, and to enforce the rights of the latter. Experience had shown that railway companies had, in many instances, favored particular localities or particular parties or particular classes of business at the expense of the community at large, and the act was, in the language used by the supreme court in *Railway Co.* v. *Goodridge*, 149 U. S. 680, 13 Sup. Ct. Rep. 970, intended "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality." The uniformity and equality of rates sought to be secured by that act are not between the schedules of rates charged by the several companies, but between the charges actually made by each railway company to its patrons. The act does not require the schedule of rates adopted by one company to conform to that of a rival company. What it does demand of each company is that, in dealing with its customers, it shall make no unjust discrimination, but shall, for the like service performed under similar circumstances, charge the same rate to all. The act provides that all charges for the transportation of persons or property from state to state shall be reasonable and just, but no standard for ascertaining whether a given rate is reasonable or not is established by the act.

I fail, therefore, to perceive the force of the argument that the [94] adoption of the interstate commerce act worked a radical change in the relations existing between railway companies and the public, and that one effect thereof was to authorize the former to combine together for the purpose of escaping the effect of competition upon the rates to be charged the public for the services rendered. Before the adoption of that act the community was certainly entitled

to the protection derived from free competition between the lines of railway engaged in interstate traffic, and there is nothing in that act which deprives the public of this safeguard. That act was intended to secure to the public the enjoyment of the pre-existing right to reasonable rates upon interstate commerce, and to defend the public against the evils resulting from unjust discrimination on behalf of favored parties, localities, or classes of business.

In the opinion of the court are found citations from the reports of the interstate commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate charges, and the advantages that are gained in many directions by proper conference and concert of action among the competing lines. It may be entirely true that, as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community, but I fail to perceive the force of the argument that, because railway companies, through their own action, cause evils to themselves and the public by sudden changes or reductions in tariff rates, they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker. Fluctuations in prices may be caused that result in wreck and disaster, yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be.

There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot, by combination and agreements among themselves, bring about this change. The fact that the provisions of the interstate commerce act may have changed in many respects the conduct of the companies in the carrying on of the public busi- [95] ness they are engaged in, does not show that it was the intent of congress in the enactment of that statute to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates.

There are three general methods by which these rates may be established. It may be done by direct legislative enactment, (whereby either fixed rates or a maximum or mimimum limit are enacted by the statute or by provisions for the adoption of rates by a commission,) or the rates may be adopted by the independent action of each company, acting under the spur of self-interest, and controlled by the effect of free competition, or the rates may be fixed by means of agreements or combinations between the rival lines of railway, whereby each contracting company is bound to charge the rate thus fixed and agreed upon. Congress has not yet undertaken to establish a standard of rates, either directly or through the action of a commission or the equivalent. Neither, in my judgment, has congress, in enacting the interstate commerce statute and the amendments thereto, conferred upon the railways the right to enter into combinations for the purpose of compelling the members to charge the rates fixed by a committee of the association, in whose deliberations the public have no part, and the avowed purpose of which is to evade the operations of the law of competition, which is as yet the only safeguard upon which the public can rely for the securing of the adoption of reasonable charges upon interstate traffic. I had always supposed that the enactment of the interstate commerce statute was the result of a popular demand, which insisted upon relief being given to the community as against the methods pursued by the railway companies which, in some particulars at least,

were deemed to be inimical to the public interests. Looking at the causes which brought about the enactment of this statute, and the evils at which it was aimed, it does seem clear that it is wholly wrested from its purpose when it is held that it creates numerous radical and effective changes in the public policy of the nation touching competition between railroad companies engaged in interstate commerce. For the better protection of the rights of the public, and to sweep away the system of discriminations in favor of localities, individuals, or classes of business which had come into vogue, the interstate commerce act was intended to introduce radical changes in railway methods, but it never was intended to curtail the rights of the public and enlarge those of the railway corporations in any substantial particular. The argument of the majority is that, even if it were admitted that under common-law principles all contracts or combinations between public common carriers for the establishment of rates would be held to be contrary to public policy, nevertheless the enactment of the interstate commerce act revolutionized the law in this particular, and authorized railway companies to enter into combinations for the purpose of establishing reasonable restrictions upon the freedom of interstate commerce.

Reading that act in the light of the causes leading to its enact- [96] ment, I cannot find in any of its provisions foundation for the theory that it was intended to confer upon railway companies the right to enter into combinations which, under the principles of the common law, would be illegal, because contrary to public policy. The reasoning of the court is to the effect that "the interstate commerce law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and congress has thereby expressed its conviction that absolutely free competition between carriers is not at the present time conducive to the public welfare, and that other things are more essential to the public good."

I do not quarrel with the proposition that the interstate commerce act imposes important restrictions, (not upon the right, however,) but upon the practice of railway companies

to do as they please in the matter of making and altering rates. But how does that fact tend to show that the act places restrictions upon the rights of the public? The congress of the United States may place restrictions upon the rights of the railway companies and upon the rights of the public, but the fact that congress may enact laws which are intended to change the methods pursued by the companies in certain particulars does not necessarily restrict the rights of the public. But if it be admitted that by some possible mode of construing the interstate commerce act, and the action of the commission created thereby, it can be held that under its provisions the railway companies became clothed with the right to combine together, and by mutual agreement to create restrictions upon the freedom of interstate commerce, so long as the same are reasonable,—which is the position of the court,—then would it not follow that the right thus created by the interstate commerce act is abrogated by the later enactment found in the anti-trust act, which expressly declares, not that unreasonable contracts, combinations, or restrictions are illegal, but that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal? The statute declares that restraint of interstate commerce, all restraints, every restraint of such trade and commerce brought about by contracts, combinations in the form of trusts or otherwise, or by conspiracy, are illegal. The statutory declaration in effect is that interstate trade and commerce are to remain free from restriction. The declaration of the court is, in effect, that railway companies engaged in interstate commerce may place restrictions upon such commerce; that the right so to do, if not existing under the common law, is conferred upon railway companies by the provisions of the interstate commerce act; that such restrictions cannot be held to be illegal unless it is shown that they are unreasonable, and the presumption is in favor of their reasonableness and consequent legality. I cannot believe that such is the meaning of the interstate commerce and the anti-trust acts. When the latter act was adopted, it had been declared by the supreme court of the United States to be the law that, with regard to the classes of business that

are of a public nature, and are carried on to meet a public necessity, contracts im- [97] posing restraints thereon, however partial, cannot be sustained, because in contravention of public policy. It cannot be successfully questioned that railway companies engaged in interstate trade and commerce are carrying on a business of such a public character as of necessity places it in the class declared by the supreme court to be of such a nature that no restraint thereof, however partial, is permissible. It is a familiar principle that statutes are to be construed with reference to and in the light of the law existing at the date of their enactment. Thus reading the anti-trust act, is not the first section thereof intended to clearly enunciate in statutory form the principle already declared to be the law by the supreme court? The interstate commerce and anti-trust acts were passed for the protection of the interests and enforcement of the rights of the public. The view taken thereof in the opinion of the court results in curtailing the rights of the public and in enlarging the powers of railway companies. If the law be as is therein declared, then these public corporations, engaged in carrying on the public duty of constructing and operating the public highways, over which, of necessity, nearly the entire traffic of the country must be carried, are at liberty to combine together and determine in secret conclave the rates they will demand from the public for the services rendered, and enforce the imposition of the schedules thus fixed by penalties assessed against any party to the combination which may vary from the agreed schedule, and the individual citizen has no relief against rates thus fixed, unless he can satisfy some court or jury that the rate charged is unreasonable.

It is admitted in the opinion of the court that the contract in question has some tendency to check competition in rates, but it is said the restraint is slight, and therefore lawful. If the natural tendency is to check competition in the matter of rates, and to place a restraint, though but slight, upon the freedom of interstate traffic, what tribunal is to determine when the proper boundary has been passed, and by what standard is the lawfulness of the restraint to be measured? The legal consequence of the position of the court is that

railway companies, by combinations between themselves, may fix the schedule of rates to be charged the public, and may bind themselves under penalties not to depart from the rates thus agreed upon, and the citizen is bound to pay the tariff thus established, unless he can satisfy a court that the sum charged is unreasonable. It may sound well to say that the courts are open to the citizen, and that they will afford him protection against the exaction of unreasonable rates, but we know that the supposed remedy would only aggravate the original wrong. It is said in the opinion of the court that there is nothing in the contract described in the bill which indicates any purpose or attempt to obtain a monopoly of the trade of the region traversed by the defendant corporations: that the systems of the Great Northern, the Northern Pacific, the Southern Pacific, and Texas Pacific Railway Companies are operated in the region subject to the regulations of the defendant association, but they are not members of it, and therefore the defendant companies cannot monopolize the entire traffic of the region. The great [98] majority of the patrons of the several lines of railway represented in the association in question do not live at competitive points. As to each of them the line of railway nearest to them has, of necessity, an absolute monopoly of the carrying trade belonging to the business in which they are engaged. Of what advantage to a farmer, a merchant, or a manufacturer doing business at or adjacent to a station upon a given line of railway is the fact that 20 or 50 or 500 miles from his place of business there is another railway line? The distance is so great, and the cost of reaching the same is so great, that he is practically debarred from making use of the same, and he has no choice in the matter. Parties doing business at competitive points may have free choice, and as to them it may be true that neither competing line has a monopoly of the business transacted at places where competition, being free and unrestricted, may work out its legitimate results, but this is not true of persons engaged in business at noncompetitive points. As to them, the control of the railway company adjacent to them is practically absolute. Of necessity, in such case the railway company has a complete monopoly of the entire transportation traffic of the region in which there is in fact no competing line. Against the evil tendencies of this monopoly, protection is afforded to the citizen by securing free and unrestrained competition between the lines of railway at the several points or localities where they in fact come into active competition, and, reasonable rates having thus been secured at these points, we have a standard established by which it may be determined whether the rates charged from intermediate noncompetitive points are reasonable or not, and the provisions of the interstate commerce act forbidding a greater charge for a shorter than a longer haul under similar circumstances may be invoked to secure a proper proportionate relation between the rates at competitive and noncompetitive points. If, however, the railway companies may combine together to fix the rates to be charged at competitive points, thus eliminating the effect of free competition, how fares it with the citizens residing at the noncompetitive point? By the very necessities of his location he is debarred from choosing the line of railway he will patronize. He is compelled to avail himself of the facilities afforded by the line nearest him. The railway therefore has the absolute monopoly of the transportation pertaining to the business of the citizen. It likewise has the exclusive control of the rates to be charged; and if the company, by contracts and combinations with the other lines of railway operating in the same region, may free itself from the restrictions afforded by free competition, what is lacking to constitute a complete and absolute monopoly of the transportation business thus dependent upon the given line of railway? The direct and necessary consequence of the contract entered into by the defendant companies is to create and perfect an absolute monopoly in each of the contracting parties over that part of the business carried over their respective lines which comes from that portion of the territory in which there is not in active operation a competing line; and, even as to regions which are so situated that competition might be had in the absence [99] of contracts preventing the effects thereof, a like monopoly is created by the contract entered into by the defendant companies.

In the matter of rates, competitive points are those where

the transportation business of the locality is sought by two or more competing lines. In the case of sales of property at public auction, it is the rule that combinations among proposed purchasers, whereby it is agreed that they will not bid against one another, but the property shall be bid off at an agreed price for the common benefit of all the contracting parties, are illegal, and a sale thus made is voidable, because all fair competition is prevented by such combination. If the competitors for the transportation business of a given locality agree that there shall be no competition between them on the subject of rates to be charged, does not the same evil result? In the one case it is sought to deprive the owner of his property, without paying to him the fair value that would probably be bid in case competition was not stifled by the agreement between the purchasers. In the other the citizen is subjected to the payment of charges which are not the result of free competition, but are the result of combinations and mutual agreements, entered into for the express purpose of eliminating competition as an element in the determination of the rate to be charged. Thus points and localities which are competitive so long as there is active rivalry between the railway lines seeking the business of the region cease to be such when the rival lines combine and become, in effect, but one upon the subject of the charges to be demanded of the citizens. In such event the citizen becomes subject to a monopoly as complete and absolute as though there was but a single line of railway within his reach. Thus is found in the contract and combination entered into by the defendant companies elements which directly tend to the establishment of a monopoly, complete and absolute, over the transportation traffic in the region traversed by the lines of the defendant companies, due to the undeniable fact that the price charged for the transportation of the property of the community exercises a controlling influence over the question of the success or failure of the various business pursuits and avocations upon which the citizens are dependent for a livelihood, and, moreover, it directly affects and controls the cost to the public of all the necessaries of life.

The declaration found in article I of the contract shows upon its face the main purpose of the combination, it being

therein recited that "the traffic to be included in the Trans-Missouri Freight Association shall be as follows: (1) All traffic competitive between any two or more members hereof passing between points in the following described territory," etc. Does not this clearly show that the main purpose of the contracting parties is to deal with that traffic which, in the absence of combinations between the railway companies, would be controlled by the results of competition, and to deal with it in such manner that it will cease to be competitive traffic and become the subject of combinations and agreements whereby the rates to be charged—which is the essential ele- **[100]** ment in which the public has a vital interest—is removed from the protection derivable from free and unrestrained competition, and is left to the determination of committees appointed by the railway companies, whose action is binding upon the members of the association, and against which the individual citizen is without adequate remedy, no matter how unjust the rate fixed by the committee may in fact be?

Another feature observable on the face of this contract is that by the exceptions contained in article I the traffic between many points and in some classes of freight are excepted out from the operation of the agreement, and thus it appears that it is the express purpose of the defendant companies to carry on part of their business subject to the results flowing from combinations between the carriers, and other portions are not to be affected thereby. Is it not the natural result that the public will be subjected to different burdens, and that differences in rates will be charged, which in effect will result in discriminations for or against particular localities? But I shall not dwell upon this and other points of minor importance. As I view the subject, the inherent and fatal vice existing in the combination and agreement entered into between the defendant railway companies is found in the fact, patent upon the face of the contract, that it is the main purpose of the contracting parties to stifle competition in the matter of rates to be charged the public. The illegality of such purpose is not dependent upon the extent of the restraint placed upon the freedom of the public business, but upon the fact that the avowed in-

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tent is to place a restraint, whether slight or great, upon a class of business which is inherently and always of a public nature, and touching which the declaration of the law, both common and statutory, is that it must remain wholly free and unrestricted. If the protection afforded by fair and free competition can be evaded and nullified by means of combinations such as are contemplated and provided for in the contract entered into by the defendants in this case, then the only safeguard against unreasonable rates will be stricken down, and thus interstate commerce will be subjected to the restraints and injuries flowing from the imposition of tariff rates agreed upon by the companies, but in the establishment of which the public has no direct control through legislation, nor direct influence through the effect of free competition.

In my judgment, the right to insist upon free competition between railway companies engaged in carrying on interstate commerce is a right which belongs to the public, of which it cannot be deprived except by its own consent, and every contract or combination between these public corporations which tends to remove the business carried on by them from the influence of free competition tends to deprive the public of this right, of necessity tends to subject interstate commerce to burdens which are a restraint thereon, is inimical to the public welfare, is contrary to public policy, and in contravention of both the language and spirit of the anti-trust act of July 2, 1890.

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[280] UNITED STATES *v.* PATTERSON ET AL.[a]

(Circuit Court, D. Massachusetts. June 1, 1893.)

[59 Fed., 280.]

INDICTMENT—DEMURRER—SURPLUSAGE.—Surplusage in an indictment cannot be reached by demurrer of any character; but, if it be assumed that a special demurrer will lie, it must point out the specific language objected to, and not require counsel and the court to seach through the indictment for what is claimed as demurrable.[b]

SAME—CONSPIRACY TO MONOPOLIZE INTERSTATE COMMERCE—ACT JULY

[a] Judgment on demurrer (55 Fed., 605). See p. 133.

[b] Syllabus copyrighted, 1894, by West Publishing Co.

Opinion of the Court.

2, 1890.—An indictment for conspiracy to monopolize interstate commerce in cash registers need not negative the ownership of patents by defendants, or aver that the commerce proposed to be carried on is a lawful one.

SAME—AVERMENTS.—It is unnecessary to set out in detail the operations supposed to constitute interstate commerce, and in this respect it is sufficient to use the language of the statute.

SAME.—It is unnecessary to allege the existence of a commerce which defendants conspire to monopolize, as the statute does not distinguish between strangling a commerce which has been born, and preventing the birth of a commerce which does not exist.

SAME.—The indictment need not show that the purpose of the conspiracy was to grasp the commerce into the hands of one of the defendants, or that defendants were interested in behalf of the party for whose benefit they conspired, or what were their relations to such party.

At Law. Indictment of John H. Patterson and others for conspiracy to monopolize interstate commerce in cash registers, in violation of the act of July 2, 1890.

Elihu Root and *F. D. Allen*, for the United States.

H. W. Chaplin, for defendants.

PUTNAM, Circuit Judge.

This case was heard on general demurrer, February 28, 1893, during the October term, 1892. 55 Fed. 605. The demurrer was overruled as to counts 4, 9, 14, and 18, and as to all other counts the demurrer was sustained, and the counts quashed, and the defendants were given leave to file special demurrers to the count sustained; and, March 7, 1893, a so-called special [281] demurrer was filed, within the time allowed therefor. This was brought to the attention of the court, and heard during the same term, May 6, 1893.

In the opinion handed down February 28th, the following occurred:

"The allegations of what was done in pursuance of the alleged conspiracy are, under this particular statute, irrelevant."

Again:

"That the means [intending the means by which the market was to be engrossed or monopolized] are alleged with reasonable precision in the remaining counts appears from the practical application of the

rules of pleading appropriate to this case made in *U. S.* v. *Waddell*, 112 U. S. 76, 5 Sup. Ct. 35. Some of the allegations in each count may be insufficient, but these are only surplusage."

Notwithstanding this surplusage, there was sufficient in each of the four counts which the court sustained to render them valid; and the surplusage is largely of such a character that it is entirely disconnected from the essential allegations, and may be disregarded at the trial. The pleadings, however, are very voluminous, and there may be difficulty in sifting out the insufficient allegations, especially those touching the "means" referred to, from those which are sufficient, and in determining what is thus to be regarded as surplusage; and, as to this, there may prove to be at the trial differences of opinion between the counsel for the United States, the counsel for defendants, and the court. As the indictment runs against many parties, scattered through several states, at remote distances from each other and from the place of trial, and as its subject-matter is complex, and involves a great number of transactions, it appeared to the court that the trial, at the best, would be burdensome and expensive, both for the United States and the accused, and that on this account it was important to minimize this by settling in advance, if it could be done, what should be held to be surplusage. The court was well aware that what are ordinarily spoken of as special demurrers find their origin in the statutes 27 Eliz. and 4 & 5 Anne, and have been held to be limited to proceedings in the nature of civil suits; but it had in thought that, independently of these special demurrers by statute, there was at common law a special demurrer lying against surplusage, which reached also indictments and criminal informations. Such the court understands to be the statement of the law in Chit. Pl. (7th Eng. Ed.) 253. The court had no intention that the questions which had been fully raised and carefully argued under the general demurrer should again be brought to its attention, and no other intention than that of assisting in simplifying the course of the trial as above explained. The court is, however, now forced to the conclusion that surplusage in indictments cannot be reached by demurrer of any character. Such is positively laid down as the law in Steph. Pl. (3d Amer. Ed.) 365; Heard,

Crim. Pl. 140, 271; and is also stated by Lord Cranworth in *Mulcahy* v. *Reg.*, L. R. 3 H. L. 306, 329. If, however, the law is otherwise, and surplusage and irrelevant matter in indictments may be [282] made the subject of a special or limited demurrer, what has been filed by the defendants in this case, under leave granted February 28th, would be sufficient, because it is expressed in general terms, and requires the counsel for the United States and the court to search through the indictment for what is claimed to be demurrable, when, by all the rules of pleading, it ought to set out the specific language objected to, and ask the ruling of the court on that alone. The reason touching this proposition stated in Story, Eq. Pl. § 457, applies everywhere. Clearly is this so in this case, because this so-called special demurrer is expressly to the entire 4th, 9th, 14th, and 18th counts.

It seemed to the court that there must be some way by which, as a matter of right, parties brought in on a complex and voluminous indictment may have settled in advance of the trial what portions of it, if any, are surplusage. It has been frequently said—certainly with reference to civil proceedings—that surplusage might be rejected on summary motion, and the pleadings left to stand as though it had been struck out or never inserted. Gould, Pl. (4th Ed. c. 3, § 170; Chit. Pl. (7th Eng. Ed.) 252; and many other authorities. It has also been understood that in criminal cases it might be disposed of to a certain extent by a nolle prosequi, and that this would apply to a separable part of any one count, as well as to the whole of a count, or to an entire indictment. Bish. Crim. Proc. (3d Ed.) § 1391. The general expressions, however, of the opinion in *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, are sufficient to cause this court to proceed no further with these suggestions, unless the subject of them is formally brought to its attention and counsel are duly heard.

On the whole, therefore, the court is compelled to conclude that the permission which it gave to defendants to file a special demurrer was perhaps inadvertent, and certainly has proved ineffectual for the purposes which the court had in mind. The counsel for the defendants, however, have availed themselves of this permission to reargue several of the propo-

sitions submitted at the hearing on the general demurrer, apparently insisting that they were overlooked by the court, because not noticed in its opinion passed down February 28th; and they also present at least one additional proposition. Many points were raised on demurrer by counsel for the defense, some of them of great importance, and some of a minor character; so that a full exposition of the views of the court touching every question which was presented, would have resulted in an opinion too lengthy to be excusable as coming from a tribunal for whose errors there is ample remedy by appeal. Therefore the court touched in its opinion only the salient features of the case. Under the present circumstances, however, the court feels called on to notice briefly some of the points which have been pressed anew on its consideration.

The claim that the indictment should negative the ownership of patents by the defendants, and also set out that the commerce carried on, or proposed to be carried on, by the National Cash-Register [283] Company, was a lawful one, and perhaps some other matters of that character, proceeds on the hypothesis that its allegations should be certain to every intent,—a rule which applies only to pleas in abatement. All such are matters of defense, not to be anticipated by the prosecutor.

The claims that these counts left it for the prosecutor, and not for the court, to decide whether they state subject-matters of interstate commerce, and also that it is necessary that they should set out in detail the operations supposed to constitute interstate commerce, are not maintainable, because, so far as this feature of the indictment is concerned, it is clearly sufficient, according to numerous decisions of the supreme court, which need not be cited, to use the language of the statute. The suggestion of the court, in the opinion passed down February 28th, that the statute is not one of a class where it is sufficient to declare in the words of the enactment, related to the particular proposition then under consideration.

As to all the propositions touching the existence of commerce in cash registers, or knowledge, or want of allegation of knowledge, on the part of the accused, it is sufficient to

say that those counts which do allege the existence of such commerce also allege positively knowledge on the part of the defendants; and those which do not allege such existence are sufficient, because neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born and preventing the birth of a commerce which does not exist. On this point, also, in the opinion of the court, it is sufficient to use the language of the statute.

Much of what is said by the defendants about judicial knowledge touching cash registers and patents has no application to common-law proceedings, especially on the criminal side of the court, and the court will not take time to enlarge upon this.

The suggestion that no count alleges an intent to injure or defraud the public by raising the price, or otherwise, relates to indictments of an entirely different character from this at bar, and to conspiracies which are illegal in their essence, without reference to the means adopted to accomplish their purposes.

As to the proposition that the National Cash-Register Company is not alleged to have been a party to the conspiracy, the court went, in this direction, to the extreme limit which the letter of the law would permit. It sustained only those counts which alleged a combination for the purpose of engrossing, monopolizing, or grasping the trade in question, and rejected all those counts which alleged only an intention to destroy certain competitors named. Beyond that the court purposely left its opinion in an indefinite form, because neither the letter of the statute nor the philosophy of pleading conspiracies require that it should appear that the purpose was to engross, monopolize, or grasp into the hands of one of the persons indicted, or that the defendants were interested in behalf of the party for whose benefit they combined to monopolize, engross, or grasp, or, indeed, what their relations were to that party. Even if the statute should finally be held to be limited to combinations to engross, monopolize, or grasp in behalf of some party to the [284] combination, yet there remains the well-known rule of law that it is unnecessary to indict all the persons involved in a conspiracy. Of course, the court would have

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felt less doubt in meeting this objection if it had been alleged that the corporation named was a party to the conspiracy, or if the relations of the accused to it, or some other matter of a kindred character, had been set out. It may be that, when the proofs are developed at the trial, some unforeseen difficulty will arise, which need not now be anticipated; but, on the whole, the court concluded that this objection was not well taken.

In order that the defendants' exceptions may be undoubtedly saved at this term, the general demurrer having been overruled at the last, and that the defendants may be able to show to the appellate court specifically the points taken on demurrer in this court, I conclude to regard the so-called "special demurrer," in connection with the motion filed March 17, 1893, as a petition for a rehearing, and the clerk will enter the following order:

Leave to the defendants to file special demurrer granted February 28, 1893, annulled as inadvertent. Petition of defendants for rehearing on general demurrer granted. Order overruling demurrer as to counts 4, 9, 14, and 18, entered February 28, 1893, annulled. Matters set out in the so-called "special demurrer" are, by leave of court, assigned as additional causes for demurrer under the general demurrer. Counsel for the defendants and for the United States heard anew touching demurrer to counts 4, 9, 14, and 18. Demurrer overruled as to those counts; defendants to answer over, as provided by statute.

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[306] UNITED STATES *v.* E. C. KNIGHT CO. ET AL.[a]

(Circuit Court, E. D. Pennsylvania. January 30, 1894.)

[60 Fed., 306.]

MONOPOLIES—INTERSTATE COMMERCE—SUGAR TRUST.—Act Cong. July 2, 1890, declares "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations" illegal; prohibits any person from attempting to monopolize, or combining or conspiring with any other person to monopolize, any part of the

[a] Affirmed by the Circuit Court of Appeals, Third Circuit (60 Fed., 934). See p. 258. Affirmed by the Supreme Court (156 U. S., 1). See 379.

Opinion of the Court.

trade or commerce among the several states, or with foreign nations; and invests the circuit courts with jurisdiction to restrain violations of the act. *Held*, that a combination whose object is to enable a single company to monopolize and control the business of refining and selling sugar, by buying up all competing concerns in the United States, is not in violation of this statute; for it constitutes no restriction upon, or monopoly of, commerce between the states, but, at most, only makes it possible for the promoters of the combination to restrict or monopolize such commerce, should they so desire.[a]

Ellery P. Ingham, United States Attorney, and *Robert Ralston*, Assistant United States Attorney.

John G. Johnson and *R. C. McMurtrie*, for defendants.

BUTLER, District Judge.

The bill charges, in substance, as follows:

E. C. Knight Company, Spreckels' Sugar Refining Company, Franklin Sugar Refining Company and the Delaware Sugar House, were, until on or about March 4, 1892, independently engaged in the manufacture and sale of refined sugar. That they were competitors with the American Sugar Refining Company and with one another; and that they were engaged in trade with the several states and with foreign nations. That the American Sugar Refining Company had, prior to March 4, 1892, obtained the control of all the sugar refineries in the United States, with the exception of the Revere, of Boston, and the refineries of the said four defendants. That the Revere produced annually about 2 per cent., and the said four defendants about 33 per cent. of the total amount of sugar refined in the United States. That in order that the American Sugar Refining Company might obtain complete control of the production and price of refined sugar in the United States, it and John E. Searles, Jr., acting for it, entered into an unlawful and fraudulent scheme to purchase the stock, etc., of the said four defendants by which they attempted to obtain control of all the sugar refineries in this district for the purpose of restraining the trade thereof among the other states. That in pursuance

[a] Syllabus copyrighted, 1894, by West Publishing Co.

of this scheme, on or about March 4, 1892, John E. Searles, Jr., entered into a contract with the defendant Knight Company and individual stockholders named for the purchase of all the stock of the said company, and subsequently delivered to the said defendants in exchange therefor shares of the American Sugar Refining Company. That on or about the same [307] time the said Searles entered into a similar contract with the Spreckels Company and individual stockholders and made a similar contract with the Franklin Company and stockholders and with the Delaware Sugar House and stockholders.

The bill further avers that the American Sugar Refining Company monopolizes the manufacture and sale of refined sugar in the United States and controls the price of sugar. That in making the said contracts the said Searles and the American Sugar Refining Company combined and conspired with the other defendants named to restrain trade and commerce in refined sugar among the several states and foreign nations. That the said contracts were made with intent to enable the said American Sugar Refining Company to monopolize the manufacture and sale of refined sugar among the several states.

The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jersey and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Company, the Spreckels Sugar Refinery, and the Delaware Sugar House, were incorporated under the laws of Pennsylvania, and authorized to purchase, refine and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about 33 per cent. of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Company and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Company had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Company in Boston, the latter producing about 2 per cent. of the

amount refined in this country; that in March, 1892, the American Sugar Refining Company entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Company thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Company obtaining authority to increase its stock $25,000,000; that this assent was subsequently obtained and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, understanding and intending that all the stock and property of the company should be sold; that the contract of sale in each instance left the sellers free to establish other refineries and continue the business if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase, the Delaware Sugar House Refinery [308] has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight Refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but is still lower than it had been for some years before, and up to within a few months of the sales; that about 10 per cent. of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Company; that some additional sugar is produced in Louisiana and some is brought from Europe, but the amount is not large in either instance.

The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country.

Are the defendants' acts, as above shown, prohibited by the statute of 1890, relating to trade and commerce? The provisions involved are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or, by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violation of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

The principal questions raised are:

First, do the facts show a contract, combination or conspiracy to restrain trade or commerce, or a monopoly within the legal signification of these terms?

Second, do they show such contract, combination or conspiracy to restrain or monopolize trade or commerce "among the several states or with foreign nations?"

Third, can the relief sought be had in this proceeding?

In the view I entertain the first and third need not be considered. The second must receive a negative answer, and this will dispose of the controversy.

[309] The federal government possesses no jurisdiction over the contracts, business or property of individuals within the states—except to collect revenue for its support. Its powers are derived exclusively from the constitution. It has none other than such as are directly or impliedly conferred by that instrument; and the latter contains no suggestion of authority to intermeddle with such property rights. By the eighth section of article first, congress is empowered "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." In pursuance of this power the statute of 1890 was enacted; and as the terms employed show, congress was duly careful to keep within the limits of its authority. It is "trade and commerce among the several states and with foreign nations" that the statutes seek to guard against restraint or monopoly.

The contracts and acts of the defendants relate exclusively to the acquisition of sugar refineries and the business of sugar refining, in Pennsylvania. They have no reference and bear no relation to commerce between the states or with foreign nations. Granting therefore that a monopoly exists in the ownership of such refineries and business, (with which the laws and courts of the state may deal,) it does not constitute a restriction or monopoly of interstate or international commerce. The latter is untouched, unrestrained and open to all who choose to engage in it. The plaintiff contends, however, that such monopoly in refineries and refining incidentally secures a monopoly of commerce among the states. This position, however, is unsound; the deduction is unwarranted. The alleged control of refining does not of itself secure such commercial monopoly; and at present none exists. The most that can be said is that it tends to such a result; that it might possibly enable the defendants to secure it, should they desire to do so. Whether it would or not depends on their ability with this advantage to control such commerce. They have not tested this ability by attempting to control it, nor shown a disposition to do so. They sell their product, and purchasers may use it in such commerce, or otherwise as they choose. At present the defendants neither have, nor have attempted to secure, such commercial monopoly. As before stated, if they have a monopoly it is in refineries and refining, alone—over which the plaintiff has no jurisdiction. If they should retire from business, close their refineries or devote them to other purposes, the plaintiff could not object. This might and doubtless would indirectly produce some disturbance of or interference with such commerce, but it would not bring the defendants or their

property within the jurisdiction of congress. Numerous instances might be cited, where contracts, business arrangements and combinations indirectly affect interstate and international commerce without bringing the parties to them or their property within this jurisdiction. It is the stream of commerce flowing across the states, and between them and foreign nations, that congress is authorized to regulate. To prevent direct interference with or disturbance of this flow alone, was the power granted to the federal government. Congress has therefore no authority over articles of merchandise or their owners, or contracts or combi- [310] nations respecting them, which have not entered into this stream, or having entered, have passed out. It may prohibit and punish all acts which are intended and directed to restrain or otherwise interfere with or disturb such commerce, but it can go no further. To extend its authority to business transactions which have no direct relation to this commerce, but which may incidentally affect it, and to ownership and rights in property not involved in such commerce, because it may possibly become so involved, would be unwarranted by the terms of the constitutional provision, or the statute,—would draw within the jurisdiction of congress most of the business transactions and property of individuals within the states, and would oust the jurisdiction of the states accordingly. A large proportion of the contracts which men enter into, and of the changes which they make in their business and business relations, may and probably do affect such commerce. The diminution or increase of production in agriculture or manufactures, changes from one branch of business or trade to another, all incidentally tend to this result. State legislation prohibiting or restraining the manufacture or sale of certain articles of merchandise, or increasing their cost by exacting license fees, have the same indirect tendency. Such legislative restraint of the manufacture or sale of poisons and alcoholic liquors, and even the increase in the cost or price of property by taxation, could only be sustained by favor of the federal government, in a different view of its power.

The discussion need not be extended; the question is not new. It was fully considered in a case which arose under the

statute—*In re Greene*, 52 Fed. 104—and the opinion of Jackson, J., (now of the supreme court,) is so clear and satisfactory that I am restrained from quoting what he says only by the desire to be brief. *Veazie* v. *Moor*, 14 How. 568, 574; *Coe* v. *Errol*, 116 U. S. 517 [6 Sup. Ct. 475]; *Kidd* v. *Pearson*, 128 U. S. 1 [9 Sup. Ct. 6],—are to the same effect. The cases of *U. S.* v. *Greenhut*, 50 Fed. 469, and *In re Corning*, 51 Fed. 213, cited by the plaintiff, are in affirmance of this view, rather than against it. Every element of combination and monopoly shown here was averred in the indictments under consideration there. It was held, however, that no offense against the statute was set out, no interference with interstate or international commerce being charged. The cases did not fail through matter of form or technically, but because the facts averred did not constitute an offense against the United States.

In the cases of *U. S.* v. *Jellico Mountain Coal & Coke Co.*, 46 Fed. 432; *Manufacturing Co.* v. *Klotz*, 44 Fed. 721; *Dueber Watch Case Manuf'g Co.* v. *E. Howard Watch & Clock Co.*, 55 Fed. 851, cited by the plaintiff, this question was not considered or raised.

People v. *American Sugar Refining Co.*, 7 Rey & Corp. (Cal.) 83, and *People* v. *North River Sugar Refining Co.*, 16 N. Y. Civ. Proc. 1 & 6, [3 N. Y. Supp. 401]; Id., 54 Hun, 354 [7 N. Y. Supp. 406],—were suits in state courts and involved questions of state law, only.

The bill must be dismissed with costs.

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[803] FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. ET AL.

(Circuit Court, E. D. Wisconsin. April 6, 1894.)

[60 Fed. 803.]

This case was not based upon the anti-trust law. It was a petition by Thomas F. Oakes and others, receivers of the property of the Northern Pacific Railroad in a suit brought against that company by the Farmers' Loan and Trust Company stating that their employees contemplated a strike for

Statement of the Case.

the purpose of preventing a reduction of wages, and praying that they be enjoined therefrom. The only portion of the decision relating to the anti-trust law is found on page 823 of the opinion, and is as follows:

"By act of Congress of July 2, 1890 (26 Stat. c. 647), every combination in restraint of commerce among the several states is declared to be illegal. Under this act it was held by Judge Speer in *Waterhouse* v. *Comer*, 55 Fed. 149, that a strike, if it ever was effective, can be so no longer; and this view seems to have been held by Judge Villings in the case of *U. S.* v. *Workingmen's Amalgamated Council*, 54 Fed. 994. On the other hand, Judge Putman, in *U. S.* v. *Patterson*, 55 Fed. 605, is inclined to the view that the statute has no relation to labor organizations. I do not find it needful to enter into this field of discussion, or to express an opinion upon the subject, being content to rest my conclusion upon the grounds discussed."

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[934] UNITED STATES *v.* E. C. KNIGHT CO. ET AL.[a]

(Circuit Court of Appeals, Third Circuit. March 26, 1894.)

[60 Fed., 934.]

MONOPOLIES—CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE.—The purchase of stock of sugar refineries for the purpose of acquiring control of the business of refining and selling sugar in the United States does not involve monopoly, or restraint of interstate or foreign commerce, within the meaning of the act of July 2, 1890.[b]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a bill in equity filed by the United States against the E. C. Knight Company, the Spreckels Sugar Refining Company, the Franklin Sugar Refining Company, the Delaware Sugar House, the American Sugar Refining Company, and numerous individuals, to have canceled and declared void certain contracts made by the American Sugar Refining Company with the other defendants, as being the result of a combination or conspiracy to monopolize or restrain interstate and foreign commerce. There was a decree for defendants in the court below, and complainant appeals.

[a] Bill dismissed by the Circuit Court, Eastern District of Pennsylvania (60 Fed., 306). See p. 250. Decree affirmed by the Supreme Court of the United States (156 U. S., 1). See p. 379.

[b] Syllabus copyrighted, 1894, by West Publishing Co.

Opinion of the Court.

Ellery P. Ingham and *Samuel F. Phillips* (*Robert Ralston*, Assistant United States Attorney, on the brief), for the United States.

John G. Johnson (*John E. Parsons* and *Richard C. McMurtrie*, on the brief), for appellees.

Before ACHESON and DALLAS, Circuit Judges, and GREEN, District Judge.

DALLAS, Circuit Judge.

There are three assignments upon this record. The first two aver, in general terms, that the court below erred in dismissing the bill of complaint, and in not granting the relief thereby prayed. The third, alone, specifies the alleged error with particularity, and is in these words: "That the court erred in holding that the facts in this case do not show a contract, combination, or conspiracy to restrain or monopolize trade or com- [935] merce among the several states or with foreign nations." This assignment correctly presents the only question which the case involves.

The bill filed on behalf of the United States is founded wholly upon the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Proceedings, such as have been instituted and pursued in this instance, "to prevent and restrain violations of this act," are authorized and directed by its fourth section; and these defendants are charged with violation of its first two sections, which are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

These sections relate, respectively, to restraint of trade and to monopoly, but, as to both, with respect only to "trade or commerce among the several states, or with foreign nations;" and upon the application of this restrictive language of the law to the facts of this case we base our judgment. The learned judge who heard the cause in the circuit court states, in the opinion filed by him, that:

"The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jersey, and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Co., the Spreckels Sugar Refinery, and the Delaware Sugar House were incorporated under the laws of Pennsylvania, and authorized to purchase, refine, and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about thirty-three per cent. of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Co., and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Co. had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Co. in Boston, the latter producing about two per cent. of the amount refined in this country; that in March, 1892, the American Sugar Refining Co. entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Co. thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Co. obtaining authority to increase its stock $25,000,000; that this assent was subsequently obtained, and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, un- [936] derstanding and intending that all the stock and property of the company should be sold; that the contract of sale in each instance left the sellers free to establish other refineries, and continue the business, if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase the Delaware Sugar House refinery has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but still lower than it had been for some years before, and up to within a few months of the sales; that about ten per cent. of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Co.; that some additional sugar is produced in Louisiana, and some is brought from Europe, but the amount is not large in either instance.

"The object in purchasing the Philadelphia refineries was to obtain a greater influence, or more perfect control, over the business of refining and selling sugar in this country."

This statement of the facts is quoted at length merely for the purpose of showing the general nature of the case; the only essential fact—and of that there is no doubt—being that the questioned conduct of the defendants does not, according to our view of the law, concern interstate or foreign commerce. There is no evidence whatever that the defendants have directly monopolized, or have attempted, combined, or conspired to directly monopolize, any part of the trade or commerce among the several states or with foreign nations; or that they have contracted, combined, or conspired in direct restraint of such trade or commerce. The utmost that can be said—and this, for the present purpose, may be assumed—is that they have acquired control of the business of refining and selling sugar in the United States. But does this involve monopoly, or restraint of, foreign or interstate commerce? We are clearly of opinion that it does not. The particular language of the act which is now under consideration was manifestly derived from the clause of the constitution by which congress is empowered to "regulate commerce with foreign nations and among the several states;" and the authorities are distinctly to the effect that this grant of power does not include the regulation of manufactures or productive industries of any sort, even where their product is made, or is intended or contemplated to be made, the subject of commerce beyond the territory of the state where the manufactory or other producing industry is situated or operated. Manufacture and commerce are two distinct and very different things. The latter does not include the former. Buying and selling are elements of commerce, but something more is required to constitute commerce, which, "strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

Enough has been said to indicate the ground upon which our conclusion in this case has been reached, and we do not

deem it necessary to say more, inasmuch as the subject has very recently been considered and passed upon in the *Case of Greene*, 52 Fed. [937] 104, by Judge Jackson (now one of the justices of the supreme court), in whose opinion the earlier cases are sufficiently referred to.

The decree of the circuit court is affirmed.

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[801] UNITED STATES *v.* ELLIOTT ET AL.[a]

(Circuit Court, E. D. Missouri, E. D. July 6, 1894.)

[62 Fed., 801.]

COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—INJUNCTION.—A combination whose professed object is to arrest the operation of the railroads whose lines extend from a great city into adjoining states until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of trade and commerce among the states, within the act of July 2, 1890, and acts threatened in pursuance thereof may be restrained by injunction, under section 4 of the act.[b]

This was a suit by the United States against M. J. Elliott, George B. Kern, Eugene V. Debs, George W. Howard, L. R. Rogers, Sylvester Kelliher, the American Railway Union, and others, to restrain violations of the act of July 2, 1890 (26 Stat. 209). Complainants moved for a preliminary injunction.

William H. Clopton, United States Attorney.

THAYER, District Judge (orally.)

The unusual character of the bill filed by the government renders it proper that the court should state briefly the reasons that have influenced its action in granting a part of the relief prayed for therein.

The act of congress approved July 2, 1890 (26 Stat. 209), entitled "An act to protect trade and commerce against unlawful restraints and monopolies," declares in its first section that:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court."

Ordinarily it is neither lawful nor expedient for a court of equity to award an injunction to prevent the doing of acts that are in themselves crimes. The regular course of judicial procedure requires that persons accused of crime should be prosecuted by information or indictment, and not otherwise. There are, however, well-established exceptions to this rule. When a criminal act is threatened, which is liable to occasion irreparable injury to private persons, or which would give rise to a multitude of suits at law to redress the wrong, if committed, a court of equity may issue an injunction, at the instance of an individual, against parties who threaten to commit the wrong. But the court is not called upon, in this instance, to consider whether the proceeding falls within the ordinary jurisdiction of a court of equity. By the fourth section of the act of July 2, 1890, which is above referred to, congress has declared that:

> "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States in their respective districts under the direction of the attorney general to institute proceedings in equity to prevent and restrain such violations. Such proceedings [802] may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed as soon as may be to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

This section of the act makes the jurisdiction of the court clear over the parties and subject-matter, if the bill now before the court, which has been exhibited with the sanction of the attorney general, shows the existence of a conspiracy among the defendants to restrain trade or commerce

[a] Demurrer overruled (64 Fed., 27). See p. 311.

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among the several states, and that acts have already been done or threatened by the several defendants in furtherance of the alleged conspiracy. Congress has seen fit, on grounds of public policy, to authorize the law officers of the government to appeal to the courts of the United States by a bill in equity filed in behalf of the people of the United States, to arrest, by writ of injunction or prohibition, the commission of acts which are designed to obstruct the free flow of commerce between the states, and no one can doubt the power of congress to confer such authority. From the very foundation of the government, it has been accepted as a proposition which admitted of no controversy that the right to regulate commerce among the several states, and to pass laws to protect commerce of that character, pertained to the general government, and that its power in that respect was plenary and paramount.

An examination of the bill which has been exhibited by the United States shows that it charges, in substance, that the various defendants named therein have combined and confederated among themselves to prevent several railroads named in the bill, whose lines radiate from St. Louis, and which are engaged, among other things, in interstate commerce, from conducting their customary business of transporting passengers and freight between points in this state and points in other adjoining states to which their several lines extend. The bill further charges that the several defendants named therein have combined and conspired to induce persons in the employ of said railroad companies to leave the service of their respective companies, and to prevent them from securing other operatives, the object of such conspiracy being to prevent said railway companies from hauling certain cars which are customarily used by them in the transaction of their business as interstate carriers of freight and passengers. The bill also charges the commission of divers and sundry acts by some of the defendants in furtherance of the objects of the aforesaid confederation. Among other things, it is alleged that certain of the defendants have issued orders to persons in the employ of the several railway companies, who act subject to their direction, whereby such

employés are commanded and required to cease from operating trains of the respective railroad companies in whose service they are employed. It is also alleged that certain of the defendants named in the bill have asserted and threatened that they will tie up and paralyze the operations of each of said railway companies which refuses to [803] accede to certain demands made upon them, and that it is the purpose and object of the defendants so conspiring, and who have made such threats, to so obstruct and cripple said railroad companies as to prevent them from performing their duties as common carriers of freight and passengers between points in the several states to which the lines of such roads extend. It is also charged in the bill, in substance, that it is the purpose and object of the defendants who are engaged in the aforesaid conspiracy to secure to themselves the entire control of interstate commerce between the city of St. Louis and points in other states to which the lines of the several railroad companies mentioned in the bill extend, and to restrain and prevent the persons owning said roads from exercising any independent control thereof in the transaction of interstate business. The court thinks it manifest that the allegations of the bill, which have thus been very imperfectly stated, show the existence of a conspiracy in restraint of trade and commerce among the several states, within the language and the fair intent and meaning of the act of July 2, 1890. A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining states, until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states. Under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose, by unlawful means. *Pettibone* v. *U. S.*, 148 U. S. 197, 13 Sup. Ct. 542; *Com.* v. *Hunt*, 4 Metc. (Mass.) 111. The construction thus given to the act of July 2, 1890, is not a new construction. It has already received the same interpretation in other circuits after full consideration,—particularly by the circuit court of the United States for

Syllabus.

the fifth circuit in the case of *U. S.* v. *Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994, and 6 C. C. A. 258, 57 Fed. 85.

The result is that this court, acting on the ground herein stated, will grant a preliminary injunction, restraining the defendants during the pendency of this suit, and until final hearing, from doing the acts threatened, in pursuance of the alleged conspiracy.

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[803] THOMAS *v.* CINCINNATI, N. O. & T. P. RY. CO.

IN RE PHELAN.

(Circuit Court, S. D. Ohio, W. D. July 13, 1894.)

[62 Fed., 803.]

CONTEMPT—INTERFERENCE WITH RECEIVER—IMPEDING OPERATION OF RAILROAD.—Any willful attempt, with knowledge that a railroad is in the hands of the court, to prevent or impede the receiver thereof appointed by the court from complying with the order of the court in running the road, which is unlawful, and which, as between private individuals, would give a right of action for damages, is a contempt of the order of the court.[a]

[804] SAME—INSTIGATING STRIKE—UNLAWFUL COMBINATION.—Maliciously inciting employés of a receiver, who is operating a railroad under order of the court, to leave his employ, in pursuance of an unlawful combination to prevent the operation of the road, thereby inflicting injuries on its business, for which damages would be recoverable if it were operated by a private corporation, is a contempt of the court.

SAME—CONSTITUTIONAL GUARANTY OF RIGHT OF ASSEMBLY AND FREE SPEECH.—Such inciting to carry out an unlawful conspiracy is not protected by constitutional guaranties of the right of assembly and free speech, and is not less a contempt because effected by words only, if the obstruction to the operation of the road by the receiver is unlawful and malicious.

CONSPIRACY—COMBINATION TO COMPEL BREACH OF CONTRACT.—A combination to inflict pecuniary injury on the owner of cars, operated by railway companies under contracts with him, by compelling them to give up using his cars, in violation of their contracts, and, on their refusal, to inflict pecuniary injury on them by inciting their employés to quit their service, and thus paralyze their business, the existence of the contracts being known to the parties so combining, is an unlawful conspiracy.

SAME—BOYCOTT.—A combination by employés of railway companies to injure in his business the owner of cars operated by the companies, by compelling them to cease using his cars by threats of quitting and by actually quitting their service, thereby inflicting on them great injury, where the relation between him and the companies is mutually profitable, and has no effect whatever on the character or reward of the services of the employés so combining, is a boycott, and an unlawful conspiracy at common law.

SAME—UNLAWFUL PURPOSE.—A combination to incite the employés of all the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their employment, thus paralyzing utterly all railway traffic, in order to starve the railroad companies and the public into compelling an owner of cars used in operating the roads to pay his employés more wages, they having no lawful right so to compel him, is an unlawful conspiracy by reason of its purpose, whether such purpose is effected by means usually lawful or otherwise.

SAME—RESTRAINT OF INTERSTATE COMMERCE.—Such combination, its purpose being to paralyze the interstate commerce of the country, is an unlawful conspiracy, within the act of July 2, 1890, declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several states. *U. S.* v. *Patterson*, 55 Fed. 605, disapproved.

SAME—OBSTRUCTING MAILS.—Such combination, where the members intend to stop all mail trains as well as other trains, and do delay many, in violation of Rev. St. § 3995, punishing any one willfully and knowingly obstructing or retarding the passage of the mails, is an unlawful conspiracy, although the obstruction is effected by merely quitting employment.

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Opinion of the Court.

This was a suit by Samuel Thomas against the Cincinnati, New Orleans & Texas Pacific Railway Company, in which Samuel M. Felton was appointed receiver. The receiver filed a petition for the commitment of F. W. Phelan for contempt, and for an injunction against him.

Harmon, Colston, Goldsmith & Hoadly, for receiver.

Cogan & Shay, for Phelan.

TAFT, Circuit Judge.

Samuel M. Felton was appointed receiver in the above-entitled cause, March 18, 1893, and has ever since been [805]

engaged, under the order of the court, in operating the railroad of the Cincinnati, New Orleans & Texas Pacific Railway Company, which is more commonly known as the Cincinnati Southern Railroad. On Monday, July 2, 1894, he filed an intervening petition in the original action, in which he stated that during the previous week, and at the time of filing the petition, he was greatly impeded in the operation of the road by a strike of his employés, and of the employés of other railroads in the city of Cincinnati, who were prevented from receiving from him and delivering to him freight carried or to be carried over his road; that said strike was the result of a conspiracy between one F. W. Phelan, now in Cincinnati, and one Eugene V. Debs and others, to tie up the road operated, as the said conspirators well knew, by the petitioner as receiver, and other roads in the western states of the United States, until certain demands or alleged grievance of certain persons not in the employ of the receiver or of any other railroad of the United States were acceded to by persons in no manner connected with the management of any railroad of the United States; that the demand of the employés of one George M. Pullman, or the Pullman Palace Car Company, at Pullman, Ill., for higher wages was refused, whereupon said Debs, Phelan, and others, members of an organization known as the American Railway Union, combined and conspired with each other and with sundry persons, who became members of the organization for the purpose, to compel the Pullman Company to comply with the demands of its employés, and that for the purpose of injuring the Pullman Company, and of thereby forcing from it the concession demanded, Debs, Phelan, and the others named had maliciously conspired and undertaken to prevent the receiver of this court and the owners of other railroads from using Pullman cars in operating their roads, though they are under contract to do so; that in pursuance of said conspiracy Phelan, a resident of Oregon, came to Cincinnati a week before the filing of the petition, and set on foot and incited a strike among the employés of the receiver, and of other railroad companies whose lines run into Cincinnati; that on June 27th, and at other times and places,

Phelan made inflammatory speeches to such employés, well knowing many of them to be employés of the receiver, in which he urged them all to quit the service of the receiver and the other railroads of the city, and to tie them all up, and to prevent others from taking their places, by persuasion if possible, by clubbing if necessary; that said Phelan was still in the city, directing and continuing the strike, and interfering with the receiver in the operation of the road; that as a result of the conspiracy and strike the receiver had been obliged at great expense to secure and maintain the protection of armed men for his employés; and that all of the foregoing constituted a contempt of this court, and a ground both for committing Phelan and for enjoining him from a continuance of said acts.

Upon the filing of the petition an attachment was issued for Phelan, the contemner, and on the morning of the 3d of July he was arrested, and brought before the court. He was admitted to bail, and at the same time was enjoined by order of the court from, either as an individual or in combination with others, inciting, encouraging, order- [806] ing, or in any other manner causing the employés of the receiver to leave his employ with intent to obstruct the operation of his road, and thereby compel him not to fulfill his contract and carry Pullman cars. On Thursday, July 5th, the motion of the receiver for Phelan's commitment came on to be heard, and a week has since been taken up in the giving of testimony and argument.

I propose first to run over the evidence, as briefly as may be, and determine the facts, and then to consider the law applicable to them.

The American Railway Union is an organization of railway employés, to which are eligible as members all persons in the service of railways below a certain rank. It was organized in June, 1893. On May 11, 1894, at Pullman, Ill., the employés of the Pullman Palace Car Company, engaged in manufacturing railway cars of all kinds, including sleeping cars, left the company's employ because of its refusal to restore wages which had been reduced during the preceding year, and the works were then closed. On June 11, 1894, the

general convention of the American Railway Union met at Chicago, and decided that the American Railway Union would take measures to compel the Pullman Company to resume business and to re-employ its employés who had left its service on terms to be fixed by arbitration. It does not appear that at this time the Pullman Company's employés were members of the Railway Union, or eligible as such. At the June convention of 1894 there were present representatives from 450 lodges of the union, and the number of members, as estimated at that time, was 250,000. It is said that the local unions had voted for the Pullman boycott before the convention met. The question where the boycott originated is not very material, but it may be said that, as the Pullman strike occurred but a month before the convention, and as it had been deemed necessary by the union to send men all over the country to explain to its members the merits of the Pullman controversy during the boycott, it is obvious that the boycott had its real origin in the union convention at Chicago, where the subject was brought before it, presumably by its board of directors.

The chief governing body of the union is a board of directors, which elects a president, vice president, and secretary, who are the chief executive officers of the union. Eugene V. Debs is, and has been since its organization, the president. Section 6 of the constitution of the union, as adopted in June, 1893, provides that "the board is empowered to provide such rules, issue such orders, and adopt such measures as may be required to carry out the objects of the order, provided that no action shall be taken that conflicts with this constitution." By section 11 of the same instrument the president's powers are thus described:

"It shall be the duty of the president to preside over the meetings of the board and the quadrennial meetings of the general union. He shall at each annual meeting of the board and at each quadrennial meeting of the general union submit a report of the transactions of his office, and make such recommendations as he may deem necessary to the welfare of the order. He shall enforce the laws of the order, sign all charters, circulars, reports, and other documents requiring authentication. He shall decide all questions and appeals, which decisions shall be final, unless otherwise ordered by the board. He may, with the concurrence of the board, deputize any member to perform any required service, issue dispensations not inconsistent with the constitution [807] or regulations of the order, and perform such other duties as his office may impose; and he shall receive such compensation for his services as may be determined at the time of his election."

Phelan, when on the stand, said that these were sections of the old constitution, but that he understood the constitution had been generally changed. He would not say that extensive or material changes had been made, but simply that general changes had been effected. He was in attendance as a delegate only during the last five days of the convention, and this is his explanation for not knowing what the changes were. Phelan's answers on this subject had really no effect to show that the foregoing sections are not still in force, but simply illustrated the evasiveness and verbal quibbling to which the witness was continually willing to resort under examination. It is certainly strange that if he was here, as he says, as a representative of the union, he should not know the changes, if any really material ones had been made in the constitution, under which he was initiating men into the union, and was receiving orders from his superior officers. We shall see, as we progress, that the two sections of the old constitution are still in force, if we can judge at all from the actual authority exercised by the officers of the union during the present boycott.

The plan of the boycott, as shown by the evidence, was this: Pullman cars are used on a large majority of the railways of the country. The members of the American Railway Union whose duty it was to handle Pullman cars on such railways were to refuse to do so, with the hope that the railway companies, fearing a strike, would decline further to haul them in their trains, and inflict a great pecuniary injury upon the Pullman Company. In case the railway companies failed to yield to the demand, every effort was to be made to tie up and cripple the doing of any business whatever by them, and particular attention was to be directed to the freight traffic, which it was known was their chief source of revenue. As the lodges of the American Railway Union extended from the Allegheny mountains to the Pacific coast, it will be seen that it was contemplated by those engaged in carrying out this plan that, in case of a refusal of the rail-

way companies to join the union in its attack upon the Pullman Company, there should be a paralysis of all railway traffic of every kind throughout that vast territory traversed by lines using Pullman cars. It was to be accomplished, not only by the then members of the union, but also by procuring, through persuasion and appeal, all employés not members either to join the union or to strike without joining, by guarantying that, if they would strike, the union would not allow one of its members to return to work until they also were restored. I shall allude again to the gigantic character of this combination. For my present purpose, it is sufficient to say that on Sunday, June 24th, Phelan came to Cincinnati as the authorized representative of the president and board of directors of the union, to enforce and carry out the contemplated boycott and paralysis of business on all railway lines running into Cincinnati which used Pullman cars until they should cease to use them.

[808] I am aware that Phelan denies that such were his authority and instructions, but, as in the case of his answers in respect to the constitution and its provisions, his denials do not, in view of the overwhelming proof of the circumstances not denied, and his previous admissions not denied, show the fact to be otherwise, but only decrease the reliance which can be placed on any statements made by him in this case. He says that he came here with no direction except to visit the employés of the Pullman Company at a branch factory at Ludlow, to explain to them the merits of the controversy between their employer and their fellows at Chicago, and then, if they struck, to see that they appointed committees who should keep order among them, and look after the sick. At another time he says he was directed to be in Cincinnati during the boycott, but he strenuously denies he was here for the purpose of laying on the boycott or inciting a general strike. He would have the court believe that what occurred was wholly spontaneous, and not through his agency, and that his business was, if there should be such coincidental spontaneity resulting in a strike, to prevent disorder, and to look after the sick. This hardly accords with his first telegram to Debs, his chief officer, dated noon, Tuesday, June 26th, as follows: "Pay no attention to press reports.

To be effective, was compelled to postpone action until seven, Wednesday morning." On Sunday, June 24th, after Phelan's explanation of the Pullman troubles, the Pullman employés at Ludlow determined to strike, and did so Monday morning at 7 o'clock. Phelan says he did not advise them to strike, but just explained the situation, and then a strike followed. When he had explained, and organized committees among the strikers, after the strike had occurred, through no agency of his, his mission was ended, so far as his instructions went. And yet we find him on Tuesday, June 26th, at 12 o'clock noon, telegraphing his chief that he was obliged to postpone action until Wednesday morning at 7, in order to be effective. Now, what action was this which he hoped to make effective? Can any one doubt for an instant that the action thus foreshadowed was that referred to in Phelan's dispatch to Debs of June 28th following, when he said, "The tie-up is successful"? On Tuesday night, June 26th, there was a meeting of all the switchmen of Cincinnati at Wuebler's Hall. There is no direct evidence how this meeting was called, but the circumstances leave no doubt. Phelan, having brought out the Pullman men, then set to work upon the railway men, and hence the meeting. The telegram of June 26th indicates that Debs expected him to have the meeting and action earlier, but that he was not able to secure an attendance at any earlier meeting sufficiently general to make the action taken effective. Indeed, when the Tuesday night meeting was held, it was found that action must be still further delayed, and a second meeting for Wednesday night was called. At both of these meetings Phelan explained and discussed the Pullman trouble, and announced the Pullman boycott. Now, what was his object? Was it for the purpose of inducing the men whom he addressed, and others not present, whom he urged them to talk to, to demand of the railway companies assistance in boycotting Pullman, and, on refusal, **[809]** to tie them up, or was it simply for their general information? He repeats upon the stand with much emphasis that he at no time advised any man to strike. What was he doing? His speeches were all directed to that end, and, even if he did not use the word "advise," his conduct was exactly

the same as if he had. His trifling with the truth, and his attempt to seek shelter again behind verbal quibbles, simply disparages him as a witness, without concealing the facts. Now, what was done at these meetings of Tuesday and Wednesday night after or during Phelan's speeches? A city committee was appointed, consisting of one employé of each of the great railroads entering the city. This committee Phelan continually refers to in his testimony as "my committee," and the term was properly used, for it seems to have spent all its time in his company, and doing his bidding. On this committee was J. Madison, a switchman in the receiver's employ. The first duty of each member of the committee was on Wednesday, June 27th, or on the next day, to notify the yard master of his road that the switchmen and members of the American Railway Union would not handle Pullman cars because a boycott had been laid on them. Madison duly notified McCarty, the yard master of the receiver. The necessary result was that three switchmen on the Cincinnati, Hamilton & Dayton Railroad were discharged or relieved of duty on the afternoon of Thursday, June 28th, and within six hours a general strike of all the switchmen and yard men, including yard engineers and firemen, on all the roads coming into Cincinnati, took place. This was exactly in accordance with the plan which Phelan had outlined to Westcott, a reporter for the Enquirer, on Tuesday or Wednesday before the strike, in a conversation which he does not deny. Beginning with Tuesday night, June 26th, Phelan has made speeches every night since, in which he has continued to explain the Pullman trouble to audiences of railroad men, and has read telegrams from Debs of a character calculated to incite and encourage all railway employés to quit their places, to assist in the Pullman boycott. He says he has made as many as 20 speeches. Two, at least, were made at Ludlow, Ky., a railroad town, the inhabitants of which are, or were, many of them, employés of the receiver. It is in evidence that when the meetings began the number of the receiver's employés who were members of the American Railway Union was 150. And yet Phelan denies that he is in any sense responsible for the strike of the receiver's employés, or of

those of any other road in town, or for the paralysis of business which followed.

It is marvelous that Phelan can assume such a position in view of the circumstances and his own declarations. Take the evidence of Westcott, the Enquirer reporter, a witness evidently of much experience in acquiring and detailing accurate information, who has no motive to misrepresent Phelan in any way. He was assigned to report the strike, and seems to have found Phelan his best source of information. He made notes of everything at the time, and prepared them afterwards for publication. Phelan has not attempted to deny anything he says. Westcott testifies that Phelan told him before the strike that his main object in coming here was **[810]** to enforce a boycott against Pullman cars, by tying up every road in Cincinnati for the American Railway Union; that he frequently and constantly repeated the statement that they intended to tie up every road in town, and keep them tied up until they refused to handle Pullman cars; that after the strike on Thursday he said he had most of the American Railway Union men out in Cincinnati, Ludlow, and Covington, and that those who were not out would be out the next morning; that after his arrest he explained that his course had been to tie up the freight trains, and not so much to stop passenger trains, because the money was in the freight business. Schaff, Gibson, and Bender, officers of the Big Four Railroad, testify that Phelan said to them on Thursday afternoon, when they met him for the purpose of seeing whether the "embargo," as Phelan and Debs expressed it, could not be lifted from the Big Four, because it was a Wagner sleeping car line, that he proposed to tie up every line in town, and was in a hurry, because he must go over and tie up the Pan Handle and the C. & O. before sunset; and that, just to show Schaff what he could do, he had called out some more of the Big Four employés. Phelan and those members of the city committee who accompanied him to this meeting deny that this was said, but by their denial show nothing save that their loyalty to their chief is greater than their regard for the sanctity of their oaths. Westcott, the Enquirer reporter, talked with Phelan about this Schaff interview, and Phelan said that, as Schaff tried to "bluff" him, he had

called out some more of his men, to show that he had no hard feelings; and when Westcott expressed surprise at that way of showing friendliness, Phelan said that was the way the American Railway Union showed its friendliness in a fight. On June 28th, the day of the strike, Debs telegraphed Phelan to let the Big Four alone, if not handling Pullmans, to which Phelan answered: "I cannot keep others out if Big Four is excepted. The rest are emphatic on all together or none. The tie-up is successful. Once more will Big Four be let alone." If Phelan was not the chief agent and inciter of the general tie-up in Cincinnati, he has been most unfortunate in the use of the language in his telegrams. What he here said necessarily implied that he had induced all the employés to go out, and was trying to keep them out, and that they threatened to return if the Big Four line was exempted from the tie-up.

What I have said of the credibility of Phelan in reference to his agency in enforcing the boycott and tie-up applies with equal force to nearly all his witnesses, especially to those from his city committee. They would have the court believe that Phelan was merely a peacemaker in this community, with no responsibility for the strike, and no purpose to incite it or continue it. Take Bateman. He was a switchman of the receiver, and on the subcommittee of the road. Debs had been applied to by the president of the stock yards to allow the cattle cars to be unloaded, and Debs—presumably in the exercise of the dispensing power given him by the constitution—had directed Phelan to have this done if no injury to the cause resulted. Pending this matter, Westcott was inquir- [811] ing into the outcome, and applied to Bateman as a subcommittee for information. Westcott says Bateman told him the stock matter was in Phelan's hands, and that the cattle could not be handled without Phelan's orders; that "whatever Phelan says, goes." Phelan told Westcott substantially the same thing, and a telegram from Phelan to Debs is in evidence, in which he says, "I am having stock unloaded." And yet Bateman denies his conversation with Westcott, and another member of the city committee says that Phelan had nothing to do with it, and only applauded when it was done. Every committee man who

came upon the stand (and they made the majority of contemner's witnesses) tried to give the impression that they were not acting under Phelan's orders, and so does Phelan, and yet his complete command is so apparent that it cannot escape any one. When Phelan forgot himself he used such expressions as "my committee," "I instructed them to do so and so," and occasionally such telltale words would creep into the evidence of all his witnesses. Another kind of statement indulged in by Phelan and all of the committee was to the effect that these committees were organized solely for the purpose of keeping the peace, and assisting the sick, providing for parades, and hiring halls; but not one word is said about the efforts of the committee to induce men to leave the employ of the various railroads, and yet, if Phelan's injunction was followed, persuasion, explanation, and argument were to be used with all who did not join the cause at once. The committee and subcommittees were 75 in number. Phelan told Westcott at one time that he had to visit railroad yards with his committee; at another time that his committee were out visiting the various yards, to see the day crews. Evidently they were visiting the men who remained still at work, for the purpose of inducing them to quit; and this, though not mentioned by a single witness for the defense, was doubtless one of the chief reasons for their appointment.

With the intention of showing that he has been guilty of no interference with a compliance with the orders of this court, Phelan said upon the stand that he knew the Southern Railroad was operated by a receiver appointed by this court, and was therefore anxious to avoid interference with its operation, and prevented the calling out of the coach cleaners in the Ludlow yards on this account. Moreover, Buelte, of his city committee, testifies that the Cincinnati Southern was especially excepted from the operation of the boycott notice because it was in the hands of the court. And yet Tuesday night, in the preparation for the boycott and strike which was to be put into effect on Thursday following, through the action of committees in respect to which Phelan himself admits he made suggestions, and which were appointed under his supervising eye, a switchman from the receiver's yard

was made the agent of the American Railway Union and its allies to notify the receiver's yard master of the boycott. The notice was given, and the strike occurred earlier among the receiver's employés than among those on some of the other roads. Phelan told Westcott on Thursday afternoon that the men were all out on the [812] Southern, and yet this was the road he wished to save from the boycott, because it was in the hands of the court. What did he visit Ludlow for on Friday, and address a meeting of railway employés, if he intended to be careful about interfering with the operation of the Southern Railroad by the court? There are no railway employés in Ludlow but those of the receiver. What was Bateman, the committee man, doing in that place in attendance at two other meetings, if the respect of Phelan and his committee for the court's orders was so great? The purpose with reference to the Southern, as with respect to every other road, is so clearly shown by the telegrams between Debs and Phelan, that it could hardly be more certain if Phelan had admitted it.

Debs to Phelan:

"JUNE 27, 1894.

"Indications are that all western lines will be tied up solidly before sunset to-day."

Phelan to Debs:

"JUNE 28, 1894.

"I cannot keep others out if Big Four is excepted. The rest are emphatic on all together or none. The tie-up is successful."

Debs to Phelan:

"JUNE 29, 1894.

"About 25 lines now paralyzed. More following. Tremendous blockade."

Debs to Phelan:

"JULY 2, 1894.

"Knock it to them hard as possible. Keep Big Four out, and help get them out at other places."

Phelan to Debs:

"JULY 2, 1894.

"Going out all around. Firemen a unit. Will soon be an avalanche to us. Working outside points."

Debs to Phelan:

"JULY 2, 1894.

"Hold Big Four solid. Going out to-day at every point. Gaining ground rapidly."

Debs to Phelan:

"JULY 2, 1894.

"Advices from all points show our position strengthened. Baltimore and Ohio, Pan Handle, Big Four, Lake Shore, Erie, Grand Trunk, and Mich. Central are now in fight. Take measures to paralyze all those that enter Cincinnati. Not a wheel turning on Grand Trunk between here and Canadian line."

I have now gone over, more at length than necessary, perhaps, the evidence concerning Phelan's connection with the boycott and strike, his purpose in coming to Cincinnati, and what he did here, and I find the fact to be that he came here deputed by Debs, president of the American Railway Union, and its board of directors, to enforce a boycott against the cars of the Pullman Company by inciting all the employés of the railroads running into Cincinnati to leave their employ, and thereby to tie up every road, and [813] paralyze all traffic of every kind until all of the railroads should consent not to carry Pullman cars in their trains; and that his plan and his actions were directed as much against the Cincinnati Southern road in the hands of the receiver of this court as against every other road in the city; and that he knew, when he inaugurated the boycott on the Southern road and incited the receiver's employés to strike, that the road was in the hands of the receiver, and was being operated under the order of this court.

We come now to consider the question of fact whether Phelan in any of his speeches advised intimidation, threats, or violence in carrying out the boycott. He is charged with having said, on Thursday night, June 28th, at the meeting at West End Turner Hall, that the strike was then declared on; that it was the duty of every A. R. U. man to quit work, to induce and coax other men to go out, and, if this was not successful, to take a club, and knock them out. He is charged with having said, on the same or another occasion during the same week, that the committees should be appointed to persuade men to go out; that, if they would not go, then the committee should get round behind, and kick them out. The meetings at which these remarks were said to have been made were behind closed doors, and no newspaper reporters were permitted to be present. Only A. R. U. men and railroad employés made up the audience. The first charge is sup-

ported by the evidence of one J. O. Sweeney, a timekeeper of the Big Four Railway, and he is, so far as the evidence shows, a wholly disinterested witness; and by the evidence of one E. W. Dormer, a witness whose credibility I shall consider later. They both say that the remark elicited much applause, and that, shortly before or after, Phelan advised them to be law-abiding citizens. To this charge Phelan makes an explanatory answer as follows:

"I told nobody to take a club, and do anything with anybody. I upon several occasions in this city, have used about that one expression about in the same line with that, the substance of which is about this: I have told the boys—different ones—there was a good deal of demands upon me to go around and see everybody and explain this Pullman trouble. I was worried to death. * * * I said, 'You constitute yourselves a committee of one, each of you, and go to the people,—the community in which you live. Go to the boys,—I mean their acquaintances,—and explain to them this trouble. Talk to them about it. Beseech them to listen, because I want them to get the idea before they would condemn us about it; but do not take a club, and knock them in the head about it.' The peculiarity of the speech elicited applause, but I am afraid it was taken the other way."

With reference to the second charge, it is supported by the evidence of E. W. Dormer, who testifies he heard Phelan say it. An account of the speech in which it was said to have occurred was published in the Cincinnati Enquirer of June 29th, and read to Phelan by counsel for the receiver. It was as follows:

"Mr. Phelan addressed the men familiarly. 'He who is not with us in this struggle is against us, and will be so regarded.' Then he spoke in scathing tones of the Pullmans. 'We want no weak-kneed individuals with us; we want warriors.' Mr. Phelan then launched into an eloquent denunciation of Grand Master Arthur, of the order of locomotive engineers. 'He has not the courage to declare a strike.'"

[814] So far Phelan admitted the truth of the article. The article proceeded:

"When this strike is declared, as it will be before you go home to-night, the members of the American Railway Union in San Francisco, Oregon, Chicago, and all over the great west will stand by you to the bitter end."

As to this he said he did not recollect it, though he would not deny it. "It might have accidentally slipped out," he said. The article, after stating the passage of a resolution not to go back to work till the strike was declared off, which

resolution Phelan said upon the stand that he never heard of, proceeded:

"Mr. Phelan then resumed: 'We must stand solidly together in this hour of trial, and, if anybody returns to work, or takes the place of strikers, seize them by the back of the neck, and throw them out.'"

Upon this passage the examination was as follows:

"Q. Did you say that?—A. I don't recollect. Q. Will you swear to the court you did not say it?—A. I don't recollect of saying it. Q. Will you swear you did not?—A. I don't recollect of saying it. Q. That is as much as you will say?—A. That is as much as I will say. I will state this, however, if you want any qualification on it. Q. I don't want any qualification.—A. If I did say it, I meant to throw them out of the organization."

This was not a denial of the remark at all, but a statement that it meant something different from what it purported to mean. Phelan said several times in his examination that in a speech remarks slip out that one does not intend. Certainly, if he did not intend personal intimidation by this remark, it was an unfortunate one.

An attack is made on the credibility of Dormer. He was a detective in the employ of Field's Detective Agency of St. Louis, and in the employ of the receiver, ostensibly as a brakeman at first, and afterwards a striker, under the name is Williams. His character has not been attacked otherwise than by showing his assumption of a false appearance and name. There is evidence tending to show a willingness on his part to involve some of his fellow strikers in a trespass on the company's property, but I am bound to say that his accuracy as to everything else that occurred at the meetings which he attended has been borne out by the evidence of Phelan and his witnesses as far as they are willing to recollect. Were the charges as to Phelan's language dependent on Dormer's statement alone, I should not give them sufficient weight to overcome positive denials from Phelan; but the difficulty with Phelan's case is that he does not really and positively deny the statement of Dormer, but seeks to give the language another meaning, which it cannot bear. He contends in respect to each of the charges of inciting violence that his meaning was misunderstood. Had his evidence and that of his committee upon the main issues in this case not been most evasive and wanting in

sincerity, I should still be inclined to give Phelan's explanations credit, and give him the benefit of a doubt on this point; but his whole case breaks down with the attempt of himself and his followers to conceal and pervert the most apparent fact in the case, namely, that he instigated, engineered, and con- [815] trolled the boycott and strike at Cincinnati from beginning to end. After this his denials and evasions can be given little weight. It is doubtless true that Phelan did tell his men to be law-abiding, that he did tell them to stay out of saloons, and off the company's property, in public, and that he did not wish his followers to subject themselves to the punishment of the law. Westcott testifies to this, and so do Dormer and Sweeney, and this has doubtless prevented many open assaults and trespasses. But I do not doubt that at the same time he encouraged in them a vicious and malicious disposition towards those of their fellows who did not join with them in this boycott, by expressions of the kind testified to by Sweeney and Dormer, and most evasively denied by Phelan, slyly slipped in where they could be given a double meaning if questioned.

The expressions were for the purpose of bringing into operation that secret terrorism which is so effective for discouraging new men from filling the strikers' places, and which is so hard to prove in a court of justice unless it results in open assault. That Phelan openly discouraged conflict with the law is to his credit as a strike organizer, for he wished public sympathy; but that he wished the aid of that secret terrorism, which is quite as unlawful, seems to me to be established. The town of Ludlow has been in such a state that the receiver's employés who live there have been in constant fear. Two engineers have left the town, and moved their families away. The receiver has boarded employés within guarded precincts. It has been shown that storekeepers of Ludlow have refused to sell goods to the receiver's employés because they were boycotted. Threats have been made, and an assault. Insulting and aggressive language has been used to receiver's employés on both sides of the river. Threats are hard to prove. If effective, they not only keep away the employés from service, but the witness from the stand. The receiver has been obliged to keep

a large force of the United States deputy marshals on both sides of the river and on his engines and trains in order to induce his employés, new and old, to remain in his service. I cannot presume that such protection was invoked by the employés because of groundless fears. The question of fact whether Phelan used expressions in his speeches behind closed doors to the employés of the receiver which were calculated to induce intimidation is not of primary importance in this case, for, as will hereafter be seen, his interference with the operation of the Southern road by the instigation and maintenance of the boycott and strike against the road was the main contempt of this court. The suggestions leading to intimidations would only be aggravations of the contempt; that is all.

Section 725, Rev. St. U. S., provides that:

"The said courts [i. e. courts of the United States] shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment at the discretion of the courts contempt of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehaviour of any person in their presence, or so near thereto as to obstruct the officers of said courts in their official transactions, and the [816] disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

It has been held by Judge Drummond in *Secor* v. *Railroad Co.*, 7 Biss. 513, Fed. Cas. No. 12605, that any unlawful interference with the operation of a road in the hands of a receiver is a contempt of the court, because it is a disobedience or resistance by a person to a lawful order of the court. This view has been taken by Judges Brewer and Treat in *U. S.* v. *Kane*, 23 Fed. 748; and *in Re Doolittle*, Id. 544; and by Judge Pardee *in Re Higgins*, 27 Fed. 443. These authorities show that any willful attempt by any one, with knowledge that the road is in the hands of the court, to prevent or impede the receiver from complying with the order of the court in running the road, when the attempt is unlawful, and as between private individuals, would give a right of action for damages, is a contempt of the order of the court. The rights of the receiver with reference to his business in conducting the railroad under order of the court are not different in any respect from those of a private rail-

way corporation. The only difference is in the remedy which the courts will apply to prevent or to punish a violation of them when such a violation prevents or impedes the operation of the road, and is intended to do so.

There is no doubt that Phelan intended to prevent utterly the operation of the Southern road by calling out the receiver's employés. He wished thus to paralyze his business. He did the trust a very substantial injury by stopping all traffic for a time, by making it necessary for the receiver to pay heavy expenses for unusual police protection, and by putting him to much trouble and expense in securing new employés. Now, if the receiver were a private corporation, could he recover damages for the injury thus inflicted on the business of the road? A malicious or unlawful interference with the business of another by inducing his employés to leave his service is an actionable wrong, and subjects the offender to liability for the loss occasioned. In *Walker* v. *Cronin*, 107 Mass. 555, it was held that a count in a declaration which alleged that a plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendants, well knowing this, did maliciously and without justifiable cause molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employment, and others who were about to enter it, to abandon it without his consent and against his will; and that thereby the plaintiff lost their services and profits and advantages, and was put to great expense to procure other suitable workmen, and was otherwise injured in his business,—stated a good cause of action. See, also, *Sherry* v. *Perkins*, 147 Mass. 212, 17 N. E. 307.

The real question, therefore, is whether the act of Phelan in instigating and inciting the employés of the receiver to leave his employ was without lawful excuse, and therefore malicious. The question is not whether such an act would subject Phelan to punishment [817] by indictment and trial under the criminal laws, but whether the act was unlawful in the sense that he could be made to pay damages for the loss occasioned. Of course, if the act would subject

him to punishment for an indictable misdemeanor and crime, a fortiori would the act be unlawful; but his act may be a contempt without being a crime.

Now, it may be conceded in the outset that the employés of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of a single employé may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory. It follows, therefore (to give an illustration which will be understood), that if Phelan had come to this city when the receiver reduced the wages of his employés by 10 per cent., and had urged a peaceable strike, and had succeeded in maintaining one, the loss to the business of the receiver would not be ground for recovering damages, and Phelan would not have been liable to contempt even if the strike much impeded the operation of the road under the order of the court. His action in giving the advice, or issuing an order based on unsatisfactory terms of employment, would have been entirely lawful. But his coming here, and his advice to the Southern Railway employés, or to the employés of other roads, to quit, had nothing to do with their terms of employment. They were not dissatisfied with their service or their pay. Phelan came to Cincinnati to carry

out the purpose of a combination of men, and his act in inciting the employés of all Cincinnati roads to quit service was part of that combination. If the combination was unlawful, then every act in pursuance of it was unlawful, and his instigation of the strike would be an unlawful wrong done by him to every railway company in the city, for which they can recover damages, and for which, so far as his acts affected the Southern Railway, he is in contempt of this court.

Now, what was the combination and its legal character? Was it an unlawful conspiracy? I do not mean by this an indictable conspiracy, because that depends on the statute; but was it a conspiracy [818] at common law? If it was, then injury inflicted would be without legal justification, and malicious. A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Pettibone* v. *U. S.*, 148 U. S. 197, 13 Sup. Ct. 542. What were the purposes of this combination of Debs, Phelan, and the American Railway Union board of directors? They proposed to inflict pecuniary injury on Pullman by compelling the railway companies to give up using his cars, and, on the refusal of the railway companies to yield to compulsion, to inflict pecuniary injury on the railway companies by inciting their employés to quit their services, and thus paralyze their business. It could not have been unknown to the combiners that the Pullman cars were operated by the railway companies under contracts with Pullman. Such large transactions are never conducted without contracts saving the rights of both sides, and the combiners had every reason to believe that it would be a violation of those contracts for the companies to refuse further to haul Pullman cars in their trains. One purpose of the combination was to compel railway companies to injure Pullman by breaking their contracts with him. The receiver of this court is under contract to Pullman, which he would have to break were he to yield to the demand of Phelan and his associates. The breach of a contract is unlawful. A combination with that as its purpose is unlawful, and is a conspiracy. *Angle* v. *Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240.

But the combination was unlawful without respect to the contract feature. It was a boycott. The employés of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employés had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service. It is the motive for quitting, and the end sought thereby, that make the injury inflicted unlawful, and the combination by which it is effected, an unlawful conspiracy. The distinction between an ordinary lawful and peaceable strike entered upon to obtain concessions in the terms of the strikers' employment and a boycott is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quick- [819] ly as the lawyer or the judge. The combination under discussion was a boycott. It was so termed by Debs, Phelan, and all engaged in it. Boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota; and they are held to be unlawful in England.

In *Moores* v. *Bricklayers' Union*, 23 Wkly. Cin. Law Bull. 48, a union which embraces 95 per cent. of the bricklayers of

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Cincinnati got into a controversy with Parker, a boss bricklayer, concerning apprentices and other matters. The union boycotted Parker, and notified all material men that any one selling him material would themselves be boycotted. Moores & Co. continued to sell Parker lime. Thereupon the union notified all of plaintiffs' customers and probable customers that none of its members would work Moores & Co.'s materials, and seriously damaged the business of Moores & Co. There was no violence, actual or threatened, in the case. Moores & Co. sued the Bricklayers' Union and some of its prominent members for the damages caused by the boycott. This case was tried before a jury in the superior court of Cincinnati, and resulted in a verdict for the plaintiffs of $2,500. The motion for a new trial was reserved to the general term, where the case was fully considered, and the conclusion reached that the verdict must stand, because the combination to injure Moores & Co. was an unlawful conspiracy. The case was then carried by writ of error to the supreme court of Ohio, and the judgment of the superior court was affirmed, without opinion. By the common law of Ohio, therefore, boycotts are illegal conspiracies. I quote from the opinion of the superior court in that case two passages, which seem to me to state the ground for holding boycotts illegal:

"We are dealing in this case with common rights. Every man, be he capitalist, merchant, employer, laborer, or professional man, is entitled to invest his capital, to carry on his business, to bestow his labor, or to exercise his calling, if within the law, according to his pleasure. Generally speaking, if, in the exercise of such a right by one, another suffers a loss, he has no ground of action. Thus, if two merchants are in the same business in the same place, and the business of the one is injured by the competition, the loss is caused by the other's pursuing his lawful right to carry on business as seems best to him. In this legitimate clash of common rights the loss which is suffered is damnum absque injuria. So it may reduce the employer's profits that his workmen will not work at former prices, and that he is obliged to pay on a higher scale of wages. The loss which he sustains, if it can be called such, arises merely from the exercise of the workman's lawful right to work for such wages as he chooses, and to get as high rate as he can. It is caused by the workman, but it gives no right of action. Again, if a workman is called upon to work with the material of a certain dealer, and it is of such a character as either to make his labor greater than that sold by another, or is hurtful to the person using it, or for any other reason is not satisfactory to the workman, he may lawfully notify his employers of his objection, and refuse to work it. The loss of the material man in his sales caused by such action of the workman is not a legal injury, and not the subject of action. And so it may be said that in these respects

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what one workman may do, many may do, and many may combine to do without giving the sufferer any right of action against those who cause his loss. But on this common ground of common rights, where every one is lawfully struggling for the [820] mastery, and where losses suffered must be borne, there are losses willfully caused to one by another in the exercise of what otherwise would be a lawful right, from simple motives of malice.

* * * * * * *

"The normal operation of competition in trade is the keeping away or getting away patronage from rivals by inducements offered to the trading public. The normal operation of the right to labor is the securing of better terms by refusing to contract to labor except on such terms. * * * If the workmen of an employer refuse to work for him except on better terms, at a time when their withdrawal will cause great loss to him, and they intentionally inflict such loss to coerce him to come to their terms, they are bona fide exercising their lawful rights to dispose of their labor for the purpose of lawful gain. But the dealings between Parker Bros. and their material men, or between such material men and their customers, had not the remotest natural connection either with defendants' wages or their other terms of employment. There was no competition or possible contractual relation between plaintiffs and defendants where their interests were naturally opposed. The right of the plaintiffs to sell their material was not one which, in its exercise, brought them into legitimate conflict with the rights of defendants to dispose of their labor as they chose. The conflict was brought about by the effort of defendants to use plaintiffs' right of trade to injure Parker Bros., and, upon failure of this, to use plaintiffs' customers' right of trade to injure plaintiffs. Such effort cannot be in the bona fide exercise of trade, is without just cause, and is, therefore, malicious. The immediate motive of defendants here was to show to the building world what punishment and disaster necessarily followed a defiance of their demands. The remote motive of wishing to better their condition by the power so acquired will not, as we think we have shown, make any legal justification for defendants' acts."

And so here there was no natural relation between Pullman and the railway employés, and their attempt to injure the companies because they would not injure him is without cause, and malicious, and is unlawful, even though the injury is inflicted merely by quitting employment.

Temperton v. *Russell* (1893) 1 Q. B. 715, was a case quite like the case just cited. There a firm of builders refused to obey certain rules laid down by three trades unions connected with the building trade at Hull. Thereupon a joint committee of the unions boycotted the building firm; that is, they attempted to prevent it from procuring any materials by notifying material men not to furnish them, on pain of being themselves boycotted. The plaintiff, a material man, refused to comply with its demand, and the unions then demanded of his material men not to furnish

him any material, with the threat that, if they did so, their workmen would quit. The result of this was that contracts for supplies to the plaintiff were broken, and others who, but for the threats, would have made contracts, were deterred from doing so. It was held that the boycott was an unlawful conspiracy, and that the joint committee of the unions who were sued were liable in damages for a malicious interference with the plaintiff's business. There was no violence or threatened violence in this case. The case was decided by the court of appeal of England, consisting of Lord Ester, master of rolls, and Lopes and A. L. Smith, lord justices.

In *Carew* v. *Rutherford*, 106 Mass. 1, a contracting stone mason, contrary to the rules of the union, sent some of his material out of the state to be dressed, and his men, members of the union, re- [821] fused to work for him any longer unless he paid a fine to the union, and did not return until he paid the fine. This was held to be illegal conspiracy for the purpose of extortion and mischief, and the employer was given a judgment for the recovery of the fine and damages.

Boycotts have been declared illegal conspiracies in *State* v. *Glidden*, 55 Conn. 46, 8 Atl. 890; in *State* v. *Stewart*, 59 Vt. 273, 9 Atl. 559; *Steamship Co.* v. *McKenna*, 30 Fed. 48; *Casey* v. *Typographical Union*, 45 Fed. 135; *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 738; and in other cases.

But the illegal character of this combination with Debs at its head and Phelan as an associate does not depend alone on the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to life and health and comfort of the people of this country as are the arteries on the human body, and yet Debs and Phelan and their associates proposed, by inciting the employés of all the railways in the country to suddenly quit their service without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slightest degree responsible, and over whose acts they can

lawfully exercise no control, to pay more wages to his employés. The merits of the controversy between Pullman and his employés have no bearing whatever on the legality of the combination effected through the American Railway Union. The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise.

More than this, the combination is in the teeth of the act of July 2, 1890, which provides that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."

That such a combination as the one under discussion is within the statute just quoted has been decided by Judge Billings of Louisiana in *U. S.* v. *Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994. His view has been followed by the circuit judges of this circuit within the past 10 days, by Judges Woods, Allen, and Grosscup of the seventh circuit, and by Judge Woolson of the eighth circuit. A different view has been taken by Judge Putnam in *U. S.* v. *Patterson*, 55 Fed. 605, but, after consideration, Judge Lurton and I cannot concur with the reasoning of that learned [822] judge. The fact that it was the purpose of Debs, Phelan, and their associates to paralyze the interstate commerce of this country is shown conclusively in this case, and is known of all men. Therefore their combination was for an unlawful purpose, and is a conspiracy, within the statute cited.

It could also be shown, if it were necessary, that this combination was an unlawful conspiracy because its members intended to stop all mail trains as well as other trains, and did delay and retard many, in violation of section 3995, Rev. St. U. S., which imposes a penalty on any one willfully and knowingly obstructing or retarding the passage of the mail.

It would be no defense, under that statute, that the obstruction was effected by merely quitting employment, where the motive of quitting was to retard the mails, and had nothing to do with the terms of employment.

Something has been said about the right of assembly and free speech secured by the constitution of Ohio. It would be strange, indeed, if that right could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be. It never has been supposed to protect one from prosecution or suits for slander, or for any of the many malicious and tortious injuries which the agency of the tongue has been so often employed to inflict. If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is not less a contempt because the instrument which he used to effect it was his tongue, rather than his hand.

But it is unnecessary to consider the question further. It is very clear that Phelan came here to carry out an illegal conspiracy, in the course of which, and in pursuance of which, he attempted, and partially succeeded in tying up the Southern Railroad, operated by a receiver under an order of this court, as he well knew. His purpose in calling out the employés of the Southern Railroad was unlawful by the law of Ohio and the laws of the United States. He intended to prevent entirely its operation. He partially succeeded, and he subjected the receiver to great expense in reducing the loss occasioned by his acts.

It follows that the contemnor is guilty as charged, and it only remains to impose the sentence of the court. This is in the discretion of the court, to be exercised on any information in reference to the convicted person which the court believes to be reliable. The court would be much more disposed to leniency in this case if the contemnor, after his arrest, had shown the slightest regard for the order of the court which the receiver was attempting to comply with in the operation of the road. Even if he did not fully realize the position in which he had put himself with respect to the order of the court to the receiver to operate the Southern Railroad, his arrest, and the service of the intervening peti-

tion, together with the restraining order, should have quickened his conscience and his perceptions of his duty in this regard. It was his duty, therefore, to cease all his operations with reference to the strike in this city which could in any way affect the operation of the Southern Railway, whether by inciting employés to leave the receiver or by preventing [823] his employment of others. What did he do? Instead of ceasing to incite the receiver's employés to leave his employ in pursuance of his unlawful conspiracy, there has been no change whatever in his course from that pursued by him before his arrest. By speeches every night since the arrest he has aggravated his contempt. On the night of July 4th, it is in evidence, the contemnor said, in a speech to railroad employés of the city, referring to this trial:

"I don't care if I am violating injunctions. No matter what the result may be to-morrow, if I go to jail for sixteen generations, I want you to do as you have done. Stand pat to a man. No man go back unless all go, and all stay out unless Phelan says go back."

It was a direct invitation to continue the course already taken under his direction of preventing the return of employés to the receiver, and of persuading the striking of others, and an avowed intention of disregarding the order of the court.

The punishment for a contempt is the most disagreeable duty a court has to perform, but it is one from which the court cannot shrink. If orders of the court are not obeyed, the next step is unto anarchy. It is absolutely essential to the administration of justice that courts should have the power to punish contempts, and that they should use it when the enforcement of their orders is flagrantly defied. But it is only to secure present and future compliance with its orders that the power is given, and not to impose punishment commensurate with crimes or misdemeanors committed in the course of the contempt, which are cognizable in a different tribunal or in this court by indictment and trial by jury. I have no right, and do not wish, to punish the contemner for the havoc which he and his associates have wrought to the business of this country, and the injuries they have done to labor and capital alike, or for the privations and sufferings to

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which they have subjected innocent people, even if they may not be amenable to the criminal laws therefor. I can only inflict a penalty which may have some effect to secure future compliance with the orders of this court and to prevent willful and unlawful obstructions thereof.

After much consideration, I do not think I should be doing my duty as a judicial officer of the United States without imposing upon the contemner the penalty of imprisonment. The sentence of the court is that Frank W. Phelan be confined in the county jail of Warren county, Ohio, for a term of six months. The marshal will take the prisoner into custody, and safely convey him to the place of imprisonment.

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[824] **UNITED STATES *v.* AGLER.**

(Circuit Court, D. Indiana. July 12, 1894.)

[62 Fed., 824.]

INJUNCTION AGAINST COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—JURISDICTION.—Under Act July 2, 1890, declaring illegal and punishing combinations in restraint of commerce among the states, and conferring jurisdiction on United States circuit courts to prevent and restrain violations of the act, the court has jurisdiction to issue an injunction to restrain such violation.[a]

SAME—TECHNICAL DEFECTS IN BILL.—That a bill for such injunction contains no prayer for process, this being a mere technical defect, although it renders the bill demurrable, does not affect the jurisdiction of the court or render the injunction issued thereon void.

SAME—DEFENDANTS NOT NAMED IN BILL, NOR SERVED WITH SUBPOENA.—An injunction for such purpose becomes binding, as against one not named in the bill, and not served with subpoena, when the injunction order is served on him as one of the unknown defendants referred to in the bill.

SAME—PROCEEDINGS TO PUNISH VIOLATION.—An information to punish violation of such an injunction order which fails to allege that the order was a lawful one, in the language of the statute, or that the person charged, not named in the order, was one of the unknown parties referred to therein, or that, either by his words or his acts, he was engaged in aiding the common object with other members of the alleged combination, lacks the necessary certainty.

[a] Syllabus copyrighted, 1894, by West Publishing Co.

Opinion of the Court.

This was an information against Hiram Agler for contempt of court in disobeying an injunction. Defendant moved to quash the information.

F. B. Burke and *Edwin Corr*, for the United States.

McCullough & Spaan, for defendant.

BAKER, District Judge (orally).

It is well settled that a restraining order or injunction issued by a judicial tribunal without jurisdiction of the subject-matter is coram non judice and void. That is affirmed in all the books, and affirmed in the judgments of the supreme court of the United States that the counsel for the defendant has called the attention of the court to. Now, the question whether or not the circuit court of the United States had jurisdiction requires an examination of the statute, for the purpose of determining whether or not there is any law that authorized the court judicially to take cognizance of the sort of action that is set forth in the petition or bill.

Prior to the 2d day of July, 1890, it is entirely clear that the United States, as a municipal corporation, had no power, either by petition or bill, to go into the courts of equity of the United States, and invoke the aid of those courts, by their restraining power, to prevent interference with the carriage of the mails or with the carriage of interstate commerce. Prior to that time the sole remedy was on the criminal side of the court. The sole method in which the United States, as a government, could prosecute violators of the law who interfered with the carriage of mails or inter- [825] fered with the instrumentalities used in the conduct of interstate commerce, was by indictment or information on the criminal side of the court; but the growth of railways in this country, and the combinations of laborers employed on those roads for the purpose of enforcing, by strikes or otherwise, what they conceived to be their just rights, had led to a condition of things that, in the judgment of congress, made it imperative that the courts of the United States,—in other words, that the nation itself,—for the purpose of protecting the mails of the country, and for the purpose of protecting the passenger and freight traffic on interstate railroads, should

have the right to invoke not only the criminal jurisdiction of the court by fines, or by sending to the penitentiary those who were guilty of violations of those laws, but that the government should also be clothed with the power—or rather the courts of the United States should be clothed with the power—of laying their strong hands on these men, and not waiting until crimes had been committed, but restraining, not for the purpose of preventing people from doing what is lawful, or to prevent their getting better wages, but for the purpose of saying to everybody that civil liberty cannot exist where combinations of men undertake by force and violence to arrest the peaceable and orderly conduct of business among the states. With that view of national duty, on July 2, 1890, congress enacted a law that enlarged the jurisdiction of the federal courts, and authorized them to apply the restraining power of the law for the purpose of checking and arresting all lawless interference with the peaceable and orderly carriage of mails, and with the peaceable and orderly conduct of railroad business between the states. This law was intended to lay its strong hand, not only upon the capitalists or monopolists who, by combinations, undertook to interfere with the business and commerce of the country, and subject them to punishment, but, on the other hand, it also undertook to say to the laboring men of the country that "you shall not enforce your rights, however just they may be, by violence and by lawlessness."

Civil order cannot exist where men undertake by strong hand to enforce rights, whatever their rights may be. In civilized and organized society there is only one avenue that is alike open to the rich and the poor—that is, the avenue of the courts—for the purpose of settling disputes between men. No man has a right, even though he has been wronged, even though he may have been oppressed, to take the law into his own hands, and, by force and terrorism or threats, redress his wrongs. It means a condition of things that would be absolutely intolerable in civilized society, and it was in order that the peaceable and quiet and orderly processes of the law might be applied to men who are thus engaged, whether they were monopolists, on the one side, or laboring men, on the other, that the law was enacted for the purpose of arresting lawlessness, composing these disturbances, and bringing about that orderly and peaceful condition of affairs that is essential to the life and happiness of the community.

[826] Now, there is no doubt, in my judgment, that this act of July 2, 1890, did clothe the circuit court of the United States with this new and enlarged power. That, however, does not answer the entire contention of the counsel for the defense. He insists that the affidavit and information filed in this case does not reach and bind the defendant as charged, because, as he alleges, the bill does not contain a prayer for process; and he reads from an authority which is undoubtedly sound that a bill in equity without containing a prayer for process which shall embody the names of the defendants against whom process is prayed would be demurrable. That is undoubtedly the law. That, however, does not settle the question that is before the court. The question is whether or not if an injunction is issued by a court which has power to issue the injunction upon a bill, provided the bill is not demurrable, is the injunction void because, on investigation, the court believes that a demurrer might have been sustained to the bill if it had been interposed? In other words, does a mere defect that could be reached by demurrer, in a bill of which the court has jurisdiction,—over which the court has been given jurisdiction by the express terms of the statute,—is the injunction order a nullity, and can it be treated with contempt because the bill is defective, so that a demurrer might be sustained to it? On that proposition the court entertains no doubt. There is not an authority, in the judgment of the court, that can be found in the books—certainly the court is aware of none—in which it has ever been held that a man who was enjoined and had violated the injunction could escape punishment by alleging that, at the time the writ of injunction was issued, the bill was demurrable.

There is no doubt but what a number of men are named expressly by name. Eugene V. Debs, Howard, and some men here in this state are named by name. If, in the prayer for process, their names had been repeated, or if it had been simply stated in the prayer for process that the com-

plainant, the United States, prays process against the parties above named, the bill would have been technically sufficient. Now, then, I assume that process of subpoena was issued against these men by order of Judge Woods, without their having been named in the prayer for process. It is a mere technical defect. It is one that does not, in the language of the supreme court, go to the jurisdiction of the court. The jurisdiction of the court depends upon the law of the land. Nor do I think it is necessary in this sort of cases for the government to file what is technically known as a "bill in equity" on the chancery side of this court as in a civil case. The right at all to file this sort of a proceeding is a new statutory right, and courts cannot—they would be derelict in the discharge of their duty if they did—disregard the purpose and object of the enactment of the law. I do not undertake to sit in judgment on either capitalists or laboring men. I have, as a magistrate, nothing to do with that. I am simply bound as a judge to take notice that a condition of things had grown up in this country of strikes, of interruption of mails, and interruption [827] and interferences with interstate commerce; that it provoked comment, and had created feeling; and, in order that labor troubles should be settled without interfering with the commerce and the happiness of millions of innocent people, it was determined that the national government should clothe its courts with power on the civil side to stop these things without waiting until crimes had been committed, and then send men to the penitentiary for the crimes so committed. That is the reason of it. It was intended to be a preventive remedy. That was the sole purpose of it. So far as this phase of it is concerned, it is true there are other sections that authorize men who do these things to be punished by fine of not more than $5,000, and imprisonment for a year in state prison; but, so far as the civil side of it is concerned, it was intended to meet an emergency and a public exigency. It could not sue until the mails had been interfered with, or until the commerce of the country had been lawlessly stopped, but it was not intended, in my judgment, in order to invoke the judgment and jurisdiction of the court that all

of the old nicety of pleading and practice of the English chancery courts should apply. The courts would be powerless if that were the case, to accomplish the beneficent purpose of the law, because it is a beneficent purpose. It is a praiseworthy purpose, in the midst of tumult and excitement, when lawlessness seizes upon the arteries of the commerce of the nation, for the courts of the land, in their peaceable and orderly way, to lay their hands on these men, and bid them cease. It is a lawful thing,—a commendable thing. The law gives them that power. So much, then, on the question of jurisdiction.

I think that in this proceeding the court (Judge Woods, as judge of the circuit court) had jurisdiction to issue this writ. Now, this party defendant is not named, and to say now that process of injunction may not be issued, to be binding upon men who are not named, or shall not be binding until they are actually served with subpoena, as they are on the civil side, on the equity side, of the court, it would defeat the purpose of the law. It is not within the language of the statute itself. I think the injunction as against unknown defendants is valid and binding when the injunction order is served upon them, although they are not at the time parties to the suit. Indeed, I think an injunction that is issued against one man enjoining or restraining him, and all that give aid and comfort to him, or all that aid and abet him, is valid against everybody that aids or gives countenance to the man to whom it is addressed. I do not entertain any doubt about that.

Now, then, the court having decided that it thinks the injunction was properly issued, and that, if it was actually served on this man as one of the unknown defendants, the injunction would be good, that brings us to the question of the technical sufficiency of the affidavit, because in this sort of proceeding, in my judgment, it is not essential that an information shall be filed, although there is no harm in doing that. The essential thing is the filing of a statement or charge that shall show clearly and distinctly that the [828] restraining order has been served on the defendant, or, if it has not been served on him, that he had notice or knowledge of its contents.

Now, in this case, the information, I think, lacks considerable of having the certainty and precision that is essential. It is not alleged that this man was one of the unknown parties that are referred to in the injunction. It is not alleged that the restraining order was a lawful one, in the language of the statute. It does not allege,—and that is the most serious thing, to my mind,—that either by his words or his acts he was engaged in aiding the common object with other members of the American Railway Union. If what this man did was not done to give aid or comfort or encouragement to the object of arresting the mails, if it was an independent crime the man was committing, if he wanted to commit arson or robbery, without having any connection with these men that were engaged in the interruption of commerce, then he would not be within the terms of the restraining order, nor within the law, which has been read here,—the law of July 2, 1890. Now, it is not charged, although it has been assumed all the way through,—I suppose the proof adduced would go to show that,—that he was connected with the railway union, and that his acts were acts that were calculated in their nature to give aid and comfort to the strike that has been carried on. If those facts were proved, why they would be sufficient to satisfy the court that his mind was acting in combination with the minds of Debs and others, or that they were engaged in the common purpose, and hence that they were in the conspiracy that is mentioned in the statute, provided the things that they were trying to do would naturally result in delaying or interrupting the mails, or in delaying or interrupting the carriage of passengers and freight from one state to another. I think that in these particulars the affidavit is insufficient. I think the charge is sufficient, so far as showing that the court has jurisdiction to issue the writ, when it is showu by an affidavit that this man was engaged in the combination or conspiracy with other railroad men in aiding and assisting to arrest the mails and interstate commerce. I think the affidavit would show a cause of action against him, and then it would depend upon the proof whether or not the offense was made out.

[840]

IN RE GRAND JURY.[a]

(District Court, N. D. California. July 13, 1894.)

[62 Fed., 840.]

CONSPIRACY—OBSTRUCTION OF INTERSTATE COMMERCE.—Any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in interstate commerce is in violation of Act July 2, 1890, declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the states.[b]

MAIL—OBSTRUCTING PASSAGE.—It is a violation of Rev. St. § 995, declaring it an offense to knowingly and willfully obstruct or retard the passage of the mail, for one to prevent the running of a mail train as made up, though he is willing that the mail car shall go on, and his purpose is other than to retard the mails.

SAME.—The railway is a great public highway, and the duty of the railroad company as a common carrier is first to the public. The road must be kept in operation for the accommodation of the public, if it is possible to do so with the force and appliances within reach. Any negligence in this respect is not excused by temporary difficulties capable of being promptly removed.

SAME.—Where the transportation of the mails and interstate commerce has long been interrupted by the refusal of the employés of the railway company to move trains carrying Pullman cars, it is the duty of the railway company to use every effort to move the mails and interstate commerce, without regard to the make-up of regular trains; and any willful failure to perform this duty is a violation of the statute.

GRAND JURY—FINDING—INDICTMENT.—An indictment should only be found where the grand jury believe that the evidence before them would warrant a conviction.

Charge to the grand jury by MORROW, District Judge:

[841] Gentlemen of the Grand Jury: You have been summoned and sworn as grand jurors of the district court of the United States for the northern district of California. It now becomes my duty to instruct you concerning the duties you will be called upon to perform under the laws of the United States.

The extraordinary occurrences in this state during the past two weeks require your immediate attention, and call for a

[a] The charges to the Grand Jury found in 62 Fed., 828 and 834, do not relate to the anti-trust law and are therefore not reprinted.

[b] Syllabus copyrighted, 1894, by West Publishing Co.

thorough and sweeping investigation. It is a matter of public notoriety that during this time a great railroad strike has prevailed; that the most important channels of trade and commerce carried by railway service have been closed, the business operations of the state paralyzed, and the passage of the mails seriously retarded and obstructed at several points in the state. The constitution of the United States provides that congress shall have power to regulate commerce among the states and establish post offices and post roads. Pursuant to the first of these provisions, congress has provided by the Act of July 2, 1890, that

"Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

"Trade" has been defined as "the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." The word "commerce," as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *County of Mobile* v. *Kimball*, 102 U. S. 702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 826. The primary object of the statute was undoubtedly to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. *U. S.* v. *Patterson*, 55 Fed. 605. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities from one state to another, and in this view the scope and purpose of the statute have been the subject of consideration in the courts, notably in the case of *U. S.* v. *Workingmen's Amalgamated Council*, 54 Fed. 995. That action was brought by the

United States in the eastern district of Louisiana against the Workingmen's Amalgamated Council of New Orleans, La., and others, to restrain the defendants from interfering with interstate and foreign commerce. The facts were that a disagreement had arisen between the warehousemen and their employés and the principal draymen [842] and their subordinates concerning the recognition that should be accorded by the employers to the demands of certain labor organizations in New Orleans, and it was threatened that unless there was an acquiescence in these demands all the labor organizations would leave work, and would allow no work in any department of business, and violence was threatened in support of the demands. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimidation springing from vast throngs of the union men assembling in the street, and in some instances by violence, so that the result was that by the intended effects of the doings of the defendants not a bale of goods constituting the commerce of the country could be moved. It was held by the court that the facts of that case brought it within the provisions of the statute. In other words, it was determined that a combination of men who by violence and intimidation restrained trade and commerce among the several states or with foreign nations were acting in violation of this law, notwithstanding they may have had in view some other purpose in relation to their employment. You will observe that in this case the elements of intimidation and violence were present. It was not a case where the men merely quit work, putting their employers to no other inconvenience than of securing other men to fill their places, but it was a case where force and intimidation were used to prevent any one in that locality from engaging in the lawful and necessary business of moving the commerce of the country. The order granting an injunction in that case was affirmed by the circuit court of appeals in the fifth circuit. 6 C. C. A. 258, 57 Fed. 85. The law as thus declared by a court of recognized ability and authority was recently applied by Judge McKenna of the circuit court of this district in like manner to one feature of the state of affairs to which I am now directing your attention. This law de-

termines that any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in transporting the interstate commerce of the country is a violation of the act of July 2, 1890.

Another agency of the government is involved in the transportation of the mails, and to protect and secure the efficiency of that branch of the service it has been enacted that all railroads or parts of railroads which are now or hereafter may be in operation are established as post roads (Rev. St. § 3964); that the postmaster general shall in all cases decide upon what trains and in what manner the mails shall be conveyed (section 3, Act March 3, 1879; 20 Stat. 358); and every railway company conveying the mails shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same (Rev. St. § 4000). It is further provided in section 3995 of the Revised Statutes that "any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver or carrier carrying the same, shall for every such offense be punished by a fine of not [843] more than $100." This statute has also been before the courts in cases where bodies of men operating as labor organizations have prevented the passage of trains carrying the mails. In the case of *U. S.* v. *Clark*, in the district court of the United States for the eastern district of Pennsylvania (23 Int. Rev. Rec. 306, Fed Cas. No. 14,805), the defendant was one of a number of persons who assembled at the depot of the Lehigh Valley Railroad at South Easton, Pa. On the arrival of the mail train at the depot, the defendant, who had no connection with the train, said to persons having charge of it that the mail car could go on, but not the rest of the train. The defendant afterwards got on the train, and, with others, placed it on a siding, where it remained for several days. Judge Cadwallader, in charging the jury upon these facts, said:

"The defendant is charged with retarding the transportation of the mail. * * * The mail, in point of fact, was retarded, as the postmaster testifies, two or three days. The occurrence which retarded it, according to the tendency of the proofs, was that several persons were assembled at the depot at Easton for no lawful purpose, and that one or more of them declared that the mail might go on, but the passenger train should not. They uncoupled the mail, and afterwards coupled it for the purpose of carrying it, as they did, to a siding. If that was the fact, and their purpose was to retard the train which transported the mail, it matters not, in point of law, whether they were or were not willing that the mail car or baggage car or the particular vehicle carrying the mail should go on."

The learned judge then quotes with approval the opinion of Judge Drummond of Chicago upon the subject, as follows:

"In relation to the transportation of the mails by means of railroads it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail where there are other cars accompanying it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss; so that while nominally they permit the mail car to go, they really, by preventing the transit of other passengers cars, interfere with the transportation of the mails."

You will observe that the law is applicable to the case of an obstruction interposed for a purpose other than that of retarding the mails. This was decided to be the law by the supreme court of the United States as long ago as 1868 in the case of *U. S.* v. *Kirby*, where it was said:

"When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object." 7 Wall. 486.

In the case of *U. S.* v. *Thomas*, 55 Fed. 381, the transportation of the mails had been obstructed by some persons acting under the influence of a strike. Judge Jackson, in addressing the jury, submitted observations intended for the strikers. He said:

"You have no right to go into a strike and undertake to stop the transportation of the mails of the United States, undertake to stop the running of the cars of the country, or undertake to stop the business which is carried on the great highways of the country, and which is the mainspring to the success of a country like ours. If all this is done, then you step upon a right which you have no right to interfere with. I make these general remarks on [844] this occasion with a hope that I may reach the ear of the intelligent masses, that they may see at once the error they have fallen into. Rely not upon combination and strikes to protect your interests. They are disastrous, stopping your mills, and stopping the enterprises and business of the community which furnish the wage-earner the means to support his home. Do not resort to such measures to stop our manufactures, our mills, or the transportation of the mails of the United States, which is so great and important an element of

our country for the comfort and welfare of society. If you take this thing up and look at it, and ponder over it, and see the result that must necessarily follow such a course of action, and the train of circumstances that must necessarily accompany it, you would refuse to enter into these combinations and strikes."

That the passage of the mails over certain lines of railroad in this state has been retarded and obstructed there is no question. The regular receipt and dispatch of mails over the roads of the Southern Pacific Company have in fact been suspended at the San Francisco post office for a period of about two weeks. Who is responsible for this state of affairs? The strikers, the railroad company, or both? The railway is a great public highway, and the duty of the railroad company as a common carrier is first to the public. The road must be kept in operation for the accommodation of the public, if it is possible to do so with the force and appliances within reach. Any negligence in this respect is not excused by temporary difficulties capable of being promptly removed. The damage and interruption caused by the elements usually receive prompt attention, that traffic may not be suspended longer than is absolutely necessary. The same energy and good faith should be observed with respect to the removal of labor and other difficulties. *Railroad Co.* v. *Hazen*, 84 Ill. 36. The present controversy between the Southern Pacific and its employés appears to be in relation to the movement of Pullman cars. Both parties to this controversy have announced in the public press that they have been ready and willing from the first to move freight cars and passenger trains without Pullman cars. In my opinion, the situation has been of such an extraordinary character, and the interruption to commerce and the transportation of the mails so serious and long-continued, as to have required of the railroad company to temporarily waive questions concerning the make-up of regular trains (as the officers of the company claim to have done), and employ such resources as the company had in the movement of other trains in an effort to relieve the prevailing congestion and distress. This obligation I believe to have been a public duty, and a willful failure to perform this duty with respect to the movement of the mails and interstate commerce is therefore, in my judgment, within the purview of the statute.

It is your duty to determine this question under the law as I have stated it to you, and present the guilty parties to the court for prosecution. In this inquiry you will not limit your examination to the conduct of any particular class of persons, but carefully scrutinize the acts of all parties concerned, whether they are officers of the railroad company or employés, and without fear or favor or influence of any kind point out in the proper manner the persons who have transgressed the law and imperiled the best interests of this state. [845] It is our duty to uphold the authority and majesty of the law, and see to it that those who have violated its provisions, whoever they may be, are brought to the bar of justice.

In your inquiry you may find that parties have so associated themselves together in their conduct as to bring them within the law of conspiracy. The statute of the United States upon that subject is as follows:

Section 5440, Rev. St.: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The elements of this offense are the combination or conspiracy to violate the law, and the overt act or acts to carry the conspiracy into effect. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy.

It is also true that any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, as we have seen, when the combination is proved, are as much responsible as if they had done the act themselves. You will observe in this connection that the act of combination to violate the statute is the important element in the crime of conspiracy. The law regards the act of un-

lawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederation of several persons to commit crime requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments, distinctive from those prescribed for the crime the subject of the conspiracy. You can readily appreciate why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionally demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community to which they belong. The statutes I have cited indicate the general character of the investigation you will be required to make concerning the affairs of the railroad company in the transportation of the mails and in the movement of interstate commerce. With the merits of the controversy between the railroad company and its employés you have nothing to do, except in so far as the facts relating thereto may furnish evidence as to the actual parties engaged in violating the laws of the United [846] States. The right of labor to organize for its own benefit and protection is not questioned. It has the same right in this respect as any other association, and, perhaps, in some respects, its freedom is properly greater. The laboring man is entitled to the highest wages and the best conditions he can command, but he is not entitled to interfere with the rights and property of others, and by force or other unlawful means seize upon the appliances of organized industry, and set at defiance the laws of the government. The right of workingmen to quit work, either singly or in a body (subject only to the civil obligations of contracts), is not denied, provided that the abandonment of service is accomplished in a peaceful and orderly manner; and here again the privilege or freedom must be exercised without interfering with the rights and property of others. It may be said that this freedom or privilege accorded to the laboring men, with the restrictions named, is of no great value, since he is thereby prevented from securing the protection he ought

to have for his labor, and the power to redress his grievances. This may be true, and it may be conceded that the relations of labor to capital present a difficult problem for solution, but it seems to me that the intelligence of the people ought to solve this question in a peaceful and proper manner. It certainly cannot, with the consent of the courts, be settled by violence or any unlawful means.

It will appear to you from what I have said that a very serious and important duty devolves upon you as grand jurors of this court. Your oath requires you to diligently inquire and true presentments make "of such articles, matters, and things as shall be given you in charge or otherwise come to your knowledge touching the present service." The oath indicates the impartial spirit with which your duties should be performed. You are to present no one from envy, hatred, or malice, nor should you leave any one unpresented for fear, favor, affection, hope of reward or gain, but should present all things truly as they come to your knowledge, according to the best of your understanding. In each judicial district there is a United States attorney, appointed by the president to represent the interests of the government in the prosecution of parties charged with the commission of public offenses against the laws of the United States. The United States attorney for this district will therefore appear before you, and present the accusations which the government may desire to have considered by you. He will point out to you the laws other than those I have mentioned which the government deems to have been violated, and will subpoena for your examination such witnesses as he may consider important, and also such other witnesses as you may direct. In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions, and hearsay evidence. Subject to this qualification, you will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more, if in the course of your inquiries you have reason to believe that there is other evidence not presented to you within your reach, which would qualify or [847] explain away the charge

under investigation, it will be your duty to order such evidence to be produced. Formerly it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment you must be convinced, so far as the evidence before you goes, that the accused is guilty; in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury. To authorize you to find an indictment or presentment, there must be a concurrence of at least 12 of your number,—a mere majority will not suffice. You are to keep your deliberations secret, and allow no one to question you as to your own action, or the action of your associates on the grand jury. In the progress of your examinations, should questions arise concerning which you may desire further instructions from the court, you may come into court for that purpose, and the law will be further explained to you with respect to such questions.

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[310] ARTHUR ET AL. *v.* OAKES ET AL.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

[63 Fed., 310.]

[This decision, although sometimes cited. was not based upon the anti-trust law. It was an appeal from certain injunctions issued in the case of *Farmers' Loan and Trust Co.* v. *Northern Pacific R. Co.*, 60 Fed. 803. On page 329 of the decision the court said:]

"In the course of the argument some reference was made to the act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.' (26 Stat., 209.) It is not necessary in this case to decide whether, within the meaning of that statute, the acts and combinations against which the injunction was aimed would have been in restraint of trade or commerce among the several states. This case was not based upon that act. The questions now before the court have been determined without reference to the above act, and upon the general principles that control the exercise of jurisdiction by courts of equity."

[27] UNITED STATES *v.* ELLIOTT ET AL.[a]

(Circuit Court, E. D. Missouri. October 24, 1894.)

[64 Fed., 27.]

CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—WHAT CONSTITUTES.—A combination by railroad employés to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce, from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads, is within Act July 2, 1890, § 1, which provides that every contract, combination in the form of trust or otherwise, "or conspiracy in restraint of trade or commerce" among the states, is illegal.[b]

SAME—INJUNCTION—POWER OF CONGRESS TO AUTHORIZE.—Act July 2, 1890, § 4, which provides that the circuit courts of the United States have jurisdiction to restrain combinations and conspiracies to obstruct and destroy interstate commerce, before such objects are accomplished, is not void for want of power in congress to authorize such proceedings.

SAME—INJUNCTION ORDER—PERSONS NOT NAMED IN BILL.—Under Act Juy 2, 1890, § 5, an injunction order in an action to enjoin an illegal conspiracy against interstate commerce may provide that it shall be in force on defendants not named in the bill, but who are within [28] the terms of the order, where it also provides that it is operative on all persons acting in concert with the designated conspirators, though not named in the writ, after the commission of some act by them in furtherance of the conspiracy, and service of the writ on them.

Bill by the United States against M. J. Elliott and others to restrain a conspiracy to obstruct and destroy interstate commerce in violation of Act July 2, 1890 (26 Stat. 209). A preliminary injunction was granted. 62 Fed. 801. Defendants demurred to the bill. Demurrer overruled.

Wm. H. Clopton, United States Attorney.

W. W. Erwin, *S. S. Gregory*, and *W. A. Shumaker*, for defendants.

PHILIPS, District Judge (orally).

This case was submitted yesterday on the demurrer filed to the bill by certain of the defendants. The district attor-

[a] Preliminary injunction granted (62 Fed., 801). See p. 262.

[b] Syllabus copyrighted, 1895, by West Publishing Co.

ney submitted the same on the pleadings; and the defendants, on the pleadings and an extensive brief. This suit grew out of the recent "strike," and the bill was filed on behalf of the United States, by the district attorney, under direction of the attorney general of the United States, to enjoin the defendants from the consummation of an organized conspiracy, which threatened to obstruct and was impeding the passage of the United States mails, and interfering with interstate commerce. The demurrer, of course, admits all the material allegations of the bill; that is, all facts which are well pleaded. These averments may be summarized as follows: It is charged, in substance, that the defendants have combined and confederated together to prevent the several railroads named in the bill,—being about all of the many important roads coming into the city of St. Louis, Mo.,—which are engaged in carrying the United States mails and in interstate commerce, carrying passengers and freights, from conducting their customary business in transporting passengers and freights between and among the different states of the Union, and foreign countries. It is further charged that said defendants have combined and conspired to induce persons in the employ of said railroads to leave the service of their respective companies, and to prevent the companies from securing the services of other persons in the place of those induced to quit, the object of such conspiracy being to prevent said railroad companies from hauling cars which are extensively used in the necessary transaction of their business in interstate commerce.. The bill charges the commission of divers and sundry acts by the alleged conspirators in furtherance of the objects of the confederation. Among other things, it is alleged that certain of the defendants, under the leadership of one Debs, have issued orders and directions to persons in the employ of said railroads to act subject to their direction, whereby said employés have been commanded and required to cease from operating the respective railroads. It is further charged that certain of said defendants have threatened to tie up the entire operations of trains of such of said companies as refuse to accede to certain demands made upon them by the leaders of the conspiracy, and that it is the purpose and object of the defend-

ants to so obstruct and crip- [29] ple the business of said roads as to prevent them from performing their duties and functions as common carriers of freights and passengers among the several states through which the several lines of said roads pass. It is further alleged that it is among the objects and plans of said conspirators to control the interstate commerce between the city of St. Louis and points in other states, and thereby prevent the owners of said roads from exercising any independent control thereof in the transaction of interstate commerce. The bill further sets up, what is quite an historic fact in commercial circles, that the city of St. Louis is a large live-stock market for the sale and slaughter of cattle and hogs, and the preparation of the same for food, and is also a large manufacturing center, from which point these food supplies and manufactured articles are distributed to various points throughout the United States, and other necessaries of life, which have become essential to the commerce, growth, and development of the country, and for its domestic life, and that the aforesaid interference with the transportation of these supplies is a great public detriment, not only to said city, of 600,000 people, but to all the people of the various states reached by the exertions and efforts of this distributing point, who, by the course of business, have become largely dependent upon this source of supply. The object of the bill is to have these parties, and their aiders and abettors, enjoined and restrained from the further prosecution of their unlawful purpose and dangerous conspiracy.

The demurrer raises the question of the jurisdiction of this court over the subject-matter, and the right of the United States to bring such suit in equity; and various other suggestions are made, of minor importance. As recited in the temporary order of injunction made by Judge THAYER, the suit was instituted upon the authority of the attorney general of the United States, and the bill is properly sworn to, in the usual form. I do not propose to go into any extended discussion of the many various questions discussed by counsel in the brief.

It is a fact of supreme importance, to be stated at the very threshold of this discussion, that the regulation and control

of commerce among the states of the Union, and with foreign nations, is, by the federal constitution, reposed exclusively in the congress of the United States. The felt necessity of this federal jurisdiction was the one great impelling cause that led to the formation of the federal Union, and the adoption of the federal constitution. As early as 1778 this question was pressed upon the consideration of congress by a memorial from the state of New Jersey, and in 1781 Dr. Witherspoon, one of the statesmen of that day, presented a resolution which declared that "it is indispensably necessary that the United States, in congress assembled, should be vested with a right of superintending the commercial regulations of every state, that none may take place that shall be partial, or contrary to the common interests." And in 1786 Virginia adopted a resolution appointing commissioners to meet with like commissioners from other states, and the resolution to that effect, formulated by Mr. Madison, recited in the preamble that "Whereas, the relative situation of the United States has [30] been found on trial to require uniformity in their commercial regulations," etc. That great jurist, Chief Justice Marshall, in *Brown* v. *Maryland*, 12 Wheat. 445, most aptly presents this matter, as follows:

"The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view of their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties, but the inability of the federal government to enforce them had become so apparent as to render that power, in a great degree, useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great Revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." "What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?" "The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior." "Commerce is intercourse. One of its most ordinary ingredients is traffic."

In the passion of the hour, we are apt to forget the pit from which we were dug, and the rock of permanency upon which our feet were planted, by the wise and patriotic men who constructed the fabric of our government. The power to regulate commerce among the states carries with it, as the supreme court has repeatedly held, the power to protect and defend.

On July 2, 1890, congress passed the law entitled "An act to protect trade and commerce against unlawful restraints and monopolies," section 1 of which is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." It may be conceded that the controlling, objective point, in the mind of congress, in enacting this statute, was to suppress what are known as "trusts" and "monopolies." But, like a great many other enactments, the statute is made so comprehensive and far-reaching in its express terms as to extend to like incidents and acts clearly within the expression and spirit of the law. It declares that every act, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the states, or with foreign nations, is forbidden. Therefore, any combination or confederation among two or more persons, in restraint of trade or commerce, comes within the express letter of the statute. The term "restraint of commerce" was used in its ordinary, business understanding and acceptation. Among the recognized meanings of the word are "prohibition of action; holding or pressing back from action; hindrance; confinement; restriction." It is a restriction or hindrance created by the application of external force. It is a vis major applied directly and effectually to carriers of [31] interstate commerce, which prevents them from operation. *Olivera* v. *Insurance Co.*, 3 Wheat. 193. It was perfectly competent for congress, in the exercise of its constitutional jurisdiction of the whole subject of such commerce, to pass laws to prevent and suppress unlawful conspiracies and com-

binations to interfere with the operation of such commerce. Accordingly, section 4 of said act provides that:

"The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited." "When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

It was pursuant to this statute, inter alia, that Judge THAYER issued the temporary restraining order in this case. I am unable to perceive the force of the argument against the power of congress to authorize such civil proceedings in equity to suppress and restrain combinations and conspiracies to accomplish the obstruction and destruction of interstate commerce and trade before it is accomplished. It was just as competent for congress to provide this civil remedy of prevention as it was to provide for punishment in a criminal proceeding for the unlawful conspiracy entered upon or consummated.

It is urged by counsel for defendants that courts of equity will not interpose by injunction to prevent the commission of an act which, when done, would be a crime penally punishable. This is an "old saw." It is a general rule of equity jurisprudence that courts of chancery will not interpose where there is an adequate remedy at law, nor will they ordinarily interpose to prevent the commission of a crime. A well and long established exception to this rule is that where parties threaten to commit a criminal offense, which, if executed against private property, would destroy it, and occasion irreparable injury to the owner, and especially where such destruction would occasion a multiplicity of suits to redress the wrong if committed, courts of equity may interpose by injunction to restrain the threatened injury. The law, it does seem to me, would be very imperfect, and indeed impotent, if a number of irresponsible men could conspire and confederate together to destroy my property,

to demolish or burn down my house, that I should be remitted alone to the criminal statutes for their prosecution after my property was destroyed. Most generally, such lawbreakers who engage in such conspiracies are a lot of professional agitators. They have no property to respond in damages. Their tongues are their principal stock in trade; and inasmuch as imprisonment for debt is abolished, and cruel and unusual punishments are prohibited, an execution would be quite unavailing. It certainly presents a case that most strongly appeals to the strong arm of a court of equity to reach forth to pre- [32] vent great injury and loss, as the only means of conserving the rights of private property. It is now a well-recognized office of a court of equity to conserve and preserve the rights of private property in advance of its molestation and appropriation, where, from the peculiar circumstances, the remedy at law might be of doubtful restitution. In the recent case in Chicago, in which E. M. Arthur was intervener, against Thomas F. Oakes et al. (63 Fed. 310), Mr. Justice Harlan, in reviewing the restraining order issued by Judge Jenkins, has very effectually met this objection, and presented the law respecting unlawful conspiracies with a force and clearness to forever set this question at rest. It may not be out of place here to say that no public decision has perhaps been so much misunderstood, or ignorantly or intentionally misrepresented and perverted, as that of the distinguished jurist. The opinion recognizes the right of employés and labor organizations, in the absence of a contract binding the employé to a given term of service, whenever they become dissatisfied with their employment or their wages, to quit the service of the employer, either separately or collectively; and they have a right, by preagreement or preconcert of action, to unite together for taking peaceful and lawful means to secure an increase of wages; to withdraw, separately or in a body, from the service of the employer, when dissatisfied. It is not competent for the courts to interpose to restrain their right of volition, which is among the natural and inalienable rights of every citizen, to work for whom he pleases, where he can get employment, and to quit whenever he is dissatisfied therewith. But the opinion distinctly an-

nounces the further proposition that such men have no right to conspire and combine together, not only for the purpose of securing better conditions and wages, and quit service if not secured, but to go further for the purpose of preventing the employer from supplying the places vacated with other employés, who are ready and willing to take their places; that they have no right to combine and confederate together for the purpose of wantonly injuring and destroying the property of their employer, and to obstruct and interfere with his dominion over and control of his private property. An act which, if done by an individual, may be lawful, may become quite a different thing when undertaken to be done by a confederation among many, having for its inspiration the purpose of injuring and destroying the property of another, by preventing him from prosecuting his business by taking into his service others to supply the places of those who voluntarily have gone out. So the learned justice says:

"It seems entirely clear, upon authority, that any combination or conspiracy upon the part of these employés would be illegal, which has for its object to cripple the property in the hands of the receivers, and to embarrass the operations of the railroad under their management, either by disabling or rendering unfit for use the engines, cars, or other property in their hands, or by interfering with their possession, or by actually obstructing their control or management of the property, or by using force, intimidation, threats, or other wrongful methods against the receivers or their agents, or against employés remaining in their service, or by using like methods to cause employés to quit, or prevent or deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests [33] of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and the personal liberty of individuals, who, in the exercise of their inalienable privilege of choosing the terms upon which they will labor, enter or attempt to enter the services of those against whom such combinations are aimed. And as acts of the character referred to would have defeated the proper administration of the trust estate, and inflicted irreparable injury upon it, as well as prejudiced the rights of the public, the circuit court properly framed its injunction so as to restrain all such acts as have specifically been set forth, as well as combinations and conspiracies having the object and intent of physically injuring the property, or of actually interfering with the regular, continuous operation of the railroad."

Further on, he says:

"In our consideration of this case, we have not overlooked the observation of counsel in respect to the use of special injunctions to prevent wrong which, if committed, may be otherwise reached by the court."

Then, after observing that this jurisdiction of a court of equity should be cautiously and conservatively exercised, said:

"It will be refused until the court is satisfied that the case before it is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act. In such a case the court owes it to its suitors and its own principles to administer the only remedy the law allows, to prevent the commission of the act. The authorities all agree that a court of equity should not hesitate to use this power when the circumstances of the particular case in hand require it to be done, in order to protect rights and property against irreparable damages by wrongdoers."

Then, quoted from Mr. Justice Story, the following:

"The jurisdiction of these courts thus operating by special injunction is manifestly indispensable for the purpose of social justice, in a great variety of cases, and therefore should be fostered and upheld by a steady confidence."

The court then concludes with the statement that no other remedy than that of injunction, to meet such extraordinary conditions of affairs, was full and complete for the protection of the property, and "for the preservation of the rights of the public in its due and orderly administration by the courts." The court then says:

"That some of the acts enjoined can criminally subject the wrongdoers to actions for damages, or to criminal prosecution, does not therefore, in itself, determine the question as to interference by injunction. If the acts stop at crime, or involve merely crime, or if the injury threatened could, if done, be adequately compensated in damages, equity would not interfere. But as the acts threatened involve the irreparable injury to and destruction of property, as well as continuous acts of trespass, to say nothing of the rights of the public, the remedy at law would have been inadequate."

This doctrine was long ago announced by so distinguished a jurist as Mr. Justice Story, who said:

"If, indeed, courts of equity did not interfere in cases of this sort, there would, as has been truly said, be a great failure of justice in this country."

As said by Judge THAYER in granting this provisional injunction:

"A combination whose professed object is to resist the operation of railroads whose lines extend from a great city into adjoining states, until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states; and under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose by unlawful means."

[34] It would present a most anomalous state of affairs, in a country like this, if men, because of some supposed or real grievance with an employer in a distinct business, should be permitted to confederate and conspire together for the purpose of coercing the employer into acceding to their demands, and, as a means to a specific end, tie up and stop independent railroads extending from the Pacific coast to the Lakes on the north and northeast, deaden all the engines on the tracks; thereby intercepting the transportation of passengers and the necessary supplies passing from one state to another, and stop the shipment of cattle, sheep, hogs, corn, wheat, oats, fruits, and vegetables. It is impossible to state in language the far-reaching destructiveness and ruin of such a scheme, if permitted to proceed to accomplishment. The business of this country has adjusted itself to operations of interstate commerce. Large communities of people are dependent for the necessaries of life upon the agricultural products of other communities. While we have a state here with a productive energy and capacity for producing nearly all the necessaries of life, yet, because of the fact that other localities can produce with less labor and more profit certain supplies than the local community, people forbear giving attention to the production of articles which they can thus obtain more cheaply and readily, and depend therefor upon other communities, and the railroads for transporting such supplies from one state to another. If persons may combine and confederate together to stop the railroad trains from passing from one city and one state to another, it is easy to be seen how quickly and readily they could produce ruin, famine, and death in our great cities. They could cut off such necessaries for the sustenance of life as an adequate supply of coal, and in one month, or less, produce a coal famine in city and country. It certainly ought to be permissible to the government, representing the whole people, to interpose, to preserve and protect the public life and the public health. The framers of the federal constitution builded wisely when they gave to congress control over our interstate commerce. With prophetic eye, they looked far into the future of their country, and foresaw the development of its commerce, and the absolute necessity of the free-

dom of commercial intercourse between the different communities extending from ocean to ocean. The fact that congress did not enact the statute above recited until 1890, is no argument against the existence of its power. Many powers lodged by the constitution in the legislative department long lie dormant, until the exigency arises to invoke them into activity. As said by Mr. Justice Miller in *Sawyer v. Hoag*, 17 Wall. 620:

> "When we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen."

Congress passed the act of 1890 in response to the public necessities. And as the sequel proved, in the great extremity to which the country was forced last summer, the framers of the law "builded wiser than they knew." The furious assaults made on the federal [35] judiciary in connection with this trouble, for grasping jurisdiction, are wholly unwarranted, in view of the express authority given the courts by said act of congress. The federal courts are the creation of the federal constitution, and the laws made in pursuance thereof. It is their office to execute, and not make, the laws. They possess just such powers, and all the power and jurisdiction, as are conferred on them by the supreme law of the land. And when they come in the exercise of the jurisdiction with which they have been clothed by an express act of the federal legislature, and grant injunctions, as they did last summer, against unlawful combinations of men, to restrain and prevent the operations of the unreasoning and unappeasable spirit of the mob, in the protection of the freedom of trade and commerce, to break the blockades on the public highways so as to open up travel and the transportation of the United States mails, and restore by civil processes the healthful glow-and flow of a nation's commerce, they come as servitors, within the meaning of the preamble to the federal constitution, "to establish justice," and to conserve the public welfare. In such office they deserve the commendation of all good men, rather than the hurtful criticisms to which they have been exposed. It is well, in such a crisis, that the American people should be reminded that this

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is a government of law, and not of the tumultuous assembly controlled by one spirit to-day, and by another to-morrow.

Objection is made in the demurrer and the brief of counsel that the restraining order granted in this case went against parties not named specifically in the bill and the restraining order. The language of the provisional order in this respect is as follows:

"It is ordered that the aforesaid injunction, with writ of injunction, shall be in force and binding upon such of the defendants as are named in said bill, * * * and shall be binding upon such defendants whose names are not stated, but who are within the terms of this order."

The order further directed that the injunction should be operative upon all persons acting in concert with the designated conspirators, and under their direction and control, and where parties were not named especially in the writ, but were found to be acting in concert with and under the direction of the alleged conspirators, and commit some act in furtherance of the conspiracy, then the marshal should serve the writ upon them, and if, after service of the writ upon them, they did any act in violation of the injunction, they would come within the terms of the restraining order. This, I think, it is competent for the court to do, under section 5 of the act aforesaid, and that it was conformable to the custom and usage of courts of equity, where there are engaged such large numbers of unknown persons in such unlawful conspiracy. As the order of injunction was not to become operative upon them until served with a copy thereof, it does not lie in their mouths to question the regularity of the proceeding. My conclusion is that the bill is sufficient, and the demurrer is overruled.

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[724] UNITED STATES *v.* DEBS ET AL.[a]

UNION TRUST CO. *v.* ATCHISON, T. & S. F. R. CO.

(Circuit Court, N. D. Illinois. December 14, 1894.)

[64 Fed., 724.]

CONTEMPT—PROCEEDING IN EQUITY—CONCLUSIVENESS OF ANSWER.—In proceedings for contempt in equity, a sworn answer, however full

[a] Writ of habeas corpus denied (158 U. S., 564). See p. 565. Debs was also indicted, with others, for conspiracy to obstruct the mails (65 Fed., 210). That decision not reprinted. Anti-trust law not considered.

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and unequivocal, is not conclusive, even in the case of a stranger to the bill for the injunction which has been violated.[a]

SAME—JUSTIFICATION—IRREGULARITIES.—Where a court had jurisdiction of an injunction suit, and did not exceed its powers therein, no irregularity or error in the procedure or in the order can justify disobedience of the writ.

[725] SAME.—In a proceeding for contempt in disobeying an injunction, the sufficiency of the petition for the injunction, in respect to matters of form and averment merely, cannot be questioned.

EQUITY JURISDICTION—RESTRAINING PUBLIC NUISANCE.—Equity has jurisdiction to restrain public nuisances on bill or information filed by the proper officer, on behalf of the people.

CONTEMPT—TRIAL BY COURT.—Though the same act constitute a contempt and a crime, the contempt may be tried and punished by the court.

COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—SCOPE OF THE STATUTE—CONSPIRACY.—Act July 2, 1890 (26 Stat. 209), § 1, declaring illegal "every contract, combination in the form of trust, or otherwise, or conspiracy" in restraint of trade or commerce among the states, or with foreign nations, is not aimed at capital merely and combinations of a contractual nature, which by force of the title, "An act to protect trade and commerce against unlawful restraints and monopolies," are limited to such as the courts have declared unlawful, the words "in restraint of trade" having, in connection with the words "contract," and "combination," their common-law significance, but the term "conspiracy" is used in its well-settled legal meaning, so that any restraint of trade or commerce, if to be accomplished by conspiracy, is unlawful.

SAME—CONSTRUCTION.—The construction of the statute is not affected by the use of the phrase "in restraint of trade," rather than one of the phrases "to injure trade" or "to restrain trade."

SAME—COMMERCE.—The word "commerce," in the statute, is not synonymous with "trade," as used in the common-law phrase "restraint of trade," but has the meaning of the word in that clause of the constitution which grants to congress power to regulate interstate and foreign commerce.

SAME—FORFEITURE OF PROPERTY.—The provision of Act July 2, 1890, § 6, for forfeiture of "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in this act, and being in the course of transportation from one state to another, or to a foreign country," does not imply that only cases in which property shall be found subject to forfeiture shall be deemed within the scope of the act.

EQUITY JURISDICTION—RIGHT TO JURY.—The power given by Act July 2, 1890, to circuit courts "to prevent and restrain violations" of the act, is not an invasion of the right of trial by jury, as the jurisdic-

[b] Syllabus copyrighted, 1895, by West Publishing Co.

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tion so given to equity will be deemed to be limited to such cases only as are of equitable cognizance.

CONTEMPT—VIOLATION OF INJUNCTION—CONSPIRACY.—Where defendants, directors, and general officers of the American Railway Union, in combination with members of the union, engaged in a conspiracy to boycott Pullman cars, in use on railroads, and for that purpose entered into a conspiracy to restrain and hinder interstate commerce in general, and, in furtherance of their design, those actively engaged in the strike used threats, violence, and other unlawful means of interference with the operations of the roads, and, instead of respecting an injunction commanding them to desist, persisted in their purpose, without essential change of conduct, they were guilty of contempt.

SAME—INTERFERENCE WITH RECEIVER.—Any improper interference with the management of a railroad in the hands of receivers is a contempt of the court's authority in making the order appointing the receivers, and enjoining interference with their control.

Proceedings for contempt against Eugene V. Debs and others for violation of injunctions issued, one on complaint of the United [726] States, and the other on petition of the receivers of the Atchison, Topeka & Santa Fé Railroad Company, appointed in a suit against that road by the Union Trust Company.

These informations were filed July 17, 1894. The substance of the first is:

That on the 2d day of July, 1894, the United States of America filed with the clerk of this court an information or complaint charging, among other things, that the defendants, Eugene V. Debs, George W. Howard, L. W. Rogers, Sylvester Keliher, the American Railway Union, and others, were engaged in a conspiracy unlawfully to interfere with and to prevent the transportation of the mails and interstate commerce over and upon the several railroads named in the complaint, and praying an injunction. That on that day, by order of the court, a writ of injunction was duly issued, whereby the defendants, and all persons combining and conspiring with them, and all persons whosoever, were commanded and enjoined "to desist and refrain"—

(1) From in any way or manner interfering with, hindering, obstructing, or stopping any of the business of any of the following named railroads: Atchison, Topeka & Santa Fé Railroad; Baltimore & Ohio Railroad; Chicago & Alton Railroad; Chicago & Eastern Illinois Railroad; Chicago & Erie Railroad; Chicago & Grand Trunk Railway; Chicago & Northwestern Railway; Chicago & Western Indiana Railroad; Chicago, Burlington & Quincy Railroad; Chicago Great Western Railway; Chicago, Milwaukee & St. Paul Railway; Chicago, Rock Island & Pacific Railway; Cleveland, Cincinnati, Chicago & St. Louis Railway; Illinois Central Railroad; Lake Shore & Michigan Southern Railway; Louisville, New Albany & Chicago Railway; Michigan Central Railroad; New York, Chicago & St. Louis Railroad; Pennsylvania Company; Wisconsin Central lines; Wabash Railroad; Union Stock-Yard & Transit Company,—as common carriers of passengers and freight between or among any states of the United States;

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(2) "From in any way interfering with, hindering, obstructing, or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the states;

(3) From in any manner interfering with, hindering, or stopping any trains carrying the mail, and from in any manner interfering with, hindering, obstructing, or stopping any engines, cars, or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the states;

(4) From in any manner interfering with, injuring, or destroying any of the property of any of said railroads engaged in or for the purpose of, or in connection with, interstate commerce, or the carriage of the mails of the United States, or the transportation of passengers or freight between or among the states;

(5) From entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce, or the transportation of passengers or property between or among the states;

(6) From injuring or destroying any part of the tracks, roadbed, or road, or permanent structures of said railroads, and from injuring, destroying, or in any way interfering, with any of the signals or switches of any of said railroads, and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, locking, or in any manner fastening any of the switches of any of said railroads, and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or engaged in carrying any of the mails of the United States;

[727] (7) From compelling or inducing, or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employés of any of said railroads to refuse or fail to perform any of their duties as employés of any of said railroads in connection with the interstate business or commerce of said railroads, or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among the states;

(8) From compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employés of any of said railroads who are employed by such railroad and engaged in its service in the conduct of interstate business, or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the states, to leave the service of such railroads;

(9) From preventing any persons whatever, by threats, intimidation, force, or violence, from entering the service of any of said railroads, and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the states;

(10) From doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate

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commerce over the lines of said railroads, and of transportation of persons and freight between and among the states; and

(11) From ordering, directing, aiding, assisting, or abetting, in any manner whatever, any person or persons to commit any or either of the acts aforesaid."

That the American Railway Union is a voluntary association, of which many thousand railway employés were at the time of the filing of the bill, and still are, members. That the defendant Eugene V. Debs is the president of the association; George W. Howard, its vice president; Sylvester Keliher, secretary and treasurer; L. W. Rogers, one of the directors; and all of the defendants were and are directors. That the avowed purpose of said union and its officers has been, and still is, to procure all of the employés of the railways within the United States to become members, and to concentrate the power and jurisdiction of the union and its members under one official control, with authority to order strikes, or a discontinuance of the service of such employés with any of the railway companies of the United States, at any time when the union, its board of directors or other officers, should elect so to do, with or without sufficient cause. That on the 26th or 27th day of June, last past, prior to the filing of the bill and the issuing of the writ of injunction, the union, or its board of directors or other officers, including the defendants, had directed and ordered all its members engaged in the service of the Illinois Central Railroad Company in the transportation of the mails, and of interstate commerce, and all other trains controlled and operated by that company, to strike or quit service. That thereafter, and before the writ of injunction was issued, similar orders were issued to the employés of other railway companies, named in the bill of complaint; and that, in pursuance to those orders, all employés who were members of the American Railway Union did in a body leave the service of said railway companies, for the avowed purpose of hindering, preventing, and delaying the operation of trains engaged in the transportation of the mails and interstate commerce. That the order of injunction was published in the daily papers of Chicago on the morning of July 3, 1894. That each of the defendants had knowledge that the order had been duly entered in said cause. That a copy was served upon the defendant Rogers on the 3d day of July, and upon the defendant Eugene V. Debs early on the morning of July 4th, and upon the defendants George W. Howard and Sylvester Keliher on the 4th day of July, 1894. That the American Railway Union, prior to the 2d day of July, had organized many local unions upon substantially all the railroads in the northwest, from Chicago to California, including substantially all the railroads to the Pacific coast, and at the same time was engaged in organizing local unions upon the main lines of road extending from Chicago to the Atlantic coast; and that the work of organization and extension was [728] continued without change or interruption, after the service of the injunction, for the avowed purpose of conferring upon the union authority to order strikes upon all of the roads as rapidly as the local unions could be organized.

That the orders for strikes and for the railway employés to leave in a body the service of the railroads named in the bill of complaint, as well as other railroads, were generally communicated by telegram from the defendant Debs to the officers or committees of local unions at the most important railway centers and cities. That copies of some of such telegrams and orders, so issued by the defendant Debs, both before and after the service of said writ of injunction, are herein inserted, for the purpose of showing that the service of the injunction did not affect or change the policy or conduct of the defendants

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relative to said strikes, but that, on the contrary, the defendants continued, notwithstanding the order of the court, and in direct and open violation thereof, to direct the employés of the railway companies named in the writ of injunction, as well as other railway companies, to leave the service of the companies in a body, and thereby hinder, delay, and prevent the discharge of their duty to the public, and especially the discharge of their duties as agents of the government in the transportation of the mails, as well as interstate commerce. That said telegrams, and hundreds of other telegrams, similar in form and character, were sent by the defendant Debs (with the knowledge, authority, and approval of each and all of the other defendants, as well as other directors of the American Railway Union), after the service upon them of the writ of injunction; and that, in pursuance of said orders and directions, many of the employés of the several railways named were induced to leave the service, and so-called "railway strikes" prevailed generally upon the lines of several of said railway companies, and the transportation of the mails and interstate commerce was thereby greatly hindered, delayed, and prevented, and upon some lines for several days.

That, as a direct result of the orders to strike upon some of the lines,—notably upon the Illinois Central Railroad, the Chicago, Rock Island & Pacific, the Chicago, Burlington & Quincy, the Chicago & Alton, the Chicago & Western Indiana, and upon the Pennsylvania Company's lines,—there was exercised upon the part of many of the strikers or ex-employés of the railway companies intimidation and open violence. That employés who refused to join in the strike, and others who had been employed by the railway companies to take the place of strikers, and were in the actual service of the companies, were assaulted and intimidated by the strikers, and driven from their post of duty, either by physical violence or threats of personal injury. That, during the 5th, 6th, and 7th days of July, the strikers, and others acting in sympathy with them, took forcible possession of some of the roads within and adjacent to the city of Chicago, and, by physical force, prevented the passage of trains carrying mails and interstate commerce. That engines and trains of cars were derailed, and passenger trains were assailed with stones and other missiles, as well as the employés in charge of such trains; and in some instances both the passenger cars and engines were fired upon, endangering the lives both of employés and passengers. That these mobs were in many instances led by the strikers or ex-employés of the railway companies, who had gone out of service upon the orders of the defendants as officers of the American Railway Union; and mobs composed of strikers and others were massed at different points, upon the different lines of road, within and adjacent to the city of Chicago, in such numbers as to be beyond the control of the government, state, and municipal authorities. That at least 1,000 freight cars belonging to the railway companies, some of which were loaded with interstate merchandise, were set on fire and destroyed. Signal towers and other appurtenances of the railways were burned. Employés of the railway companies who refused to obey the orders of the defendants and other officers of the American Railway Union, and remained faithful to the discharge of their duty, were violently assaulted, beaten, and bruised, and in some instances were forcibly arrested, and taken from their engines, and kept for hours in confinement. That many lives were also sacrificed,—all of which was a direct result of the numerous strikes ordered as aforesaid.

[729] That the defendants had full knowledge that many of such violent acts upon the part of the strikers or ex-employés of the railroads had been perpetrated prior to the service of the injunction;

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and notwithstanding such knowledge, and the further knowledge that violence invariably follows all strikes of a similar character, they daily and continuously, and in willful violation after the service of the injunction, issued their orders and directions for the employés of the railways to quit service in a body, and also continued such orders while the mobs were in partial possession of the railroads, and engaged in forcible resistance of the orders of this court and its officers.

That the strikes were not ordered on account of any wrongful act of the railroad companies, or of their officers, towards the members of the American Railway Union or other employés of the railroad companies; but on the contrary, the avowed purpose of the directors of the Railway Union, including the defendants, was wrongfully and unlawfully to establish a boycott against Pullman sleeping cars, which were used in great numbers by the railroad companies in trains carrying the mail and passengers traveling from state to state, and through the several states; and, to make boycott effectual, the directors of the American Railway Union, including the defendants, ordered that no trains or cars of any kind or character should pass over the tracks of any road within and adjacent to the city of Chicago until the use of Pullman cars had been abandoned by all of said railroad companies.

That the board of directors of the American Railway Union, including the defendants and its authorized agents, assume the authority and power, and, as complainant believes, have full authority and power, to order strikes and boycotts, and to discontinue the same, under the rules of the American Railway Union.

That such assumed power and authority is clearly shown by a communication signed by Debs, Howard, and Keliher, as officers of the union, and addressed to the railway managers, on the 12th of July, of which the following is a copy:

"CHICAGO, *July 12, 1894*,

"*To the Railway Managers*—

GENTLEMEN: The existing troubles growing out of the Pullman strike having assumed continental proportions, and there being no indication of relief from the wide-spread business demoralization and distress incident thereto, the railway employés, through the board of directors of the American Railway Union, respectfully make the following proposition as a basis of settlement:

"They agree to return to work in a body at once, provided they shall be restored to their former positions without prejudice, except in cases, if any there be, where they have been convicted of crime.

"This proposition, looking to an immediate settlement of the existing strike on all lines of railway, is inspired by a purpose to subserve the public good. The strike, small and comparatively unimportant in its inception, has extended in every direction, until now it involves or threatens not only every public interest, but the peace, security, and prosperity of our common country. The contest has waged fiercely. It has extended far beyond the limits of interests originally involved, and has laid hold of a vast number of industries and enterprises in no wise responsible for the differences and disagreements that led to the trouble. Factory, mill, mine, and shop have been silenced; widespread demoralization has sway. The interests of multiplied thousands of people are suffering. The common welfare is seriously menaced. The public peace and tranquillity are imperiled. Grave apprehensions for the future prevail.

"This being true,—and the statement will not be controverted,—we conceive it to be our duty as citizens, and as men, to make extraordinary efforts to end the existing strife and approaching calamities whose shadows are even now upon us. If ended now, the contest, however serious in some of its consequences, will not have been in

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vain. Sacrifices have been made, but they will have their compensations. Indeed, if lessons shall be taught by experience, the troubles now so widely deplored will prove a blessing of inestimable value in the years to come. The differences that led up to [730] the present complications need not now be discussed. At this supreme juncture, every consideration of duty and patriotism demands that a remedy for existing troubles be found and applied. The employés propose to do their part by meeting their employers halfway. Let it be stated that they do not impose any serious condition of settlement except that they be returned to their former positions. They do not ask the recognition of their organization or any organization.

"Believing this proposition be fair, reasonable, and just, it is respectfully submitted, with the belief that its acceptance will result in the prompt resumption of traffic, the revival of industry, and the restoration of peace and order.

"Respectfully,

E. V. DEBS, *President*,
"G. W. HOWARD, *Vice President*,
"SYLVESTER KELIHER, *Sec'y*,
"*American Railway Union.*"

That the authority exercised over the members of the union by its board of directors, and by Debs, as its president, relative to the movement of trains, is shown by an order issued on the 2d day of July, 1894, of which the following is a copy:

"*To the Panhandle Yard Men—Greeting:*

"Please execute the orders of Mr. John Brenock in reference to the removal of dead stock from the stock yards to Globe station. This is issued by order of the board of directors, in the interest of public health.

"EUGENE V. DEBS, *President.*"

That the following report of an interview with the defendant Debs was published in the Chicago Herald of July 15th:

"We are in condition to keep the strike on for months. Nothing but armed intervention to-day permits the moving of trains. Throughout that great stretch of country which lies west of the Mississippi river our men are steadfast and willing to wait until the bitter end. You will notice that it is impossible to buy a ticket to the Pacific coast in Chicago to-day, except by way of the Great Northern Road, over which no Pullman cars are run, and against which we have no possible grievance. This shows the line on which our future campaign is to be carried. We shall keep the men of the West, where the air is purer and wholly free from plutocratic combinations, in line with our ideas. We shall persist in our work of organization throughout the East. As a road throughout the country hitherto unorganized by us falls into line, we shall call it out. And we shall keep on doing this until the very end of all things. If our present struggle, based, as it is, on motives wholly disinterested, be successful, there is no wage earner in the land who will not feel its beneficent effects before the year closes. And if this is true, when the command of the so-called 'arteries of commerce' falls into our hands, and the trades' unions which have given us comfort require reciprocation from us, we, and we alone, are in a position to give them material assistance. This is an axiom, and I believe no one will disagree with me."

ANSWER OF DEBS, HOWARD, ROGERS, AND KELIHER.

The defendants, being in custody under a writ of attachment issued by order of the court, Judge Seaman presiding, filed on the 23d of

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July a joint answer, admitting specified averments of the information, and in substance alleging:

That the purpose of the American Railway Union was the protection of all its members in their rights and interests as employés of the various railway systems of the United States, and to procure for them, by all lawful means, fair and adequate compensation for the service performed by them. That membership in the American Railway Union was open to every employé of good personal character and reputation, engaged upon the railway systems of the United States; and that to better secure and effectuate the objects of the union, as hereinbefore set forth, it was the desire and one of the purposes of the union to procure all such persons to become members. That, by the organization of the said American Railway Union, strikes could only be declared or discontinued by the vote of a majority of the members of such American Railway Union employed in the service affected by any [731] such strike; and that the only power, authority, or office of the officers or directors of the American Railway Union, or of these defendants, or either of them, in respect to said matter, was to notify the members of the union in the service concerned in such strike of the action taken by such majority. That, on or about the 26th or 27th day of June (contrary to the averments of the information), a majority of the members of the American Railway Union employed upon the Illinois Central Railroad and upon the other roads referred to in the information did for themselves, without any order, direction, or control of the American Railway Union, or of its officers or directors, or of these defendants, or any of them, voluntarily determine by vote that they would strike or leave the service of said railway companies; and that, in pursuance of that vote, the employés did, on or about the time stated, leave the service of the railway companies freely, and of their own accord, without any order, direction, or control on the part of said American Railway Union, its officers or directors, or of these defendants, or any of them. "Upon information and belief, the defendants deny that the employés so leaving the service of said railway companies, as aforesaid, did so for the purpose of hindering, preventing, and delaying said railway companies in the operation of trains engaged in the transportation of the United States mails and interstate commerce over the respective roads of said companies." They "deny that, after the service of said injunction, they or either of them carried on the work of organization other than by generally advising railroad employés to become members of such union, and receiving to membership persons so applying therefor as aforesaid. They expressly deny that the organization of said unions upon said roads, or any of them, was intended to confer or did confer upon said American Railway Union, its officers or directors, or upon these defendants, or either of them, the power and authority to order strikes upon said roads, as alleged in said information or otherwise, but, on the contrary, allege that strikes could be ordered upon said road by the employés of said road themselves, and that such employés were in no manner subject to the authority or control of said American Railway Union, its officers or directors, or of these defendants, or either of them, in that regard." "They deny that orders to strike were at any time or in any manner communicated by said American Railway Union, its officers or directors, or these defendants, or either of them, to said local unions, or any of them, as alleged in said information or otherwise."

"The defendants deny that any one of the telegrams set forth in said information was sent, or caused to be sent, by them, or any of them, or that they authorized or approved the same, or any one thereof, except a certain telegram dated July 6, 1894, in the words

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and figures following: 'We have assurance that within forty-eight hours every labor organization in this country will come to our rescue. * * * Whatever happens, do not give credence to rumors and newspaper reports,'—which said telegram defendants admit was sent, or caused to be sent, by the defendant Debs, as in said information alleged; but save as hereinbefore admitted, defendants allege that they had no knowledge or notice whatever of the sending of said telegrams, or of the contents thereof, until the filing of said information." "They deny that any other telegrams similar in form and character to those in said information set out were sent by the defendant Debs, or any of the defendants, with the knowledge, authority, or approval of any of said other defendants, at any time after the service of said writ of injunction upon said defendants, and deny that any employés of any of the railway companies named in said information were induced by reason of any telegram sent, or caused to be sent, by the defendants, or any of them, by threats, intimidation, force, or violence, to leave the service of said railway companies, or that the transportation of the United States mails and interstate commerce was thereby in any way hindered, delayed, or prevented." "The defendants admit that upon some of said lines of railway there was exercised, upon the part of some persons to the defendants unknown, violence against persons and property. They deny that they, or any of them, have any knowledge or information sufficient to form a belief as to the commission of the specific acts of violence in said information set forth, or any thereof; and, upon information and belief, they deny that any member of said American Rail- [732] way Union in any manner participated in said acts of violence or any of them." "They deny that, in violation of the order of the court, they daily and continuously or at all issued any orders or directions for the employés of said railway companies, or any of them, to leave such service in a body, as alleged in said information or otherwise. They deny that at said time, or at any time, they knew that violence and unlawful conduct necessarily followed from strikes of the kind mentioned in said information, and deny that such is the fact, but, on the contrary, allege that, so far as said American Railway Union, or the members thereof, are concerned, said strike, and all strikes of a similar character, contemplate nothing more than the quiet, peaceable, and lawful cessation of work by such members when and for such periods as they shall for themselves determine. Defendants expressly deny that they, or any one of them, did at the time mentioned in said information, or at any other time, order, direct, counsel, advise, recommend, or approve the acts of violence in said information set forth, or any of them, or any violence or unlawful acts of any kind or character, but, on the contrary, allege that they did at all said times counsel and advise all members of the said American Railway Union with whom they were in communication to at all times abstain from violence, threats, intimidation, and to at all times respect the law and the officers thereof." "They deny that the board of directors of said American Railway Union, or its officers, or these defendants, or either of them, at any time assumed the authority and power, or have now or ever have had any authority or power whatsoever, to order strikes and boycotts, or to discontinue the same." "They admit that on the 12th day of July, 1894, the communication set out in said information was addressed to the railway managers, and signed by the defendants, whose names are affixed thereto, but allege that so much of said communication as implies or assumes any right, power, or authority in said defendants, or either of them, to discontinue said strike, was unauthorized, and that said defendants had no other power or authority in said matter than to recommend to the members of the said American Railway

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Union the adoption of the proposals therein stated." "Defendants admit the sending of the communication to the Panhandle yard men set forth in said information, but deny that in and by said communication they exercised, or assumed to exercise, any power or authority over said men, or any thereof, but that said communication was merely a request to said men to perform the acts therein stated." "They deny that they have any knowledge or information sufficient to form a belief as to whether the interview set forth in said information was in fact published in the Chicago Herald on July 15th, or at any other time. They deny that the defendant Debs, or any other defendants, caused said interview to be published, or uttered the statements therein contained, or any of them, but allege that said interview is wholly false, forged, and fictitious." "The defendants deny that they, or either of them, have in any way or manner interfered with, hindered, obstructed, or stopped any of the business of the railroads mentioned in said injunction, or either of them, as common carriers of passengers and freight between or among the states of the United States; or that they, or either of them, have in any manner interfered with, hindered, obstructed, or stopped any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the states; or that they, or either of them, have in any manner interfered with, hindered, or stopped any train carrying the mail; or that they, or either of them, have in any manner interfered with, hindered, obstructed, or stopped any engine, car, or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the states; or that they, or either of them, have in any manner interfered with, injured, or destroyed any of the property of any of said railroads engaged in or for the purpose of or in connection with interstate commerce, or the carriage of the mails of the United States, or the transportation of passengers or freight between or among the states; or that they, or either of them, have entered upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger, or freight trains, [733] engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce, or the transportaion of passengers or property between or among the states; or that they, or either of them, have injured or destroyed any part of the tracks, roadbed, or road, or permanent structures of said railroads; or that they, or either of them, have injured, destroyed, or in any way interfered with any of the signals or switches of any of said railroads; or that they, or either of them, have displaced or extinguished any of the signals of any of the said railroads; or that they, or either of them, have spiked, locked, or in any manner fastened any of the switches of said railroads; or that they, or either of them, have uncoupled or in any way hampered or obstructed the control of any of said railroads or any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or engaged in carrying any of the mails of the United States; or that they, or either of them, have compelled or induced, or attempted to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employés of any of said railroads to refuse or fail to perform any of their duties as employés of any of said railroads in connection with the interstate business or commerce of such railroads, or the carriage of the United States mail by such railroads, or the

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transportation of passengers or property between or among the states; or that they, or either of them, have compelled or induced, or attempted to compel or induce, by threats, intimidation, force, or violence, any of the employés of said railroads who are employed by such railroads and engaged in its service in the conduct of interstate business, or in the operation of any of its trains carrying the mail of the United States or doing interstate business, or in the transportation of passengers and freight between or among the states, to leave the service of such railroads; or that they, or either of them, have prevented any person whatever, by threats, intimidation, force, or violence, from entering the service of any of said railroads, and doing the work thereof in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the states; or that they, or either of them, have done any act whatever in furtherance of any conspiracy or combination to restrain either of the said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroad, and of transportation of persons and freight between and among the states; or that they, or either of them, ordered, directed, aided, assisted, or abetted in any manner whatever any person or persons to commit any or either of the acts aforesaid." "And the said defendants each for himself does plead to the said information that he is not guilty of any or either or all of the acts therein charged, or of any contempt of the orders of this court in the premises." "Defendants further allege that, after the service of said injunction upon them, they forthwith consulted competent counsel, learned in the law, and duly authorized and licensed to practice as attorney and counselor at law in the courts of the United States, and fully and fairly stated to him all the facts in the premises, and exhibited to him the order of the court made herein, and were advised by him as to what they might rightfully and lawfully do in the premises without violation of the order of the court or contempt of its authority; and that they have since that time in all things proceeded, in their acts and conduct in regard to said strike and the persons engaged therein, in strict accordance with the advice of the said attorney so by them consulted. And the said defendants each for himself denies that he intended in any way to violate the injunction of this court, or to act in defiance or contempt of its authority in any respect. And the defendants further allege that by the organization of said American Railway Union, and by custom and usage uniformly and universally prevailing therein, at all the times in said information mentioned, which said custom and usage had the force and effect of, and stood in lieu of, by-laws of said American Railway Union, and by the general and unanimous will, consent, delegation, and acquiescence of all the members thereof, the officers and directors of said American Railway [734] Union, including these defendants, were at all the times in said information mentioned fully authorized, empowered, and directed to act as the agents of the members of said American Railway Union, and all of them, and all the separate unions thereof, whenever a strike or cessation of labor had been determined upon by said members of said union, or either of them, to inform and advise them concerning the condition and prospects thereof, and the condition and attitude of the several local unions engaged therein, and to advise and counsel them as to peaceful and lawful methods pursued by them to secure the redress of grievances complained of by them, and to treat and negotiate for them, subject to their ultimate ratification, with their employers for a settlement or adjustment of the causes leading to said strike, but had no right, power, or authority to in any way order or command any of said members in respect to any of said matters; and they allege

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that each and every act and thing done by them in reference to the strike in said information mentioned, or any of the persons engaged therein, was done in pursuance of such power and authority, and not otherwise. Wherefore, defendants pray that they may be adjudged not guilty of contempt; that the complainant's information be as to them dismissed, and they go hence without delay."

On July 25th the defendants filed a supplemental answer, denying "each and every allegation in said information contained, and each and every part thereof, save as the same are in their former answer expressly admitted or denied."

SECOND INFORMATION.

On the 1st day of August, 1894, a second information was presented in the cause, directed against James Hogan, William E. Burns, R. M. Goodwin, J. F. McVean, and M. J. Elliott. This information recites the filing of the original information, and the arrest of the defendants therein named upon the writ of attachment issued, and, alleging that the persons named were directors of the American Railway Union, reiterates the original averments and charges further: That on or about June 27, 1894, the officers and directors of the American Railway Union entered into a combination and conspiracy to bring about, by their orders, their advice, their counsel and persuasion, the strike and boycott more particularly described in said original bill of complaint; and that the better to conduct the business of said combination and conspiracy, and to more effectually manage the vast number of persons being members of said American Railway Union and others engaged in such combination and conspiracy, said officers and board of directors divided up the work of such management and direction among committees. That, under said arrangement and action of the board of directors, Debs and Howard would have, and thereafter they did have, charge of the work of publication and publicity; Rogers, Burns, and Goodwin had charge of all meetings and speakers, and the organization of lodges; and Hogan, either alone or with others of the directors, had charge of correspondence, and of the sending and receiving of letters and telegrams, or a considerable portion thereof. That each of the directors is responsible for every act done or omitted to be done by all or any of the other directors or officers or servants or agents in connection with the business of said strike or boycott. That, by arrangement or agreement of the board of directors, Rogers was to have charge of editing and the publishing of a certain newspaper called the "Railway Times," which was to be the official organ of the American Railway Union. That the paper was published in the city of Chicago by Rogers; and that in and through said newspaper the directors counseled, encouraged, and directed the members of the American Railway Union and all other railway employés, including the employés of the railway companies named in the bill of complaint, to disregard said order and writ of injunction, and the orders and directions of the officers operating said railroads, respectively. That said officers and directors, in pursuance of said conspiracy, did, on different dates in the months of June and July, 1894, cause to be sent each and all of the telegrams set out in the original information, to which the name of said Debs is attached, and also the several following telegrams, which are set out by copy; also many hundred other telegrams of like purport, and with similar intent and purport, copies of which, sent to different [735] places in the different states, over the signature of E. V. Debs, between the dates of June 27 and July 29, 1894, are set out. That said defendants continued to send out, by telegraph, orders, directions, and advice to the meeting of

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the various unions along the lines of railroads, directing and counseling them to continue the strike and the various acts of interference with the operation of said roads; and that all of the directors have persisted in violation of the injunction, and in their defiance of the order of this court.

ANSWER OF HOGAN AND OTHERS.

The defendants so brought into the case filed a joint answer, not essentially different from the answer of the original defendants, except that it contains the following averments:

They deny that on the 26th day of June, A. D. 1894, or at any other time, the American Railway Union, through its officers and directors, or otherwise, ordered or directed all or any of the employés of the railroad companies named in the bill, or either of them, to enter upon any strike for the purpose in the information alleged, or otherwise. They admit that at divers times during the month of June, and before the issuing of the injunction, they did counsel and advise certain of the employés of the railway companies named in the bill, all of the employés so counseled and advised being members of the American Railway Union, to quietly, peaceably, and lawfully quit the service of their employers, and allege that, in giving such advice and counsel, they acted for the employés, and by their authority conferred upon them or each of them, as hereinafter set forth. And they deny that their purpose in giving such advice and counsel was to cause any strike with the sole purpose, or with the purpose at all, of compelling the railway companies, or either of them, to unite with the American Railway Union, or with any person or persons, in any illegal boycott, or in any boycott whatsoever, and deny that the American Railway Union, its officers, directors, and members, or these defendants, or either of them, did on the day mentioned, or at any time, for any purpose or in fact, enter into any unlawful conspiracy or combination whatever to tie up or paralyze any of the business of any of said railroads or the carrying of the mails or interstate commerce until such company should consent to enter into any conspiracy or refuse to haul the cars of said Pullman Sleeping-Car Company, whether as alleged or otherwise, or that said combination was to be persisted in as alleged or otherwise. On the contrary thereof, the defendants allege that they were at all said times informed, and in good faith verily believed, that the railroad companies named in the bill, and all of them, had formed or organized and were members of a certain unlawful conspiracy and combination among and between themselves to reduce the wages and compensation of their employés upon said roads, and each of them, including the members of the American Railway Union thereon, and all of them; and that, pursuant to that conspiracy and combination, the railroad companies proposed and intended to make reduction in the wages of employés, including the members of the American Railway Union, upon each of the lines of railroad, separately and successively, they, the railroad companies, uniting their powers, property, and influence to prevent the employés, including the members of the American Railway Union, upon each of the lines whereon the wages were to be successively reduced, from obtaining redress against the action of the railroad companies in pursuance of such unlawful conspiracy, and proposed and intended, by their combined and united action, to overcome successively and in detail any lawful and peaceable resistance that the employés, or any of them, might make to the reduction of their compensation. And, upon information and belief, the defendants allege that such conspiracy was in fact

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formed at said time with the intents and for the purposes hereinbefore set forth.

"It is further alleged that at all times they were informed and did in good faith verily believe that the Pullman Palace-Car Company, a corporation organized under the laws of the state of Illinois, and engaged in the business of constructing passenger and other cars upon the lines of said railroads (which said Pullman Palace-Car Company had various contract relations with said railroad companies, and each of them, for the use of its [736] said cars), was a member of and party to said conspiracy, and all the intents and purposes thereof; and, upon information and belief, defendants allege that such was the fact in regard thereto." They allege that very many of the employés of the Pullman Palace-Car Company were members of the said American Railway Union at the time in the information mentioned, and for some months prior thereto had been such members. They deny that they, or either of them, knew, or could have known, that any such acts were certain or almost certain or probable or reasonably to be expected to follow from such strike or cessation of labor, or that the same were in any manner due to or occasioned by or resulted naturally or otherwise from the orders, directions, counsel, or advice or acts, or either thereof, of the officers and directors of said American Railway Union, or either of them, or these defendants.

They allege that obstructions of the business of the railroad companies, or either of them, by the so-called "strike," was occasioned solely by the free, voluntary, and peaceable action of the employés of said railway companies in quitting the service thereof, for the purpose of protecting themselves and their rights and interests, and for their own purposes, and to secure their own ends, without any orders, directions, control, counsel, or assistance from these defendants, or either of them. And they allege, on information and belief, that the railway companies, and each of them, in pursuance of said conspiracy, and for the purpose of maintaining the said Pullman Palace-Car Company in its dispute with its said employés, and for the purpose of overcoming the resistance of their employés to the acts threatened and contemplated by them, as aforesaid, and to bring down upon said employés the penalties of law, and endeavor to invoke against the employés the action of the courts of the United States, did, by their efforts, contribute largely to the hindering and impeding of said transportation of mails and interstate commerce; and that said railway companies could, had they been so disposed, have fully performed their duties, under the laws of the United States, in that regard. They allege that they and each of them have uniformly and consistently and at all times in said petition mentioned, by speech and writing, advised a great number of said American Railway Union members, and all persons acting with them, to use only peaceable and lawful methods, and to refrain from any force or violence or unlawful conduct whatever, and from any violation of the laws of the United States or any of the states thereof, or any order of the courts to them directed.

Defendants admit the proceedings in the nature of contempt had in this court against Eugene V. Debs, George W. Howard, Sylvester Keliher, and L. W. Rogers, and admit that in said information against such persons it was charged that they had caused to be sent certain telegrams, and that, in their answers, they deny the sending of all said telegrams except a certain one dated July 6, 1894. They deny that any or all of the telegrams set out in said information were sent, or caused to be sent, by the officers and directors of said American Railway Union except as hereinafter admitted, or that any other telegrams in relation to said strike were sent except as hereinafter admitted, and deny that any telegrams were sent by said officers and directors, or either of them, in pursuance of any combination or conspiracy, or to accomplish the purposes thereof. They deny that there was any specific division among the officers and directors of the American Railway Union of the business and duties of the organization or the labors occasioned by their relation to the cessation of labor or strike hereinbefore mentioned, but allege that, in respect to said work, each of said officers and directors performed generally the work and things coming under his notice, and seeming to him fit and proper to be done. They deny that said work was divided in the manner alleged in said information or otherwise, or any of said officers or directors had charge of the alleged divisions of work stated in said information, or any such divisions or departments of work. They allege that, in the actual practice of work, some tacit and occasional division actually occurred, but that the same was in nowise formally or generally observed; and that each and every one of said officers and directors acted for himself, upon his own judgment and responsibility, except where, by conference upon a given subject, a course was determined upon; and that each one of said officers and directors was responsible solely for the specific acts by him done, and not otherwise. They allege that each and all the acts done by said officers and directors and by these defendants, and each of them, were so done in pursuance of the authority conferred upon them by the members of said American Railway Union as the same is hereinbefore alleged, and not otherwise. Defendants deny that, in pursuance of any arrangement or agreement or otherwise, the defendant Rogers was to have charge of the editing or publishing of the so-called "Railway Times"; or that said Rogers caused said paper to be published in the said city of Chicago, as alleged, or otherwise; or that, by said newspaper or otherwise, said directors, or either of them, have counseled, encouraged, directed, or advised the members of said American Railway Union, or any other person or persons, or class of persons, to disregard the order and writ of injunction of this court, or any order or writ of any court, or to disregard the orders and directions of the persons operating any railway at any time. They admit and allege that the telegrams set forth in said information were sent by the defendant James Hogan; and allege that the same were sent by him for the purpose and with the intent of peacefully and lawfully counseling and advising men who had, by reason of the grievances done or threatened to them, and by reason of the unlawful conspiracy of said railway companies and said Pullman Palace-Car Company, hereinbefore set forth, peaceably, lawfully, and voluntarily quit the service of said railway companies; and allege that said telegrams, and all of them, had no other relation to or effect upon said strike, or any of the matters incident to or growing out of the same, than might well result from the lawful and peaceful counsel to the members of the said American Railway Union as to such of their own personal rights and interests as were involved in said controversy. The said defendants each for himself denies that he intended in any way, in any act or thing by him done, to violate the injunction of this court, or to act in defiance or contempt of its authority. And the said defendants each for himself does plead to said information that he is not guilty of any of either or all of the acts therein charged, or of any contempt of the authority of this court in the premises.

The petition of the receivers shows their appointment in December, 1893; that, by the order appointing them, all persons were forbidden to interfere with their possession and management; that the road

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extends through a number of states, and is an important line of commerce, using Pullman sleepers under contract; that on the 22d of June, 1894, the defendants, being officers of the American Railway Union, entered into a conspiracy to boycott Pullman cars, and, upon the refusal of the receivers to submit to their dictation, proceeded to employ substantially the same modes of interference as are charged in the information presented in the other case in the name of the United States.

In addition to the order made when the receivers were appointed, it is also shown that on June 29, 1894, this court issued an additional order, for the protection of the receivers in the management of the property, whereby "all persons were enjoined and restrained from interfering in any manner with trains, cars, switches, or other property, and from interfering, by intimidation, threats, violence, or in any other manner, with the employés of said receivers in the performance of their duties"; that this order was published in the evening papers of Chicago on June 29th, and in morning papers of the 30th; and that on July 2d an injunction was issued, upon the petition of the United States, enjoining the defendants, and others in conspiracy with them, from interfering with the railroads named, including the Atchison, Topeka & Santa Fé; that, notwithstanding these orders and injunctions, the defendants persisted in "their illegal acts and doings, without change or abatement," etc.

The defendants Debs, Howard, Keliher, and Rogers, who only, in the first instance, were named in this information, filed an answer, differing in no respect which need be pointed out from their answer in the other case. The names of Hogan, Burns, Goodwin, McVean, and Elliott were afterwards [738] inserted in the information, by leave of court; and it was agreed that they should have the benefit of the answer already filed by Debs and others as if it were their own. The two cases were heard at the same time, upon an agreement that they should be considered to be separate hearings, but that any evidence introduced in either case might be considered in the other, if relevant.

Edwin Walker and *T. E. Milchrist*, United States District Attorney, for the United States.

E. A. Bancroft and *John S. Miller*, for receivers.

W. W. Erwin, *Clarence S. Darrow*, and *S. S. Gregory*, for defendants.

The attorneys for the receivers presented the following propositions and citations of authorities:

"Any interference with property in the custody of the court is a contempt. *Richards* v. *People*, 81 Ill. 551; *Noe* v. *Gibson*, 7 Paige, 513; *In re Sowles*, 41 Fed. 752. Such, also, is any act of interference by force or threats with employés in charge of such property. *Secor* v. *Toledo, P. & W. R. Co.*, 7 Biss. 513, Fed. Cas. No. 12,605; *King* v. *Ohio & M. R. Co.*, 7 Biss. 529, Fed. Cas. No. 7,800; *In re Wabash R. Co.*, 24 Fed. 217; *In re Higgins*, 27 Fed. 443; *In re Doolittle*, 23 Fed. 544; *U. S.* v. *Kane*, Id. 748. See, also, *In re Chiles*, 22 Wall. 157; *McCaulay* v. *Sewing Mach. Co.*, 9 Fed. 698; *Sherry* v. *Perkins*, 147 Mass. 219, 17 N. E. 307. Where the court has jurisdiction of the person, a disobedience of the court's order is contempt, though committed in another district.

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McCaulay v. *Sewing Mach. Co.*, *supra*; *Williams* v. *Hintermeister*, 26 Fed. 889, 890. Aiding, advising, or persuading another to do a forbidden act, or even permitting another whose action can be controlled to do the forbidden act, is contempt. *Societe Anonyme de la Distillerie de la Liqueur Benedictine de l'Abbaye de Fecamp* v. *Western Distilling Co.*, 42 Fed. 96; *Blood* v. *Martin*, 21 Ga. 127; *Neale* v. *Osborne*, 14 How. Pr. 81; *Wheeler* v. *Gilsey*, 35 How. Pr. 139; *Stimpson* v. *Putnam*, 41 Vt. 238; *Poertner* v. *Russell*, 33 Wis. 193."

WOODS, Circuit Judge, after making the foregoing statement:

If the case presented were itself of less moment, the very great importance of some of the questions involved could not be overlooked. To the study of them I have devoted more time than could well be spared from other duties. It is due to counsel to say that the labor of the court, protracted and painstaking as it has been, has been greatly relieved by the contributions of learning and research which they brought to the discussion. While the principles considered are not new, in the question of the validity of the injunction which the defendants are charged with violating there are involved inquiries which in some respects go beyond the lines of established or unquestioned precedent.

A preliminary question in the case was whether or not, upon the filing of their answers, the defendants were entitled to be discharged without an inquiry into the facts. The authorities seem to be agreed, and accordingly the court ruled, District Judge Grosscup participating in the decision, that, in a proceeding for contempt in equity, a sworn answer, however full and unequivocal, is not conclusive. *King* v. *The Vaughan*, 2 Doug. 516; *Underwood's Case*, 2 Humph. 48, 49; *Rutherford* v. *Metcalf*, 5 Hayw. (Tenn.) 58, 61, 62; *Magennis* v. *Parkhurst*, 4 N. J. Eq. 433, 434; *State* v. *Harper's Ferry Boat Co.*, 16 W. Va. 864, 873; *Crook* v. *People*, 16 Ill. 534, 537; *Buck* [739] v. *Buck*, 60 Ill. 105, 106; *Welch* v. *People*, 30 Ill. App. 399, 409; *Yates' Case* (Kent, Ch. J.) 4 Johns. 317, 373; *McCredie* v. *Senior*, 4 Paige, 378, 381, 382; *Bank* v. *Schermerhorn*, 9 Paige, 372, 375; *U. S.* v. *Anon.*, 21 Fed. 761, 768.

The objection raised by demurrer that the injunction was illegal and void was overruled at the time of presentation, but with leave for further argument at the final hearing upon

the evidence. A great body of evidence, consisting of the testimony of witnesses, telegrams, and other documents, has been adduced to show the guilt of the accused. The defendants, claiming the constitutional privilege against self-incrimination, refused to testify at the instance of the prosecution, and have offered no evidence in their own behalf, excepting parts of certain documents which were allowed to be read in connection with other parts offered by the prosecution. Besides denying that any violation of the injunction has been proved against them, the defendants now reassert and insist that the injunction is invalid, on the two grounds that the court had no jurisdiction to hear and determine the case in which the injunction was ordered, and that, though possessed of such jurisdiction, the court lacked organic power to make the particular order in question. Reference is made to *Ex parte Fisk*, 113 U. S. 713, 718, 719, 5 Sup. Ct. 724; *In re Sawyer*, 124 U. S. 200, 220–222, 8 Sup. Ct. 482; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77; *Windsor* v. *McVeigh*, 93 U. S. 274, 282, 283; *Kerfoot* v. *People*, 51 Ill. App. 409. If the injunction was, for any reason, totally invalid, no violation or disregard of it could constitute a punishable contempt; but if the court acquired jurisdiction, and did not exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justlfy disobedience of the writ. *Elliott* v. *Peirsol*, 1 Pet. 340; *Ex parte Watkins*, 3 Pet. 193; *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263. The considerations of public policy on which this rule rests are too plain and well understood to need restatement.

Was the case one of which the court had jurisdiction? No question is made, or could be made in a proceeding for contempt, of the sufficiency of the petition for the injunction in respect to matters of form and averment merely. In *Coy's Case*, *supra*, the court said:

"In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses,—as forgery of its bonds, or perjury in its courts,—its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus."

The question here, therefore, is whether the case presented by the petition was of a class which in a federal court admits of the remedy by injunction.

Without going into the details of averment, the charge made against the defendants was that they were engaged in a conspiracy to hinder and interrupt interstate commerce and the carriage of the mails upon the railroads centering in Chicago, by means and in a manner to constitute, within the recognized definitions, a public nuisance. A nuisance is "anything that unlawfully work- **[740]** eth hurt, inconvenience or damage." 3 Bl. Comm. 216. "A public nuisance is such an inconvenience or troublesome offense as annoys the whole community in general, and not merely some particular person." Id. 166. As defined in Wood on Nuisances (page 38), "a public nuisance is a violation of a public right, either by a direct encroachment upon public rights or property, or by doing some act which tends to a common injury, or by omitting to do some act which the common good requires, and which it is the duty of a person to do, and the omission to do which results injuriously to the public." A form of public nuisance of which cognizance has been taken by the courts of equity in England and in this country is called "purprestur," which is defined to be "an encroachment upon lands, or rights and easements incident thereto, belonging to the public, and to which the public have a right of access or of enjoyment, and encroachment upon navigable streams." "The remedy for a purprestur, simply, is by information in equity at the suit of the attorney general or other proper officer." Wood, Nuis. pp. 107, 117; *People* v. *Vanderbilt*, 28 N. Y. 396; *New Orleans* v. *U. S.*, 10 Pet. 662; *Attorney General* v. *Forbes*, 2 Mylne & C. 123.

In Kerr on Injunctions (page 395) it is said:

"There is a wide difference between a purprestur and a nuisance. Although they may coexist, either may exist without the other. If the act complained of be a purprestur, it may be restrained at the suit of the attorney general, whether it be a nuisance or not. Being an encroachment on the soil of the sovereign, like trespass on the soil of an individual, it will support an action irrespective of any damage which may accrue. But, to constitute a public nuisance, damage to the public right of navigation or other public right must be shown to exist. If the act complained of be a mere purprestur, without being at the same time a nuisance, the court

will usually direct an inquiry to be made whether it will be more beneficial to the crown to abate the purpresture or to suffer the erection to remain and be arrested; but, if the purpresture be also a public nuisance, this cannot be done, for the crown cannot sanction a public nuisance."

Accordingly, it is contended, and numerous decisions and texts are cited to show, that "equity had jurisdiction to restrain public nuisances upon bill or information filed by the attorney general on behalf of the people." High, Inj. §§ 745, 759, 764, 1570; Pom. Eq. Jur. § 1349; Wood, Nuis. p. 124; Story, Eq. Jur. §§ 921–924; 1 Daniell, Ch. Pr. 7, 8; Mitf. Eq. Pl. 104, 117, 196; *Attorney General* v. *Johnson*, 2 Wils. Ch. 87; *Attorney General* v. *Forbes*, 2 Mylne & C. 123; *Attorney General* v. *Terry*, 9 Ch. App. 423; *Attorney General* v. *Birmingham*, 4 Kay & J. 528; *People* v. *Miner*, 2 Lans. 396; *People* v. *Ferry Co.*, 68 N. Y. 71; *Davis* v. *Mayor*, etc., 14 N. Y., 526; *People* v. *Vanderbilt*, 28 N. Y. 396; Id., 26 N. Y. 287; *Attorney General* v. *Hunter*, 1 Dev. Eq. 12. I quote passages, some of which, besides bearing upon the principal question of jurisdiction, will be found to be determinative of other questions which have come under discussion.

Story says:

Section 921: "In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date. * * * The jurisdiction is applicable, not only to 'public nuisances,' strictly so called, but also to purprestures upon public rights and property. * * * In its common acceptation it [purpresture] is now understood to mean an encroachment upon the [741] king, either upon part of his demesne lands, or upon rights and easements held by the crown of the public, such as open highways, public rivers, forts, streets, etc., and other public accommodations." *City of New Orleans* v. *U. S.*, 10 Pet. 662; *Mohawk Bridge Co.* v. *Utica & S. R. Co.*, 6 Paige, 554; *Attorney General* v. *Cohoes Bridge Co.*, 6 Paige, 133.

Section 923: "In cases of 'public nuisances,' properly so called, an indictment lies to abate them, and to punish the offenders; but an information also lies in equity to redress the grievance by way of injunction. The instances of the interposition of the court, however, are, it is said, rare, and principally confined to informations seeking preventive relief. Thus, informations in equity have been maintained against a public nuisance by stopping a highway."

Section 924: "The ground of this jurisdiction of courts of equity in cases of purprestures, as well as of public nuisances, undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations. In the first place, they can interpose, where the courts of law cannot, to restrain and prevent such nuisances which are threatened or are in progress,

as well as to abate those already existing. In the next place, by a perpetual injunction, the remedy is made complete through all future time."

So Pomeroy, in section 1349, says:

"A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney general, in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the commonwealth, in this country." *Attorney General* v. *Eau Claire*, 37 Wis. 400; *State* v. *Eau Claire*, 40 Wis. 533; *Rochester* v. *Erickson*, 46 Barb. 92; *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 13 How. 518.

Wood (volume 1, p. 124) says:

"While, at the close of the Revolution, the people of each state, in their sovereign capacity, acquired the absolute right to all navigable waters and the soil under them, yet where the state has permitted a use of navigable waters connecting the two states that interferes with navigation, the general government, under the power given it by the constitution to regulate commerce between the states, may exercise jurisdiction over the waters, and procure an abatement of such obstructions." *Insurance Co.* v. *Curtenius*, 6 McLean, 209, Fed. Cas. No. 3,045.

High says:

Section 1554: "When the right involved is purely of a public nature, and the grievance which it is sought to enjoin is one which affects the public at large, the proceeding is usually instituted, both in England and in this country, by the attorney general in behalf of the people, sometimes proceeding in his own name or that of the people absolutely, and sometimes upon the relation of a citizen; and in actions to enjoin the erection or continuance of public nuisances this course is generally pursued." *State* v. *Dayton & S. E. R. Co.*, 36 Ohio St. 434; *People* v. *Vanderbilt*, 28 N. Y. 396.

Section 764: "When proceedings are had to enjoin a public nuisance, such as the pollution of a river by a board of municipal officers in violation of an act of parliament under which they are acting, a distinction is drawn, as to the necessity of proving an actual injury, between the case of an information filed by the attorney general in behalf of the public and a bill filed by private citizens in their own behalf; and in the former case it is held to be unnecessary for the attorney general to establish any actual injury, the statute having prohibited the act complained of."

Section 745: "It is, however, to be observed that the fact that the commission of the threatened act, which it is sought to enjoin as a nuisance, may be punished criminally as such, will not prevent the exercise of the restraining power of equity." *People* v. *St. Louis*, 5 Gilman, 351; *Attorney General* v. *Hunter*, 1 Dev. Eq. 12; *Gilbert* v. *Canal, etc., Co.*, 8 N. J. Eq. 495.

[742] To the same effect, in 2 Daniell, Ch. Pl. & Pr. (4th Ed.) p. 1636, it is said: "In cases of 'public nuisance,' properly so called, an indictment lies to abate them, and to prosecute the offender; but an information will also lie in equity to stop the mischief, and to restrain the continuance of

it"; and among the cases cited in support of the text are *Attorney General* v. *Nichol*, 16 Ves. 338; *Attorney General* v. *Forbes*, 2 Mylne & C. 123; *Attorney General* v. *Cambridge Consumers' Gas Co.*, L. R. 6 Eq. 282; Bunnell's Appeal, 69 Pa. St. 59. See, also, *Craig* v. *People*, 47 Ill. 487; *Attorney General* v. *Railroad Companies*, 35 Wis. 527; *Attorney General* v. *City of Eau Claire*, 37 Wis. 400.

The supreme court of the United States has spoken on the subject. In the case of *Mayor of Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91, 98, where an injunction was sought against obstructing the navigation of the Potomac river, the court said:

"Besides this remedy at law, it is now settled that a court of equity may take jurisdiction, in cases of public nuisance, by an information filed by the attorney general. This jurisdiction seems to have been acted on with caution and hesitancy. Thus, it is said by the chancellor, in 18 Ves. 217, that the instances of the interposition of the court were confined and rare. He referred, as to the principal authority on the subject, to what had been done in the court of exchequer upon the discussion of the right of the attorney general, by some species of information, to seek, on the equitable side of the court, relief as to nuisance, and preventive relief. Chancellor Kent, in *Attorney General* v. *Utica Ins. Co.*, 2 Johns. Ch. 382, remarks that the equity jurisdiction in cases of public nuisance, in the only cases in which it had been exercised (that is, in cases of encroachment on the king's soil), had lain dormant for a century and a half (that is, from Charles I. down to the year 1795). Yet the jurisdiction has been finally sustained upon the principle that equity can give more adequate and complete relief than can be obtained at law. While, therefore, it is admitted by all that it is confessedly one of delicacy, and accordingly the instances where it is exercised are rare, yet it may be exercised in those cases in which there is eminent danger of irreparable mischief before the tardiness of the law can reach it."

See, also, the opinion in *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 13 How. 518, where a bridge across the Ohio river was held to be a public nuisance, and ordered abated, at the suit of the state of Pennsylvania.

But while this jurisdiction of the English courts of chancery and of the equity courts of the several states of the Union is not understood to be disputed by counsel for the defendants, they do insist that, in the absence of legislation by congress conferring the authority, the federal courts can do nothing for the protection of the highways of interstate commerce, whether upon land or water. They cite the following language from the opinion in *Parkersburg & O. R. Transp. Co.* v. *City of Parkersburg*, 107 U. S. 691, 2 Sup. Ct. 732, in which *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, it may be observed, is declared to be "a peculiar case":

"Now, wharves, levees, and landing places are essential to commerce by water, no less than a navigable channel and a clear river. But they are attached to the land; they are private property,—real estate; and they are, primarily at least, subject to the local state laws. Congress has never yet interfered to supervise their administration; it has hitherto left this exclusively to the states. There is little doubt, however, that congress, if it [743] saw fit, in cases of prevailing abuses in the management of wharf property,—abuses materially interfering with the prosecution of commerce,—might interpose and make regulations to prevent such abuses. When it shall have done so it will be time enough for the courts to carry its regulations into effect by judicial proceedings properly instituted; but, until congress has acted, the courts of the United States cannot assume control over the subject as a matter of federal cognizance. It is congress, and not the judicial department, to which the constitution has given the power to regulate commerce with foreign nations and among the several states. The courts can never take the initiative on this subject."

And from *Bridge Co.* v. *Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, the following:

"The power of congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned; but, until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and, if such law could be enforced (a point which we do not undertake to decide), it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the states within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist, and none such exist except what are to be found on the statute book."

Accordingly, notwithstanding the provision, in the "Act for the admission of Oregon into the Union" that "all the navigable waters of said state shall be common highways and forever free," it was held in that case that the bridge which it was sought to remove was not an offense against the United States, in the absence of direct legislation bringing obstructions and nuisances in navigable streams within the scope of national law.

In reply to this position of the defense, reference is made to the "Act to regulate commerce," as amended by the act of March 2, 1889 (25 Stat. 855); and it is contended that by

force of the provisions of that statute, passed in exercise of the power conferred on congress by the constitution "to regulate commerce among the several states," the national control has been extended over the channels and agencies of interstate commerce, including railways as well as navigable waters, and that out of this legislation, whatever had been the rule before, has arisen by necessary implication the jurisdiction of the federal courts, in accordance with the principles of equity, to protect that commerce against interference or obstruction. The right of the federal government to obtain the injunction is also asserted upon the ground of property right in the mails.

That the nation owns the mail bags is of course beyond dispute, and that it pays large sums annually for the carrying of the mails upon the railroads is well understood. In *Searight* v. *Stokes*, 3 How. 151, where the question was whether vehicles carrying the mails were "laden with the property of the United States," and therefore exempt from toll on the Cumberland road, in Pennsylvania, the supreme court said:

[744] "The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the sessions of congress, consists of communications to or from the officers of the executive department, or members of the legislature, on public service or in relation to matters of public concern."

It is said, on the contrary, to be easy "to show that, at common law, jurisdiction of the chancery on information of the attorney general to restrain a purpresture or nuisance rests on the idea that the king owns the land whereon it exists." It is doubtless true that, in the cases where the jurisdiction was invoked, the king was the owner of the land, because the land under navigable waters in England has always belonged to the crown; but the object of the suits has always been, not to vindicate the title to the land, which could have been done by the action of ejectment, but to prevent or remove obstructions to navigation, which required the prompt and efficient methods of equity; and it is not to be believed that if in England, as along the fresh-water rivers of this

country, the title of lands under the water had belonged to the riparian owners, the same jurisdiction would not have been exercised for the protection of the public right of navigation. The public interest is concerned in the unobstructed use of the water, and it is sticking in the mud to say that the right to protect that use is dependent upon the ownership of the underlying soil. If, however, the jurisdiction in such cases must be held to rest upon some legal title or property right, which by fiction shall be deemed to be worthy of equitable protection, or to afford a basis of jurisdiction for protecting incidental rights, it would seem that the property which the government has been declared to have in the mails and its unquestioned ownership of mail bags might well be deemed sufficient for the purpose. Justice Brewer said in *U. S.* v. *W. U. Tel. Co.*, 50 Fed. 28, 42: "The dollar is not always the test of real interest. It may properly be sacrificed if anything of higher value be thereby attained."

"But," say counsel, "this whole subject is utterly foreign to the question in this case. * * * Waterways are not railways. They are free to all comers, and are not the subject of private ownership nor control, but only of municipal regulation by public authority. *Lake Front Case*, 146 U. S. 387, 13 Sup. Ct. 110. The control of the railway is primarily with the company that owns and operates it. These great interests are entirely able to cope with any interference with their property. If they be held, in a high sense, as trustees for the public, why should equity entertain a suit by the beneficiaries of this trust until the trustees have proved recreant? These companies own the land over which their lines run, or a right of way in perpetuity, and, though charged with public duties, are still private pecuniary corporations operated for gain. As to all local matters, viz. the speed of trains, stopping at crossings, elevation of tracks, and things of that character, they are subject to local or state regulation. This could not be were the power of congress exclusive as in the matter of interstate rates. *Wabash, etc., Ry.* [745] *Co.* v. *People of Illinois*, 118 U. S. 557, 7 Sup. Ct. 4." It is, of course, true that waterways are not railways; that the latter and the title to the land

under them are owned and controlled, under legal limitations, by companies which operate them for gain; but so are the boats which ply the rivers and lakes of the country; and I see no reason in any of the suggestions advanced for saying that the courts may give to commerce on the rivers a protection which they may not extend to commerce on the railways. The railroad companies are clothed with the power of eminent domain, to enable them to acquire lands necessary for their purposes, because the proposed use is for the public benefit. To the extent of the share which the companies have in interstate commerce they hold their lands and rights of way for the benefit of the general public and subject to the national control. "For this purpose," to use the expression of the supreme court in *Gilman* v. *Philadelphia*, 3 Wall. 713, in respect of navigable waters, "they are the public property of the nation, and subject to all the requisite legislation of congress."

But while the reasons to justify, on the grounds considered, the issuing of the injunction for the purpose of protecting, against obstruction or interruption, either the mails alone or interstate commerce, of which the carrying of the mails is a part, are strong, and perhaps ought to be accepted as convincing, there seems to be no precedent for so holding, and the responsibility of making a precedent need not now be assumed.

While, however, the point is not decided, the authorities on the subject have been brought forward so fully because, in part, of their bearing upon the question now to be considered,—whether or not the injunction was authorized by the act of July 2, 1890. It was under that act that the order was asked and was granted; but it has been seriously questioned in this proceeding, as well as by an eminent judge and by lawyers elsewhere, whether the statute is by its terms applicable, or consistently with constitutional guaranties can be applied, to cases like this. It is admitted in one of the briefs for the defendants, and the authorities already quoted clearly demonstrate, "that were congress to declare that the United States might maintain a bill to enjoin the obstruction of interstate commerce on railroads engaged therein,

where such obstructions amounted to what, on a public highway, would be a public nuisance, such legislation would be admissible." Such an act, not going beyond the scope of equity jurisdiction in England at the time when the federal constitution was adopted, it is plain would not be obnoxious to the objection that it was an invasion of the field of criminal law which involved interference with the right of trial by jury. The jurisdiction of the courts of equity, and by implication their right to punish for contempt, are established by the constitution, equally with the right of trial by jury; and so long as there is no attempt to extend jurisdiction over subjects not properly cognizable in equity, there can be no ground for the assertion that the right of jury trial has been taken away or impaired. The same act may constitute a contempt and a crime. But the contempt is one thing, the crime another; and the punishment for one is not a dupli-
[746] cation of the punishment of the other. The contempt can be tried and punished only by the court, while the charge of crime can be tried only by a jury.

The first and fourth sections of the act of July 2, 1890 (26 Stat. 209), read as follows:

Section 1: "Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4: "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the cause and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

It is not contended that other sections bear materially upon the construction or interpretation of these, except the sixth, to which reference will be made further along. The position of the defendants in respect to this statute, as stated in one of

the briefs, is that it "is directed at capital," "at dangers very generally supposed to result from vast aggregations of capital;" that "the evil aimed at is one of a contractual character, and not of force and violence." In another brief it is said more definitely:

"That, sections 1 and 6 being construed together, it is apparent that the statute is aimed at monopoly of trade or commerce by which trade should be engrossed, and in and by which property should be employed and secured, but that, even should this contention be denied, still the statute does not confer a right on the government to proceed under the direction of the attorney general to abate a public nuisance existing in a highway of interstate commerce, but generally, by section 4, to prevent and restrain, by injunction, violations of a penal statute. It is thought, therefore, that, as held by Judge Putnam in *U. S.* v. *Patterson*, 55 Fed. 605, this act is inapplicable; but, if it is, then it is unconstitutional as an attempt to enforce a penal statute in equity, and not a justifiable authority for a proceeding familiar to equity, and, under congressional authority, admissible in the federal courts in the name of the government."

The very elaborate arguments presented in support of these propositions are the same, in the main, as were made and reported at length in the case referred to (*U. S.* v. *Patterson*), and therefore need not be restated. Reference was made in that case, and has been made in this, to the debates in congress while the measure was under consideration in that body; and, though it is conceded that we cannot take the views or purposes expressed in debate as supplying the construction of statutes, it is said we may gather from the debates in congress, as from any other source, "the history of the evil which the legislation was intended to remedy." Doubtless, that is often [747] true; and in this instance it is perhaps apparent that the original measure, as proposed in the senate, "was directed wholly against trusts, and not at organizations of labor in any form." But it also appears that before the bill left the senate its title had been changed, and material additions made to the text; and it is worthy of note that a proviso to the effect that the act should not be construed to apply "to any arrangements, agreements or combinations made between laborers with a view of lessening hours of labor or of increasing their wages, nor to any arrangements, agreements or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products," was not adopted. Such an amendment, doubtless, was not necessary in order to exclude agreements and arrangements of the kind mentioned; but the offering of the proposition shows that the possible application of the statute to cases not in the nature of trusts or monopolies, and in which workmen or farmers should be concerned, was not overlooked. But it is more significant that, upon the introduction of the bill into the house, the chairman of the judiciary committee, as reported in the Congressional Record (volume 21, pt. 5, p. 4089), made the following statement:

"Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of trade or commerce, mentioned in the bill, will not be known until the courts have construed and interpreted this provision."

It is therefore the privilege and duty of the court, uncontrolled by considerations drawn from other sources, to find the meaning of the statute in the terms of its provisions, interpreted by the settled rules of construction. That the original design to suppress trusts and monopolies created by contract or combination in the form of trust, which of course would be of a "contractual character," was adhered to, is clear; but it is equally clear that a further and more comprehensive purpose came to be entertained, and was embodied in the final form of the enactment. Combinations are condemned, not only when they take the form of trusts, but in whatever form found, if they be in restraint of trade. That is the effect of the words "or otherwise." It may be that those words should be deemed to include only forms of like character,—that is to say, some form of contract as distinguished from tort; but, if that be so, it only emphasizes and makes imperative the inference, which otherwise it seems to me would be sufficiently clear, that the word "conspiracy" should be interpreted independently of the preceding words. It is hardly to be believed that the words "or otherwise" were used simply for the purpose of giving fuller scope to the antecedent words "contract" and "combination," and then "conspiracy" added merely for the same purpose. Construed literally, the terms used in the body of this act forbid all contracts or combinations in restraint of

trade or commerce; but that construction is controlled by the title, which shows that only unlawful restraints were intended. But what constitutes an unlawful restraint is not defined; and, under the familiar rule that such federal enactments will be interpreted by the light of the common law, I have no doubt but that this [748] statute, in so far as it is directed against contracts or combinations in the form of trusts, or in any form of a "contractual character," should be limited to contracts and combinations such, in their general characteristics, as the courts have declared unlawful. But to put any such limitation upon the word "conspiracy" is neither necessary, nor, as I think, permissible. To do so would deprive the word, as here used, of all significance. It is a word whose meaning is quite as well established in the law as the meaning of the phrase "in restraint of trade," when used—as commonly, if not universally, that phrase has been used—in reference to contracts. A conspiracy, to be sure, consists in an agreement to do something; but in the sense of the law, and therefore in the sense of this statute, it must be an agreement between two or more to do, by concerted action, something criminal or unlawful, or, it may be, to do something lawful by criminal or unlawful means. A conspiracy, therefore, is in itself unlawful, and, in so far as this statute is directed against conspiracies in restraint of trade among the several states, it is not necessary to look for the illegality of the offense in the kind of restraint proposed; and, since it would be unnecessary, it would be illogical, to conclude that only conspiracies which are founded upon, or are intended to be accomplished by means of, contracts or combinations in restraint of trade, are within the purview of the act. It would be to make tautologous words which have distinctly different meanings, and to deprive the statute, in a large measure, of its just and needful scope. Any proposed restraint of trade, though it be in itself innocent, if it is to be accomplished by conspiracy, is unlawful. A distinction has been suggested between the phrase "in restraint of trade" and the phrases "to injure trade" and "to restrain trade." Though perceptible, the distinction does not seem to me so significant that the use of one expression rather than the other should vary the interpretation of this statute. Any

contract, combination, or conspiracy, to be "in restraint of trade," must involve the use of means of which the effect is "to injure" or "to restrain" trade. A contract, combination, or conspiracy in restraint of trade is therefore a contract, combination, or conspiracy to restrain or to injure trade. It would not, I suppose, be enough, in an indictment, to charge conspiracy in restraint of trade in the language of the statute, but it would be necessary, unless the proposed restraint be shown to be in itself unlawful, to allege the illegal means intended to be used in order to effect the restraint; and whether the means should be averred to have been used "in restraint of" or "to restrain" trade could hardly be important. There are many cases, doubtless, in which the rule that every word of a statute should be given effect is inapplicable, because, when synonymous words are used, the court is powerless to give them different meanings; but, when words of different significance are employed, the rule forbids that the scope of the statute be compressed within the limits of the narrower word. "Drinking house" and "tippling house" are necessarily one, and it was well held in *Reg.* v. *McCulley*, 2 Moody, Cr. Cas. 34, that "ram, ewe, sheep, and lamb" were all covered by the word "sheep"; but, if the words had been "ram, ewe, or sheep," it would have been a plain violation of the rule to reject [749] the comprehensive word "sheep," and say that lambs or wethers were not included. *Rice* v. *Railroad Co.*, 1 Black, 379; *Gelpcke* v. *City of Dubuque*, 1 Wall. 220; *Fau* v. *Marsteller*, 2 Cranch, 10; *Adams* v. *Woods*, Id. 337; *U. S.* v. *Coombs*, 12 Pet. 72; *Maillard* v. *Lawrence*, 16 How. 251; *Market Co.* v. *Hoffman*, 101 U. S. 115; *Thornley* v. *U. S.*, 113 U. S. 313, 5 Sup. Ct. 491. And it is no more legitimate here to reject the word "conspiracy," or, what is practically the same thing, strip it of its well-settled criminal significance by confining it within forms of contract or of combinations in the form of trusts. For like reasons I am unable to regard the word "commerce," in this statute, as synonymous with "trade," as used in the common-law phrase "restraint of trade." In its general sense, trade comprehends every species of exchange or dealing, but its chief use is "to denote the barter or purchase and

sale of goods, wares, and merchandise, either by wholesale or retail," and so it is used in the phrase mentioned. But "commerce" is a broader term. It is the word in that clause of the constitution by which power is conferred on congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Const. U. S. art. 1, § 8. In a broader and more distinct exercise of that power than ever before asserted, congress passed the enactments of 1887 and 1888 known as the "Interstate Commerce Law." The present statute is another exercise of that constitutional power, and the word "commerce," as used in this statute, as it seems to me, need not and should not be given a meaning more restricted than it has in the constitution. That meaning has often been defined by the supreme court. *Gibbons* v. *Ogden*, 9 Wheat. 195, 197; *Gilman* v. *Philadelphia*, 3 Wall. 713; *The Daniel Ball*, 10 Wall. 557; *The Case of the State Freight Tax*, 15 Wall. 232, 275; *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S. 1; *Ex parte Siebold*, 100 U. S. 371, 395; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Wabash, etc., Ry. Co.* v. *Illinois*, 118 U. S. 569, 7 Sup. Ct. 4; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 657, 10 Sup. Ct. 965. I quote passages which will serve incidentally to dispose of a number of points raised in the course of the argument, without referring to them more directly:

"The power of congress," said Chief Justice Marshall, in *Gibbons v. Ogden*, in 1824, when railroads were unknown, "comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes.'"

In *Gilman* v. *Philadelphia* it is said:

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, imposed by the states or otherwise. * * * It is for congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

In the case of The Daniel Ball, a steamer employed on

Grand river between Grand Rapids and Grand Haven, Mich., Justice Field, speaking for the court, said:

[750] "So far as the steamer was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states; and, however limited that commerce may have been, she was, so far as it went, subject to the legislation of congress. She was employed as an instrument of that commerce; for, whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of congress."

In the *State Freight Tax Case*, Justice Strong said:

"Beyond all question, the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by a state was the thing desired. The power was given by the same words, and in the same clause, by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. In his work on the constitution (section 1057), Judge Story asserts that the sense in which the word 'commerce' is used in that instrument includes not only traffic, but intercourse and navigation; and in the Passenger Cases, 7 How. 416, it was said: 'Commerce consists in selling the superfluity; in purchasing articles of necessity, as well productions as manufactures; in buying from one nation and selling to another; or in transporting the merchandise from the seller to the buyer to gain the freight.' Nor does it make any difference whether this interchange of commodities is by land or by water. In either case, the bringing of the goods from the seller to the buyer is commerce."

In *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, Mr. Chief Justice Waite, speaking for the court, after reciting the provisions of the constitution, says:

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the

demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily hindered by state legislation."

In *County of Mobile* v. *Kimball*, in reference to the power of congress over the subject, it is said:

"That power is indeed without limitation. It authorizes congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several states, and to adopt measures to promote its growth and insure its safety."

[751] In *Wabash, etc., Ry. Co.* v. *Illinois*, Justice Miller, in the course of an exhaustive discussion, says:

"It cannot be too strongly insisted upon that the right of continued transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the state might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the constitution (*Cook* v. *Pennsylvania*, 97 U. S. 566, 574; *Brown* v. *Maryland*, 12 Wheat. 419, 446); and it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

Speaking by the same judge, in Ex parte Siebold, the court had said:

"We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to exercise its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the constitution itself show which is to yield: 'This constitution and all laws which shall be made in pursuance thereof * * * shall be the supreme law of the land.' * * * The government must execute its powers, or it is no government. It must execute them on the land as well as on the sea; on things as well as on persons."

In *Cherokee Nation* v. *Southern Kan. Ry. Co.*, the court, speaking by Mr. Justice Harlan, says:

"Congress has power to regulate commerce, not only with foreign nations and among the several states, but with the Indian tribes. It is not necessary that an act of congress should express in words the purpose for which it was passed. The court will determine for itself whether the means employed by congress have any relation to the powers granted by the constitution. * * * The question is no longer an open one, whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation."

These definitions and expositions of the scope and law of interstate commerce, except the last, preceded the enactments by congress on the subject. It was therefore of commerce so defined, embracing all instrumentalities and subjects of transportation among the states, that congress, by that legislation, assumed the control; and I see no reason for thinking that as employed in the act of 1890, which is essentially supplemental of the other acts, the word was intended to be less comprehensive. It has been decided in a number of cases in the circuit courts, and in one instance by a circuit court of appeals, that this act cannot be applied to trusts or monopolies in the manufacture or production of articles of commerce. For instance, in *Greene's Case*, 52 Fed. **[752]** 104, Justice Jackson held that congress had not the constitutional power, and by this act had not attempted, to limit the right of a corporation, created by a state, in the acquisition, control, and disposition of property in the several states, even if carried to the extent necessary for the control of traffic in a species of property among the several states. To the same effect was the ruling in *U. S.* v. *Knight*, which was affirmed by the United States circuit court of appeals for the Third circuit. 60 Fed. 306; Id., 60 Fed. 934, 9 C. C. A. 297. This case is pending on appeal in the supreme court.[a] See, also, *Dueber Watch-Case Manuf'g Co.* v. *E. Howard Watch & Clock Co.*, 55 Fed. 851. If these decisions are right (a point upon which I express no opinion), it follows that the act in question has relation only to commodities, and possibly to persons, in the course of move-

[a] Affirmed, 15 Sup. Ct. 249.

ment among the states, and to the agencies or means of transportation; and if, as is contended, and as seems to have been decided in *U. S.* v. *Patterson*, *supra*, it covers only contracts, combinations, or conspiracies "intended to engross or monopolize the market," it is an act of very narrow scope. Why should it not be construed to embrace all conspiracies which shall be contrived with intent, or of which the necessary or probable effect shall be, to restrain, hinder, interrupt, or destroy interstate commerce?

The argument to the contrary, drawn from the sixth section of the act, is not controlling, nor, as it seems to me, even strongly persuasive. That section provides for the forfeiture of "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in this act, and being in the course of transportation from one state to another, or to a foreign country"; but it does not say nor imply that only cases, whether of contract or combination or conspiracy, in which property shall be found subject to forfeiture, shall be deemed to come within the scope of the act. The force of the section is the same, I think, as if it read: "If in any case there shall be found any property owned," etc., "it shall be forfeited," etc.; and so read it neither expresses nor implies any limitation of the provisions of other sections.

At this point is interposed the constitutional objection which, it is urged, forbids a construction that goes beyond trusts and monopolies to include conspiracies to employ force or violence in restraint of trade or commerce. The argument was employed and amplified in the *Patterson Case*, 55 Fed. 605, 629–632. It was contended there "that if two or more persons commit an act of murder, robbery, forgery, shop-breaking, store-burning, champerty, or maintenance, which in fact has a natural, though unintended, result of interference with interstate commerce, they are liable criminally for a conspiracy to interfere with interstate commerce, if the statute broadly covers conspiracy merely to interfere with it." This proposition is built on the assumption—which I believe is supported neither by authority nor reason—that co-conspirators are responsible as conspirators for the natural, though unintended, results of the commission or attempt by

one of them to commit the particular offense [753] originally agreed upon or intended. It is a fundamental and essential principle of law, and of social order, that all engaged in the commission of a particular crime, whether as counselors, aiders, abettors, or otherwise, are individually responsible criminally for other offenses which result naturally from the commission or attempt to commit the crime intended; but as agreement and intent are of the essence of a conspiracy, a conspiracy to commit a particular offense can hardly be deemed to include another conspiracy to commit another offense, unless the latter was the necessary result of the commission or attempt to commit the crime intended, or to such a degree the probable result that it could itself be charged in the indictment to have been intended. But if it were possible, by a course of technical reasoning and refinement, to extend the law of conspiracy to all crimes known to the law where two or more persons are implicated, it would, as Judge Putnam held, not involve the constitutionality of this act, which is limited to the field of interstate commerce, where the power of congress is unrestricted and supreme.

The question here, however, is of the validity of the fourth, rather than of the first, section of the act. It is urged that the power given by that section "to prevent and restrain violations" of the act is an unwarranted invasion of the right of trial by jury, and in support of the proposition are cited *Puterbaugh* v. *Smith*, 131 Ill. 199, 23 N. E. 428; *Carleton* v. *Rugg*, 149 Mass. 550–557, 22 N. E. 55; *Littleton* v. *Fritz*, 65 Iowa, 488, 22 N. W. 641; *Eilenbecker* v. *Plymouth Co.*, 134 U. S. 31, 10 Sup. Ct. 424; *Scott* v. *Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Pearson* v. *Yewdall*, 95 U. S. 294; *Boyd* v. *U. S.*, 116 U. S. 616–634, 6 Sup. Ct. 524; *Counselman* v. *Hitchcock*, 142 U. S. 547–582, 12 Sup. Ct. 195.

Little need be added to what has already been said upon that subject. The same act may be a crime and a contempt of court. If an assault or murder be committed in the presence of a court, the offender will be punishable both for the crime and for the contempt, and so with any other act committed in violation both of a criminal statute and of an injunction or order of court. Within the proper subjects of equitable cognizance, as established when the constitution was adopted,

it was competent for congress to vest the courts with the jurisdiction granted by this section, and to impose upon them the duty of its exercise in proper cases. Just as, in construing the first section of the act, its general words are limited by force of the title to unlawful restraint, and the words "in restraint of trade," in their connection with the words "contract" and "combination," are to be given their common-law significance, so the jurisdiction in equity, though given in broad and general terms, will be deemed to be limited so as not to extend to a case which is not of equitable cognizance. Indeed, if the sixth section of the act may legitimately be used in aid of the construction of the first section, the fourth section warrants, if it does not require, that the first section be restricted to cases in which, in accordance with established precedent, an injunction could issue,—a limitation which would not be essentially uncertain or of difficult application, [754] and which, if necessary to the upholding of the statute, might well be adopted.

That this case is one of equitable character is clear, and, as I understand, has not been questioned by counsel; their contention being that neither by this statute, nor upon general principles, is the case within the jurisdiction of a federal court. Excepting the case of *U. S.* v. *Patterson*, I know of no ruling inconsistent with the jurisdiction here exercised. The case of *U. S.* v. *Trans-Missouri Freight Ass'n*, 53 Fed. 440; Id., 7 C. C. A. 15, 58 Fed. 58,—had reference to a contract between railroads, which was alleged to have been made in violation of the act, but was held to be not unlawful. In the case of *U. S.* v. *Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994, the late Judge Billings, under this statute, granted an injunction upon facts which made the question of jurisdiction the same as it is here, and in respect to that question his ruling and opinion were distinctly approved by the circuit court of appeals for the Fifth circuit (6 C. C. A. 258, 57 Fed. 85). The court said:

"The appellants assign as error the overruling by the circuit court of each of the grounds of objection urged in that court against the granting of said injunction. These are well summarized, discussed, and disposed of in the very able opinions of the judge of the circuit court who passed the decree now sought to be reversed. The matters of law presented to and considered by him were not well taken by the appellants (respondents below) and the circuit court's ruling to that effect was correct. The bill exhibited is clearly within the statute, and the pleadings of the respondents were not such as to require the refusal of the prayer for a temporary injunction."

See, also, the opinion of Judge Speer in *Waterhouse* v. *Comer*, 55 Fed. 149.

In the *Case of Phelan*, 62 Fed. 803, who was charged with contempt of the United States circuit court at Cincinnati, growing out of the strike of last summer, and involving facts essentially identical with the facts of this case, Judge Taft declared the combination to be "in the teeth of the act of July 2, 1890," and after quoting from the act, and referring to the rulings of other judges in accord with his own view, said:

"A different view has been taken by Judge Putnam in the case of *U. S.* v. *Patterson*, 55 Fed. 605; but, after consideration, Judge Lurton and I cannot concur with the reasoning of that learned judge. The fact that it was the purpose of Debs, Phelan, and their associates to paralyze the interstate commerce of this country is shown conclusively in this case, and is known of all men. Therefore, their combination was for an unlawful purpose, and is a conspiracy, within the statute cited."

In the recent case of *U. S.* v. *Elliott*, 64 Fed. 27, Judge Philips declares similar views.

The facts of this case suggest illustrations of the impropriety as well as inconsistency of putting upon the statute the restrictive construction proposed. If, for example, the manufacturers of other sleeping cars, in their own interest, should enlist the brakemen and switchmen or other employés of the railroads, either individually or in associated bodies, in a conspiracy to prevent or restrain the use of Pullman sleepers, by refusing to move them, by secretly uncoupling, or by other elusive means, the monopolistic character of [755] the conspiracy would be so evident that, even on the theory that the statute is aimed at contracts or combinations intended to engross or monopolize the market, it would be agreed that the offense ought to be punishable. But in such a case if the officers or agents of the car companies, who might or might not be capitalists, would be individually responsible for violating the statute, upon what principle could the brakeman or switchman be exempt? Can workingmen, or, if you will, poor men, acting by themselves, upon

their own motion and for their own purposes, whether avowed or secret, do things forbidden by the statute without criminal responsibility, and yet be criminally responsible for the same things done at the instance and to promote the purposes of others? Or will it be said that under this statute one who is not a capitalist may, without criminality, assist capitalists in the doing of things which on their part are criminal? If that be so, then, if a capitalist and one who is not a capitalist join in doing things forbidden by this statute, neither can be punished, because one alone cannot be guilty of conspiracy. The persistent effort of the defendants, as the proof shows, was to force the railroad companies—the largest capitalists of the country—to co-operate, or at least to acquiesce, in a scheme to stop the use of Pullman sleepers; and for a time they had the agreement of a manager and other officers of one road to quit the use of the obnoxious cars, and perhaps a qualified submission of the officers of another road or two to the same dictation: Does the guilt or innocence of the defendants of the charge of conspiracy, under this statute, depend on the proof there may be of their success in drawing to the support of their design those who may be called capitalists, or does it depend upon the character of the design itself, and upon what has been done towards its accomplishment by themselves and by those in voluntary co-operation with them, from whatever employment or walk in life?

I have not failed, I think, to appreciate the just force of the argument to the contrary of my opinion,—it has sometimes entangled me in doubt,—but my conclusion is clear that, under the act of 1890, the court had jurisdiction of the case presented in the application, and that the injunction granted was not without authority of law, nor for any reason invalid.

This brings me to the question of fact: Did the defendants violate the injunction? The evidence upon the question is voluminous, but need not be reviewed in detail. The injunction issued July 2d, and on the 3d and 4th was served upon the defendants Debs, Howard, Rogers, and Keliher. It was not served upon the other defendants, and in one of the briefs it is contended that only parties to a bill can be charged

with violating an injunction; that while strangers to a suit in chancery may be liable for willful interference, their cases stand upon the same footing as ordinary criminal contempts, and their answers are conclusive. Authorities cited: *Watson* v. *Fuller*, 9 How. Pr. 425; *Kip* v. *Deniston*, 4 Johns. 24; *Boyd* v. *State*, 19 Neb. 128, 26 N. W. 925; *Lord Eldon's Opinion*, 7 Ves. 257–259; *State* v. *Anderson*, 5 Kan. 90, 114; *Elliott* v. *Osborne*, 1 Cal. 396; *Jewett* v. *Bowman*, 27 N. J. Eq. 171; [756] *Coddington* v. *Webb*, 4 Sandf. 639. In another brief the weight of authority is conceded to be that one who has actual notice of an injunction is bound by it. Rapalje, Contempt, 46; *Ewing* v. *Johnson*, 34 How. Pr. 202; *Waffle* v. *Vanderheyden*, 8 Paige 45. I know of no authority and perceive no reason for treating the answer of a stranger to the bill as conclusive, while the answer of a party to the bill is not conclusive.

The testimony of newspaper reporters shows that on July 4th Debs said to one of them:

"I have done nothing unlawful. I have kept myself strictly within the provisions of Judge Caldwell's decision, * * * and I shan't change my course of conduct in any way by reason of the service of this injunction."

Again, on the 7th, that:

"There had been another injunction served upon him, and it should not make the slightest difference in the manner in which the American Railway Union was doing its business; it had kept within the bounds of the law."

To another, on July 2d, he had said, in substance—

"That he was not afraid of any court or grand jury, or of any injunction as he had done nothing to be enjoined against, and that the American Railway Union would continue the fight on the same lines they had commenced."

July 3d the defendant Burns, who, it should be observed, in responding jointly with his codefendants Hogan and others to interrogatories, had asserted that they were not informed of the injunction until near the end of the strike, in answer to the inquiry of the reporter what they should do about it, said:

"Why, they would simply laugh at the injunction; that the Railway Union knew its rights; that they had not done anything wrong,—had not interfered with interstate commerce or mails or passengers;

that they had simply called off their men; that they had not done anything contrary to the injunction; that they had a right to strike peaceably."

These declarations are not brought forward for the purpose of showing that the defendants held or expressed sentiments of contempt for the order of the court. Whether they did or not is immaterial here. Their conduct only is in question, and these expressions are quoted because they confirm the inference deducible from other evidence, that no essential and voluntary modification of their course of action either followed or was caused by the injunction. Their original intention, it is true, was only to prevent the use of Pullman cars, but finding, as they did, immediately, that that aim would be thwarted by the discharge from service of men who refused to handle those cars, they began as early as June 27th, the day after the boycott was proclaimed, to issue orders to strike; and from that time to the end, to the extent of their ability, they conducted and controlled the strike with persistent consistency of purpose, and with unchanged methods of action. What they did the first day they did, in substance, each succeeding day, so that it is not necessary to discriminate very closely between what was done before and what after service of the injunction.

As officers of the American Railway Union, it is beyond question that the defendants had practical control of the strike, guiding as they chose the movements of the men actively engaged. Is it [757] true, as they assert, that they did nothing, and advised or instigated nothing, unlawful, and nothing contrary to the injunction? Leaving out of view for the moment the rule that co-conspirators are responsible for the deeds of each other, done in furtherance of the common design, is it true that the defendants, in the exercise of their acknowledged leadership, did no more than advise a peaceable strike or withdrawal of their followers from railroad service, or did they counsel and encourage such violence and intimidation as they knew to be necessary to prevent the equipment and moving of trains? To the charge of the information that they knew "that violence invariably follows all strikes of a similar character," they answered by denying that "they knew that violence and unlawful conduct necessarily follows from strikes of the kind mentioned." When, at an early stage of the case, the court suggested that in the use of the word "necessarily" the answer was not responsive to the information, where the word "invariably" was employed, the variance was stated by counsel to have been inadvertent, and leave was taken to amend; but, instead of an amendment curing the defect, a supplemental answer was filed, which merely denies such averments and parts of the information as they had not "in their former answer expressly admitted or denied." On this point, Hogan and the other defendants to the second information speak more explicitly, denying "that they or either of them knew or could have known that any such acts were certain or almost certain, or prboable or reasonably to be expected, to follow from such strikes or cessation of labor." While this is not perceived to be equivocal or evasive, it is difficult to understand how intelligent men familiar with the subject, as these men may be presumed to have been, could honestly affirm it. Strikes by railroad employés have not been infrequent of late years in this country, and the testimony of the one witness who spoke on the subject, and whose experience and intelligence made him apparently quite competent to speak, accord with what I suppose to be common knowledge,—that they have been attended generally, if not in every instance, with some form of intimidation or force. The witness said he knew of no exception. Under the conditions of last summer, when there were many idle men seeking employment, it was impossible that a strike which aimed at a general cessation of business upon the railroads of the country should succeed without violence; and it is not to be believed that the defendants entered upon the execution of their scheme without appreciating the fact, and without having determined how to deal with it. The inference therefore is a fair one, aside from direct evidence to the point, that they expected and intended that this strike should differ from others only in magnitude of design and boldness of execution, and that the accustomed accessories of intimidation and violence, so far at least as found essential to success, would not be omitted. For that much the striking workmen, acting on the promptings of self-interest, without instigation or direct suggestion, and

even in spite of admonitions to the contrary, may ordinarily be counted on. Such admonitions against violence were [758] sent out occasionally by the defendants, but it does not appear that they were ever heeded; and I am not able to believe on the evidence that, in the fullest sense, it was expected or intended that they should be. I am able and quite ready to believe that the defendants not only did not favor, but deprecated, extreme violence, which might lead to the destruction of property or of human life; but they were not unwilling that coupling pins should be drawn; that Pullman cars should be "cut out" and side tracked; that switches should be turned and trains derailed; that cars should be overturned and tracks obstructed; that false or contradictory signals should be given to moving trains; that the strikers and lawless rioters should wear a common badge, and should assemble together upon the tracks and yards of the companies to obstruct business; that engineers and firemen should be pulled from their cabs, if by persuasion or threats they could not be induced to leave them; that the unemployed should be deterred by threats or abuse from taking the places of strikers; and that engines should be "plugged," or otherwise "killed." These things, and the like of them, were done daily in Chicago and elsewhere by members, and sometimes by officers, of the local unions, without protest or condemnation, and some of them at the instigation of the defendants, who, it can hardly be doubted, were well aware of what was going on. When, therefore, in his address of June 29th, "To the Railway Employés of America," Debs said: "I appeal to the strikers everywhere to refrain from any act of violence. Let there be no interference with the affairs of the companies involved, and, above all, let there be no act of depredation. A man who will destroy property or violate law is an enemy, and not a friend, to the cause of labor. The great public is with us," etc.,—the chief aim, I am convinced, was to secure the good will of the public. To that end the warnings against acts of depredation or visible destruction of property, it may well be believed, were sincere; but their followers did not understand, and the court cannot believe, that it was intended to

forbid intimidation and the milder forms of violence, which did not directly involve the destruction of property or severe injury to person, and which for that reason, it seems, were assumed to be not unlawful, when employed in the interests of organized labor in a contest with "an alliance of rich and powerful corporations." By just what theories of law and duty they were governed might be better understood, perhaps, if in that part of the answer which alleges "that upon the service of the injunction the defendants consulted competent counsel, learned in the law, and, upon a full and fair statement of the facts in the premises, they were advised what they might rightfully and lawfully do without violating the order of the court, and that since that time they have in all things proceeded in accordance with that advice," they had disclosed, as they ought to have done, just what statement of the facts they made to counsel, and what advice they received. Without such disclosure, either in the answer or the proof, the alleged advice neither justifies nor mitigates a wrong or error committed in pursuance of the advice, but raises, rather, a presumption that a full [759] statement would not be advantageous. Proof was made of portions of the testimony of Mr. Debs on the 20th of August before the commission appointed by the President, wherein, among other things, he said:

"It is understood that a strike is war; not necessarily a war of blood and bullets, but a war in the sense that it is a conflict between two contending interests or classes of interests. There is more or less strategy, too, in war, and this was necessary in our operation. Orders were issued from here, questions were answered, and our men were kept in line from here. * * * As soon as the employés found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances, if we had been permitted to remain upon the field, among them. Once we were taken from the scene of action, and restrained from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work. * * * Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up, * * * not by the army, and not by any other power, but simply and solely by the action of the United States court in restraining us from discharging our duties as officers and representatives of our employés."

In answer to an inquiry what, if anything, he did to ascertain whether his men were concerned in violence, he said:

"We did that [by] our committee, which called at headquarters every evening and advised us. They were instructed to guard the company's property, if they were near it at all, and to apprehend anyone that might be caught destroying property. This instruction was given again and again to the central committee that went out from headquarters. We said we knew that if there was trouble, if there was disorder and riot, we would lose, because we knew enough by experience in the past that we had everything to lose by riot, and nothing to gain. We said that man who incites riot or disorder is our enemy, and we have got to be the first to apprehend and bring him to justice. So we called upon our men, and advised them, urged them, to do everything in their power to maintain order, because we felt and knew that if there was perfect order there was no pretext upon which they could call out the soldiers, or appeal for the intervention of the court, and we would win without a question of a doubt."

One or two reflections upon these statements will be enough: First, with all that is said about guarding property, keeping the peace, and being the first to arrest offenders, not one was arrested, and no effort was made by strikers or members of the Railway Union to preserve the peace or to protect property. On the contrary, many of them were leaders in scenes of violence and disorder. Second, if this strike, like others, was understood to be war, not necessarily of blood and bullets, but a conflict between contending interests or classes of interests, in which strategy had to be employed to keep the men in line, it was more than a peaceable strike, or mere cessation from work. Had it been only that, the injunction, instead of being a hindrance, would have been in their hands the very weapon they needed to enable them to suppress the violence and disorder in which alone, they say, they saw possible danger to the success of their cause.

"When the trouble began," said Mr. Debs again, in his testimony before the commission, "there were thousands of telegrams and communi- **[760]** cations pouring in, and it was impossible for me to see them all personally, because I was out among the men, meeting with committees, meeting at different cities, and addressing meetings, and all that kind of work; so it was really impossible for all those telegrams that were coming in to come under my personal notice. So then the work was apportioned by the board to its members. This young man named Benedict (who had been employed

as an assistant secretary) answered, by instruction of the board, some telegrams, and in other cases, where the board was all absent, he answered telegrams himself. Telegrams, when he had answered others of a kindred character, he would answer without instructions." The inconsistency of these statements with the averments of the answer of the defendants to the original information, denying responsibility for the telegrams sent and received, is too evident to need comment, but they are quoted here not so much to point out the discrepancy as to show the activity of Mr. Debs, his intimate connection with the conduct of the strike, and consequently his direct responsibility for what was done. By his admission, he was out among the men, meeting committees, and addressing meetings. It is shown also by the testimony of two or more witnesses that on the night of June 29th he and Howard and Keliher attended a meeting of the local union at Blue Island, a suburb of Chicago, on the line of the Rock Island & Pacific Railroad; that he and Howard each addressed the men, urging them to join the strike; that, among other things, one or both of them said the men "ought to stand together and go out in a body"; that if others came to take their places "they ought to make them walk the plank." In the language of the witnesses, "They told the workmen there that the only way to resist the orders of the general managers in cutting down the wages of the men in detail on the different roads was by unanimously organizing and standing by,—all standing together. Debs told them not to molest the mail trains, but," as the witness puts it, "not to let the Pullman cars out, at no hazards." Howard "advised the men not to do any violence, or anything like that, but to go out, and stay out, man to man, and they would win the victory." "Howard said not to commit any violence, but not to allow any Pullman cars to run, at no hazard." "He said all those that didn't go out and stay out, and help the laboring class of people out of trouble, will have to walk the plank in the future." These speeches did not mean, and were not understood by the men to whom they were addressed to mean, that no resistance should be made by them to the running of Pullman

cars, or that they should submit unresistingly to the employment of other men to take their places. They voted that night to join the strike, and on the next day inaugurated "a condition of turbulence" which a witness declared he "did not believe could exist." "A body of men, principally ex-employés of the Rock Island road, blockaded traffic, threatened violence, and tied up the road." "The same condition, only worse, July 1st," and notwithstanding the efforts of the United States marshal, by reading the injunction and otherwise, to quell the disturbance, nothing was ac-
[761] complished until the 5th of July, when federal soldiers arrived. With that assistance, through trains began to be moved, and the transportation of the mails was resumed on the 7th or 8th, but it was not until the 14th that traffic on that line was fully restored. These things directly followed, and in large measure, I think it not unwarranted to say, were the natural and probable result of, the speeches made and counsel given to the men by Debs and Howard at the meeting on the night of the 29th at Blue Island. Similar suggestions, calculated to incite to acts of violence or intimidation, were contained in many of the telegrams which were sent out over the name of Debs, and for which, notwithstanding the averment of their sworn answers to the contrary, it is no longer possible for any of the defendants to evade some measure of responsibility. I quote from a few of them, commencing June 27th:

"A boycott has been declared against the Pullman Company, and no Pullman cars are to be handled." "If men are discharged for refusing to handle Pullman cars, every employé should at once leave the service of the company."

June 28th:

"No forcible interference with mail trains, but any man who handles trains or cars will be a scab." "No loyal man will handle any train at all on your system." "Tie up every line possible, to enforce boycott. Do not cut any cars from mail trains, but no loyal man will move a train of any kind under existing conditions." "Passenger train came south this morning, and will be held here." (To Debs from Las Vegas.) "If your company refuses to boycott Pullman, tie it up."

June 29th:

In substance: Leave denied for train at Livingston, Montana, to proceed with sick passengers. "All taking part in this struggle will

receive protection of A. R. U., whether members or not." "Pay no attention to injunction orders. Men will not be slaves."

June 30th:

"This is a fight against combined capital and oppression, and we are assured winners. Do no violence, but every man stand pat and firm." "No fear about reinstatement. All lines in Chicago are paralyzed. Impossible to get scabs to fill places in time." "Do not interfere with mail trains in any manner."

July 1st:

"Knock it to them as hard as possible." "Have men stand firm. They show a better front in Ohio than you. * * * I do not suspect Grand Junction of housing scabs or sucklings of autocrats."

July 2d:

"The train will haul your car to its destination on presentation of this telegram." (To Mrs. Leland Stanford.) "All who work during present strike will be branded as scabs."

July 3d:

"This is authority to call out roads named." "Tie up Big Four." "Get your men out immediately." "It will take more than injunctions to move trains. Get everybody out." "Wear a white ribbon, instead of red. We have requested our friends to wear white in Chicago." "Let everybody wear white ribbon who are in favor, and all opposed wear red." "Do not let court order scare you. I have had orders served on me. We are breaking no laws. You and all strikers have quit your places peaceably, as is your right. * * * Don't be silly."

[762] July 4th:

"Have your men stand pat. They will have to make many arrests before this strike is over. We all stand firm. Arresting men will not operate the road." "To call out troops was an old method of intimidation. Commit no violence. Have every man stand pat. Troops cannot move trains. Not scabs in the world to fill places, and more occurring hourly." "This is authority to call out P. D. & E."

July 5th:

"The lines are now sharply drawn. Capital has declared war. Any man who works is assisting capital to defeat labor." (Richards of St. Paul to Debs): "Send all good news possible. * * * Look after locals on all roads, and play the strongest card left."

July 8th:

"You cannot paralyze the world in a minute. Do not let strong men become childish. * * * You appear to be paying more attention to newspapers than to messages."

July 10th:

"Debs, Howard, Keliher, Rogers, in jail. Rest expect to go. This is the last act of the corporations. Our cause is just. Victory certain. Stand pat. [Signed] Hogan."

July 14th:

"All negotiations off. Stand to a finish now."

The condition as it was on the 12th of July is aptly described in the letter of that date signed by Debs, Howard, and Keliher, as officers of the American Railway Union, and addressed, "To the Railway Managers." It is set out in full as a part of the information,[a] and if more convincing evidence of the nature of the strike, and of the direct personal and official responsibility of the defendants for what was done, and for the results, were needed, it is found in that document.

But the defendants are not entitled to be judged solely by the rules which determine the responsibility of one who has acted without combination or agreement with another. The bill upon which the injunction was ordered charged them with conspiracy, as, under the statute, it must have done, in order to bring them within the cognizance of the court. Conforming to the allegations of the bill, the injunction, in substance, commanded them, and all combining or conspiring with them, "to desist and refrain" from interfering with the business, rolling stock, and other property of the roads named; from using force, threats, or persuasion to induce employés of the roads to neglect duty; from using force or threats to induce employés to quit, or other persons not to enter, the service of the roads; from doing any act in furtherance of a conspiracy to interfere with interstate commerce on the roads; and from ordering, aiding, or abetting any person to do the forbidden things. It is not necessary to consider whether this injunction, when properly construed, forbids, or whether it might lawfully have been made to forbid, the employés of the railroad companies to quit work in furtherance of the alleged conspiracy, or to forbid others, in aid of the conspiracy, to persuade or advise them to quit. The order was not intended when issued. **[763]** and will not now be construed, to go so far. In the recent case of *Arthur* v. *Oakes* (C. C. A., 7th Circuit), 63 Fed. 310, it was decided, with my full concurrence in the opinion, that a court of equity will not "under any circumstances, by

[a] Ante, p. 310.

injunction, prevent one individual from quitting the personal service of another"; and in respect to the right of employés, singly or in concert, to quit work, and of others to advise them on the subject, there is no present necessity for adding to what was said in that case, further than to observe that neither expressly nor by implication does the opinion there delivered lend the remotest sanction to the proposition asserted by one of the counsel for the defendants, that in free America every man has a right to abandon his position, for a good or a bad reason, and that another, for good or bad reason, may advise or persuade him to do so. Manifestly, that is not true. If it were, a servant might quit his place, and another might advise him to quit, in order to make way for the entry of thieves or burglars into the employer's house,—a suggestion at which simple minds revolt, and for which the acutest can invent neither justification nor apology. The rule is familiar in criminal jurisprudence that any act, however innocent in itself, becomes wrongful or criminal when done in furtherance of an unlawful design. But whether or not, in a particualr case, an injunction will be appropriate, and to what extent it shall go if granted, will depend on other considerations than the mere wrongfulness or illegality of the act or conduct proposed to be enjoined. The right of men to strike peaceably, and the right to advise a peaceable strike, which the law does not presume to be impossible, is not questioned. But if men enter into a conspiracy to do an unlawful thing, and, in order to accomplish their purpose, advise workmen to go upon a strike, knowing that violence and wrong will be the probable outcome, neither in law nor in morals can they escape responsibility.

The evidence establishes, and it has not been denied, that on the 21st day of June, 1894, the American Railway Union, in convention at Chicago, declared a boycott against the Pullman palace cars, to take effect after five days if meanwhile the Pullman Company should not accede to a proposed arbitration with striking workmen; that the convention, after conferring upon the directors of the union jurisdiction over all matters connected with the boycott, adjourned on the 25th of June; that on the next day the following notice or order was issued, over the signature of the president of

the union: "June 26, 1894, 1:30 p. m. Boycott against Pullman cars in effect at noon to-day. By order of convention. E. V. Debs,"—and that on the same day the following telegram was sent to the general officers of labor organizations throughout the country:

"A boycott against the Pullman Company, to take effect at noon to-day, has been declared by the American Railway Union. We earnestly request your aid and co-operation in the fight of organized labor against a powerful and oppressive monopoly. Please advise if you can meet with us in conference, and, if not, if you will authorize some one to represent you in this matter. Address 421 Ashland Block. Eugene V. Debs, President."

Pullman cars in use upon the roads are instrumentalities of commerce, and it follows that from the time of this announcement, if not [764] from the adoption of the resolution by the convention, the American Railway Union was committed to a conspiracy in restraint of interstate commerce, in violation of the act of July 2, 1890, and that the members of that association, and all others who joined in the movement, became criminally responsible each for the acts of others done in furtherance of the common purpose, whether intended by him or not. The officers became responsible for the men, and the men for the officers. While I do not accede to the proposition which was advanced in *Patterson's Case*, for the purpose of invalidating or of putting a narrow construction upon the statute, that a conspiracy to commit a specified offense includes a conspiracy to commit any other offense which may result and does result from an attempt to commit the offense intended, the rule is well settled, and I suppose well understood, that all who engage, either as principals or as advisers, aiders, or abettors, in the commission of an unlawful or criminal act, are individually responsible for the criminal or injurious results which follow the commission or an attempt by any of their number to commit the intended crime or wrong. It is by the same rule that co-conspirators are responsible for the acts and declarations of each other in the furtherance of their unlawful purpose. *Brennan* v. *People*, 15 Ill. 511; *Hanna* v. *People*, 86 Ill. 243; *Lamb* v. *People*, 96 Ill. 74; Whart. Cr. Law, § 1405; 1 Bish. Cr. Law, 636; Hawk. P. C. c. 29, § 8. I quote:

"Upon this ground [says Hawkins, supra], it has been adjudged that where persons combine together to stand by one another in the breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all the company are equally principals, though at the time of the fact some of them were at such a distance as to be out of view."

"A man may be guilty of a wrong which he did not specifically intend [says Bishop], if it came naturally, or even accidentally, through some other specific, or a general evil, purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding and growing out of the common plan, terminates in a criminal result, though not the particular result meant, all are liable."

In *State* v. *McCahill* (Iowa) 30 N. W. 553, the court said:

"Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged."

These defendants were the directors and general officers of the American Railway Union, and had practical control of the organization. They procured the adoption of the resolutions by which the boycott of the Pullman cars was declared, and authority given themselves to begin and control the movement. They put themselves at once in telegraphic communication with the officers of local unions, advising them of the action of the convention, and that no Pullman cars were to be handled; but, it appearing very soon that men who refused to handle Pullman cars were being discharged, they determined to prevent the running of all trains upon all the roads until the companies should accede to their demands, including the reinstatement of men who had been discharged. Later the Pullman strikers were abandoned, and only the re-employment of [765] railroad men insisted on. As early as the 27th of June they sent out telegrams directing men to quit work if the running of Pullman cars was insisted upon, and unless discharged men were restored to their places, and by the 28th it had become the distinct policy "to get the men out"; "to tie up" or paralyze the roads; to promise full protection to all who joined in the strike; to denounce as scabs, or as traitors to the cause of labor, all who refused to go out, and all who should consent to take places which others had abandoned,—and later the form or substance of expression became: "All employés of all roads will stand together"; "None will return until all return." By this course the original conspiracy against the use of Pullman cars became a

conspiracy against transportation and travel by railroad. Upon their own authority, without consulting the local unions, the defendants converted the boycott into a strike; and with the aid of followers, some of whom stopped at no means between the drawing of a coupling pin and the undermining of a bridge, whereby men should be hurled to death, they pushed the strike to the conditions which prevailed when the intervention of the court was asked, and which, in the end, compelled the employment of military force to re-establish peace and start again the activities of commerce. The evidence leaves no feature of the case in doubt. The substance of it, briefly stated, is that the defendants, in combination with the members of the American Railway Union and others, who were prevailed upon to co-operate, were engaged in a conspiracy in restraint or hindrance of interstate commerce over the railroads entering Chicago, and, in furtherance of their design, those actively engaged in the strike were using threats, violence, and other unlawful means of interference with the operations of the roads; that by the injunction they were commanded to desist, but, instead of respecting the order, they persisted in their purpose, without essential change of conduct, until compelled to yield to superior force.

Much has been said, but without proof, of the wrongs of the workmen at Pullman, of an alliance between the Pullman Company and the railway managers to depress wages, and generally of corporate oppression and arrogance. But it is evident that these things, whatever the facts might have been proved or imagined to be, could furnish neither justification nor palliation for giving up a city to disorder, and for paralyzing the industries and commerce of the country.

My conclusion in the case on the information of the United States implies a like conclusion in the other case, tried at the same time and upon the same evidence, wherein, by an information presented by the receivers of the Santa Fé Railroad, the defendants were charged with wrongful and violent interference with the operation of that road pending the strike. That they did interfere as alleged, is established by the evidence already considered. Though violation of the

injunction of July 2d is alleged in the bill, the questions of jurisdiction and of the construction and application of the act of 1890 are not essentially involved, because, the property being in the custody of the court, any improper interference with its manage- [766] ment, it is well settled, constituted a contempt of the court's authority, as exercised in making the order appointing the receivers and enjoining interference with their control. The decision, or rather letter, of Judge Caldwell has been referred to, but, while that recognized the right of employés to quit the service of the receivers, it contained no warrant for intimidating or abusing those who were willing to take employment, or for otherwise interfering directly, as the defendants and their followers did, with the management and operation of the road. The court therefore finds the defendants (except McVean, whose case is held under advisement) guilty of contempt as charged in each of the cases. The same sentences will be ordered in both cases, but it is not intended that they shall be cumulative.

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[821] PIDCOCK v. HARRINGTON ET AL.

(Circuit Court, S. D. New York. December 20, 1894.)

[64 Fed., 821.]

MONOPOLIES—SUIT BY PRIVATE INDIVIDUAL.—The act "to protect trade and commerce against unlawful restraints and monopolies" (Act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons, and the right to bring suits in equity being vested in the district attorneys of the United States.[a]

This was a suit by John F. Pidcock against Dennis Harrington and others for an injunction and accounting. Defendants demurred to the bill.

[822] This is a suit in equity against the above-named defendant, and a number of others, praying for an injunction and an accounting on the ground that the defendants have conspireed to ruin complainant's business as a commission merchant and dealer in live stock. The bill alleges that the defendants have ceased dealing with the com-

[a] Syllabus copyrighted, 1895, by West Publishing Co.

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plainant and have threatened to cease dealing with people who deal with him. The action is founded upon the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209).

William F. Randel, for complainant.

Edward C. Boardman, for defendants.

COXE, District Judge.

At the argument the counsel for the complainant was asked whether he sought to maintain this action under the general equity principles of the common law or under the provisions of the act of July 2, 1890. He answered that it was founded solely upon the statute. It is unnecessary, therefore, to discuss the proposition whether or not the action can be maintained independently of the statute. The demurrer challenges the jurisdiction of this court to maintain, under the act in question, a bill in equity filed by a private individual and his solicitor. It is clear that the right to maintain such a suit is not expressly conferred by the act. Indeed, such right is, by implication, denied—First, because a private person is given (section 7) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the attorney general (section 4), are charged with the duty of commencing suits in equity. If it were the intention of the lawmakers to vest in every irresponsible individual, who may deem himself aggrieved, the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose that they would have said so in unambiguous terms? The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribes the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy. If it ended with section 6 there would probably be no pretense that it sanctioned a suit like the one at bar. What follows, however, in no way strengthens the complainant's position. The

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only section which gives a private remedy is the seventh, which is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

But for this section no private person would have any standing in court, and as the only right conferred by it is the right to sue for damages in a court of law, it follows that the point presented by the demurrer is well founded. The precise question was decided in favor of the views here expressed in *Blindell* v. *Hagan*, 54 Fed. 40, affirmed 56 Fed. 696, 6 C. C. A. 86. The demurrer is allowed.

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[1] UNITED STATES *v.* E. C. KNIGHT COMPANY.[a]

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 675. Argued October 24, 1894.—Decided January 21, 1895.

[156 U. S., 1.]

The monopoly and restraint denounced by the act of July 2, 1890, c. 647, 26 Stat. 209, "to protect trade and commerce against unlawful restraints and monopolies," are a monopoly in interstate and international trade or commerce, and not a monopoly in the manufacture of a necessary of life.[b]

The American Sugar Refining Company, a corporation existing under the laws of the State of New Jersey, being in control of a large majority of the manufactories of refined sugar in the United States, acquired, through the purchase of stock in four Philadelphia refineries, such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business. *Held*, that the result of the transaction was the creation of a monopoly in the manufacture of a necessary of life, which could not

[a] Bill dismissed by Circuit Court, En. D. Penn. (60 Fed., 306). See p. 250. Decree affirmed by Circuit Court of Appeals, Third Circuit (60 Fed., 934). See p. 258. Affirmed by the Supreme Court (156 U. S., 1).

[b] Syllabus and abstract of argument copyrighted, 1895, by Banks & Bros.

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be suppressed under the provisions of the act of July 2, 1890, c. 647, 26 Stat. 209, "to protect trade and commerce against unlawful restraints and monopolies," in the mode attempted in this suit; and that the acquisition of Philadelphia refineries by a New Jersey corporation, and the business of sugar refining in Pennsylvania, bear no direct relation to commerce between the States or with foreign nations.

[2] THIS was a bill filed by the United States against E. C. Knight Company and others, in the Circuit Court of the United States for the Eastern District of Pennsylvania, charging that the defendants had violated the provisions of an act of Congress approved July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, "providing that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several States is illegal, and that persons who shall monopolize or shall attempt to monopolize, or combine or conspire with other persons to monopolize trade and commerce among the several States, shall be guilty of a misdemeanor." The bill alleged that the defendant, the American Sugar Refining Company, was incorporated under and by virtue of the laws of New Jersey, whose certificate of incorporation named the places in New Jersey and New York at which its principal business was to be transacted, and several other States in which it proposed to carry on operations, and stated that the objects for which said company was formed were "the purchase, manufacture, refining, and sale of sugar, molasses, and melads, and all lawful business incidental thereto;" that the defendant, E. C. Knight Company, was incorporated under the laws of Pennsylvania "for the purpose of importing, manufacturing, refining and dealing in sugars and molasses," at the city of Philadelphia; that the defendant, the Franklin Sugar Company, was incorporated under the laws of Pennsylvania "for the purpose of the manufacture of sugar and the purchase of raw material for that purpose," at Philadelphia; that the defendant, Spreckels Sugar Refining Company, was incorporated under the laws of Pennsylvania "for the purpose of refining sugar, which will involve the buying of the raw material therefor

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and selling the manufactured product, and of doing whatever else shall be incidental to the said business of refining," at the city of Philadelphia; that the defendant, the Delaware Sugar House, was incorporated under the laws of Pennsylvania "for the purpose of the manufacture of sugar and syrups, and preparing the same for [3] market, and the transaction of such work or business as may be necessary or proper for the proper management of the business of manufacture."

It was further averred that the four defendants last named were independently engaged in the manufacture and sale of sugar until on or about March 4, 1892; that the product of their refineries amounted to thirty-three per cent of the sugar refined in the United States; that they were competitors with the American Sugar Refining Company; that the products of their several refineries were distributed among the several States of the United States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; that the American Sugar Refining Company had, on or prior to March 4, 1892, obtained the control of all the sugar refineries of the United States with the exception of the Revere of Boston, and the refineries of the four defendants above mentioned; that the Revere produced annually about two per cent of the total amount of sugar refined.

The bill then alleged that in order that the American Sugar Refining Company might obtain complete control of the price of sugar in the United States, that company, and John E. Searles, Jr., acting for it, entered into an unlawful and fraudulent scheme to purchase the stock, machinery, and real estate of the other four corporations defendant, by which they attempted to control all the sugar refineries for the purpose of restraining the trade thereof with other States as theretofore carried on independently by said defendants; that in pursuance of this scheme, on or about March 4, 1892, Searles entered into a contract with the defendant Knight Company and individual stockholders named, for the purchase of all the stock of that company, and subsequently delivered to the defendants therefor in exchange shares of the American Sugar Refining Company;

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that on or about the same date Searles entered into a similar contract with the Spreckels Company and individual stockholders, and with the Franklin Company and stockholders, and with the Delaware Sugar House and stockholders. It was further averred that the American Sugar Refining Company monopolized the manufacture and [4] sale of refined sugar in the United States, and controlled the price of sugar; that in making the contracts, Searles and the American Sugar Refining Company combined and conspired with the other defendants to restrain trade and commerce in refined sugar among the several States and foreign nations, and that the said contracts were made with the intent to enable the American Sugar Refining Company to restrain the sale of refined sugar in Pennsylvania and among the several States, and to increase the regular price at which refined sugar was sold, and thereby to exact and secure large sums of money from the State of Pennsylvania, and from the other States of the United States, and from all other purchasers, and that the same was unlawful and contrary to the said act.

The bill called for answers under oath, and prayed—

"1. That all and each of the said unlawful agreements made and entered into by and between the said defendants, on or about the fourth day of March, 1892, shall be delivered up, cancelled, and declared to be void; and that the said defendants, the American Sugar Refining Company and John E. Searles, Jr., be ordered to deliver to the other said defendants respectively the shares of stock received by them in performance of the said contracts: and that the other said defendants be ordered to deliver to the said defendants, the American Sugar Refining Company and John E. Searles, Jr., the shares of stock received by them respectively in performance of the said contracts.

"2. That an injunction issue preliminary until the final determination of this cause, and perpetual thereafter, preventing and restraining the said defendants from the further performance of the terms and conditions of the said unlawful agreements.

"3. That an injunction may issue preventing and restraining the said defendants from further and continued violations of the said act of Congress, approved July 2, 1890.

"4. Such other and further relief as equity and justice may require in the premises."

Answers were filed and evidence taken, which was thus [5] sufficiently summarized by Judge Butler in his opinion in the Circuit Court:

"The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jersey, and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Co., the Spreckels Sugar Refinery, and the Delaware Sugar House, were incorporated under the laws of Pennsylvania, and authorized to purchase, refine, and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about thirty-three per cent of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Co., and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Co. had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Co. in Boston, the latter producing about two per cent of the amount refined in this country; that in March, 1892, the American Sugar Refining Co. entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Co. thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Co. obtaining authority to increase its stock $25,000,000; that this assent was subsequently obtained and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, understanding and intending that all the stock and property of the company should be sold; that the contract of sale in each instance left the sellers free to establish other refineries [6] and continue the business if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase the Delaware Sugar House Refinery has been operated in conjunction with the Spreckles Refinery, and the E. C. Knight Refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but is still lower than it had been for some years before, and up to within a few months of the sales; that about ten per cent of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Co.; that some additional sugar is produced in Louisiana and some is brought from Europe, but the amount is not large in either instance.

"The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country."

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The Circuit Court held that the facts did not show a contract, combination, or conspiracy to restrain or monopolize trade or commerce "among the several States or with foreign nations," and dismissed the bill. 60 Fed. Rep. 306. The cause was taken to the Circuit Court of Appeals for the Third Circuit, and the decree affirmed. 60 Fed. Rep. 934. This

appeal was then prosecuted. The act of Congress of July 2, 1890, c. 647, is as follows:

"An act to protect trade and commerce against unlawful restraints and monopolies.

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one [7] year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary [8] restraining order or prohibition as shall be deemed just in the premises.

"SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"SEC. 8. That the word 'person,' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 26 Stat. 209, c. 647.

Mr. Solicitor General and *Mr. S. F. Phillips*, (with whom was *Mr. Attorney General* on the brief,) for appellants.

Mr. John G. Johnson, (with whom was *Mr. John E. Parsons* on the brief,) for appellees.

[9] Mr. CHIEF JUSTICE FULLER, after stating the case delivered the opinion of the court.

By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890.

The relief sought was the cancellation of the agreements under which the stock was transferred; the redelivery of the stock to the parties respectively; and an injunction against the further performance of the agreements and further violations of the act. As usual, there was a prayer for general relief, but only such relief could be afforded under that prayer as would be agreeable to the case made by the bill and consistent with that specifically prayed. And as to the injunction asked, that relief was ancillary to and in aid of the primary equity, or ground of suit, and, if that failed, would fall with it. That ground here was the existence of contracts to

monopolize interstate or international trade or commerce, and to restrain such trade or commerce, which, by the provisions of the act, could be rescinded, or operations thereunder arrested.

In commenting upon the statute, 21 Jac. 1, c. 3, at the commencement of chapter 85 of the third Institute, entitled "Against Monopolists, Propounders, and Projectors," Lord Coke, in language often quoted, said:

> "It appeareth by the preamble of this act (as a judgment in Parliament) that all grants of monopolies are against the ancient and fundamental laws of this Kingdome. And therefore it is necessary to define what a monopoly is.
>
> "A monopoly is an institution, or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole [10] buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome, or liberty that they had before, or hindred in their lawfull trade.
>
> "For the word monopoly, *dicitur ἀπὸ τῦ μόνυ* (i. *solo,*) *καὶ πωλέομαι* (i, *vendere,*) *quod est cum unus solus aliquod genus mercaturæ universum vendit, ut solus vendat, pretium ad suum libitum statuens:* hereof you may read more at large in that case. Trin. 44 Eliz. Lib. 11, f. 84, 85; *le case de monopolies.*" 3 Inst. 181.

Counsel contend that this definition, as explained by the derivation of the word, may be applied to all cases in which "one person sells alone the whole of any kind of marketable thing, so that only he can continue to sell it, fixing the price at his own pleasure," whether by virtue of legislative grant or agreement; that the monopolization referred to in the act of Congress is not confined to the common law sense of the term as implying an exclusive control, by authority, of one branch of industry without legal right of any other person to interfere therewith by competition or otherwise, but that it includes engrossing as well, and covers controlling the market by contracts securing the advantage of selling alone or exclusively all, or some considerable portion, of a particular kind of merchandise or commodity to the detriment of the public; and that such contracts amount to that restraint of trade or commerce declared to be illegal. But the monopoly and restraint denounced by the act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life.

In the view which we take of the case, we need not discuss whether because the tentacles which drew the outlying refineries into the dominant corporation were separately put out, therefore there was no combination to monopolize; or, because, according to political economists, aggregations of capital may reduce prices, therefore the objection to concentration of power is relieved; or, because others were theoretically left [11] free to go into the business of refining sugar, and the original stockholders of the Philadelphia refineries after becoming stockholders of the American Company might go into competition with themselves, or, parting with that stock, might set up again for themselves, therefore no objectionable restraint was imposed.

The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill.

It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power. On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left

free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict [12] with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. "Commerce, undoubtedly, is traffic," said Chief Justice Marshall, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 210; *Brown* v. *Maryland*, 12 Wheat. 419, 448; *The License Cases*, 5 How. 504, 599; *Mobile* v. *Kimball*, 102 U. S. 691; *Bowman* v. *Chicago & N. W. Railway*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545, 555.

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to

regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

[13] It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. This was so ruled in *Coe* v. *Errol*, 116 U. S. 517, 525, in which the question before the court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the State of Maine were liable to be taxed like other property in the State of New Hampshire. Mr. Justice Bradley, delivering the opinion

of the court, said: "Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . . There must be a point of time when they cease to be governed exclusively by the domestic [14] law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin to that of their destination."

And again, in *Kidd* v. *Pearson*, 128 U. S. 1, 20, 21, 22, where the question was discussed whether the right of a State to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the State and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, did not constitute an unauthorized interference with the right of Congress to regulate commerce. And Mr. Justice Lamar remarked: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufacturers, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short,

every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the [15] South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management. . . . The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantage of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be

difficult to imagine." And see *Veazie* v. *Moor*, 14 How. 568, 574.

In *Gibbons* v. *Ogden*, *Brown* v. *Maryland*, and other cases [16] often cited, the state laws, which were held inoperative, were instances of direct interference with, or regulations of, interstate or international commerce; yet in *Kidd* v. *Pearson* the refusal of a State to allow articles to be manufactured within her borders even for export was held not to directly affect external commerce, and state legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was not direct.

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from

the provisions applicable where Congress might exercise mu-[17]nicipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.

The Circuit Court declined, upon the pleadings and proofs, [18] to grant the relief prayed, and dismissed the bill, and

we are of opinion that the Circuit Court of Appeals did not err in affirming that decree.

Decree affirmed.

MR. JUSTICE HARLAN, dissenting.

Prior to the 4th day of March, 1892, the American Sugar Refining Company, a corporation organized under a general statute of New Jersey for the purpose of buying, manufacturing, refining, and *selling sugar in different parts of the country*, had obtained the control of *all* the sugar refineries in the United States except five, of which four were owned and operated by Pennsylvania corporations—the E. C. Knight Company, the Franklin Sugar Refining Company, Spreckels' Sugar Refining Company, and the Delaware Sugar House—and the other, by the Revere Sugar Refinery of Boston. These five corporations were all in active competition with the American Sugar Refining Company and with each other. The product of the Pennsylvania companies was about thirty-three per cent, and that of the Boston company about two per cent, of the entire quantity of sugar refined in the United States.

In March, 1892, by means of contracts or arrangements with stockholders of the four Pennsylvania companies, the New Jersey corporation—using for that purpose its own stock—purchased the stock of those companies, and thus obtained absolute control of the entire business of sugar refining in the United States except that done by the Boston company, which is too small in amount to be regarded in this discussion.

"The object," the court below said, "in purchasing the Philadelphia refineries was to obtain a greater influence or *more perfect control* over *the business* of refining *and selling* sugar *in this country*." This characterization of the object for which this stupendous combination was formed is properly accepted in the opinion of the court as justified by the proof. I need not therefore analyze the evidence upon this point. In its consideration of the important constitutional question presented, this court assumes on the record before us **[19]** that the result of the transactions disclosed by the pleadings and proof was the creation of a monopoly in the

manufacture of a necessary of life. If this combination, so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the national government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling in their own interest, the entire trade *among the States* in food products that are essential to the comfort of every household in the land.

The court holds it to be vital in our system of government to recognize and give effect to both the commercial power of the nation and the police powers of the States, to the end that the Union be strengthened and the autonomy of the States preserved. In this view I entirely concur. Undoubtedly, the preservation of the just authority of the States is an object of deep concern to every lover of his country. No greater calamity could befall our free institutions than the destruction of that authority, by whatever means such a result might be accomplished. "Without the States in union," this court has said, "there could be no such political body as the United States." *Lane County* v. *Oregon*, 7 Wall. 71, 76. But it is equally true that the preservation of the just authority of the General Government is essential as well to the safety of the States as to the attainment of the important ends for which that government was ordained by the People of the United States; and the destruction of *that* authority would be fatal to the peace and well-being of the American people. The Constitution which enumerates the powers committed to the nation for objects of interest to the people of all the States should not, therefore, be subjected to an interpretation so rigid, technical, and narrow, that those objects cannot be accomplished. Learned counsel in *Gibbons* v. *Ogden*, 9 Wheat. 1, 187, having suggested that the Constitution should be strictly construed, this court, speaking by Chief Justice Marshall, said that when the original States "converted their league into a **[20]** government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature empowered to enact laws

on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected." "What do gentlemen mean," the court inquired, "by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, one might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument—for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent—then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded." p. 188. On the same occasion the principle was announced that the objects for which a power was granted to Congress, especially when those objects are expressed in the Constitution itself, should have great influence in determining the extent of any given power.

Congress is invested with power to regulate commerce with foreign nations and among the several States. The power to regulate is the power to prescribe the rule by which the subject regulated is to be governed. It is one that must be exercised whenever necessary throughout the territorial limits of the several States. *Cohens* v. *Virginia*, 6 Wheat. 264, 413. The power to make these regulations "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." It is plenary because vested in Congress "as absolutely as it [21] would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." It may be exercised "whenever the subjects exists." *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, 196. In his concurring opinion in that case,

Mr. Justice Johnson observed that the grant to Congress of the power to regulate commerce carried with it the whole subject, leaving nothing for the State to act upon, and that "if there was any one object riding over every other in the adoption of the Constitution, it was to keep commercial intercourse among the States free from *all* invidious and partial restraints." p. 231. "In all commercial regulations we are one and the same people." Mr. Justice Bradley, speaking for this court, said that the United States are but one country, and are and must be subject to one system of regulations in respect to interstate commerce. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 494.

What is commerce among the States? The decisions of this court fully answer the question. "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It does not embrace the completely interior traffic of the respective States—that which is "carried on between man and man in a State, or between different parts of the same State and which does not extend to or affect other States"—but it does embrace "every species of commercial intercourse" between the United States and foreign nations and among the States, and, therefore, it includes such traffic or trade, buying, selling, and interchange of commodities, as directly affects or necessarily involves the interests of the People of United States. "Commerce, as the word is used in the Constitution, is a unit," and "cannot stop at the external boundary line of each State, but may be introduced into the interior." "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, *and to those internal concerns which affect the States generally*."

These principles were announced in *Gibbons* v. *Ogden*, and have often been approved. It is the settled doctrine of this [22] court that interstate commerce embraces something more than the mere physical transportation of articles of property, and the vehicles or vessels by which such transportation is effected. In *County of Mobile* v. *Kimball*, 102 U. S. 691, 702, it was said that "commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including, in these terms, naviga-

tion and the transportation and transit of persons and property, *as well as* the purchase, sale, and exchange of commodities." In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203, the language of the court was: "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, *as well as* the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions." In *Kidd* v. *Pearson*, 128 U. S. 1, 20, it was said that "the buying and selling, and the transportation *incidental thereto* constitute commerce." Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations.

In the light of these principles, determining as well the scope of the power to regulate commerce among the States as the nature of such commerce, we are to inquire whether the act of Congress of July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, is repugnant to the Constitution.

By that act "every contract, combination in the form of trust *or otherwise*, or conspiracy, in restraint of trade or commerce *among the several States* or with foreign nations," is declared to be illegal, and every person making any such contract, or engaging in any such combination or conspiracy, **[23]** is to be deemed guilty of a misdemeanor, and punishable, on conviction, by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court. § 1. It is also made a misdemeanor, punishable in like manner, for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce *among the*

several States or with foreign nations." § 2. The act also declares illegal "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories or any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations," and prescribes the same punishments for every person making any such contract, or engaging in any such combination or conspiracy. § 3.

The fourth section of the act is in these words: "Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

It would seem to be indisputable that no *combination* of corporations or individuals can, *of right*, impose unlawful restraints upon *interstate* trade, whether upon transportation or upon such interstate intercourse and traffic as precede trans- **[24]** portation, any more than it can, *of right*, impose unreasonable restraints upon the completely internal traffic of a State. The supposition cannot be indulged that this general proposition will be disputed. If it be true that a *combination* of corporations or individuals may, so far as the power of Congress is concerned, subject interstate trade, in any of its stages, to unlawful restraints, the conclusion is inevitable that the Constitution has failed to accomplish

one primary object of the Union, which was to place commerce *among the States* under the control of the common government of all the people, and thereby relieve or protect it against burdens or restrictions imposed, by whatever authority, for the benefit of particular localities or special interests.

The fundamental inquiry in this case is, What, in a legal sense, is an unlawful restraint of trade?

Sir William Erle, formerly Chief Justice of the Common Pleas, in his essay on the Law Relating to Trades Unions, well said that "restraint of trade, according to a general principle of the common law, is unlawful;" that "at common law every person has individually, and *the public also have collectively*, a right to require that *the course of trade* should be kept free *from unreasonable obstruction;*" and that "the right to a free course for trade is of great importance to commerce and productive industry, and has been carefully maintained by those who have administered the common law." pp. 6, 7, 8.

There is a partial restraint of trade which, in certain circumstances, is tolerated by the law. The rule upon that subject is stated in *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64, 66, where it was said that "an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. *Horner* v. *Graves*, 7 Bing. 735, 743. A contract, even on good consideration, not to use a trade anywhere in England is held void in that country as being too general a restraint of trade."

[25] But a general restraint of trade has often resulted from *combinations* formed for the purpose of controlling prices by destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open, free competition. Combinations of this character have frequently been the subject of judicial scrutiny, and have always been condemned as illegal because of their necessary tendency to

restrain trade. Such combinations are against common right and are crimes against the public. To some of the cases of that character it will be well to refer.

In *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Penn. St. 173, 184, 186, 187, the principal question was as to the validity of a contract made between five coal corporations of Pennsylvania, by which they divided between themselves two coal regions of which they had the control. The referee in the case found that those companies acquired under their arrangement the power to control the entire market for bituminous coal in the northern part of the State, and their combination was, therefore, a restraint upon trade and against public policy. In response to the suggestion that the real purpose of the combination was to lessen expenses, to advance the quality of coal, and to deliver it in the markets intended to be supplied in the best order to the consumer, the Supreme Court of Pennsylvania said: "This is denied by the defendants; but it seems to us it is immaterial whether these positions are sustained or not. Admitting their correctness, it does not follow that these advantages redeem the contract from the obnoxious effects so strikingly presented by the referee. The important fact is that these companies control this immense coal field; that it is the great source of supply of bituminous coal to the State of New York and large territories westward; that by this contract they control the price of coal in this extensive market, and make it bring sums it would not command if left to the natural laws of trade; that it concerns an article of prime necessity for many uses; that its operation is general in this large region, and affects all who use coal as a fuel, and this is accomplished by a combination of all the companies engaged in this branch of business **[26]** in the large region where they operate. The combination is wide in scope, general in its influence, and injurious in effects. These being its features, the contract is against public policy, illegal, and therefore void." Again, in the same case: "The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit, the combination resorted to by these five companies. Singly

each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offence. 'I take it,' said Gibson, J., 'a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the [27] latter, whether of extortion or of mischief.' *Commonwealth* v. *Carlisle*, Brightly, (Penn.,) 40. In all such combinations where the purpose is injurious or unlawful, the gist of the offence is the conspiracy. Men can often do by the combination of many what severally no one could accomplish, and even what when done by one would be innocent." "There is a potency in numbers when combined, which the law cannot overlook, where injury is the consequence."

This case in the Supreme Court of Pennsylvania was cited with approval in *Arnot* v. *Pittston & Elmira Coal Co.*, 68 N. Y. 558, 565, which involved the validity of a contact between two coal companies, the object and effect of which was to give one of them the monopoly of the trade in coal in a particular region, by which the price of that commodity could be artificially enhanced. The Court of Appeals of New York held that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal. . . . If they should be sustained, the prices of articles of pure necessity, such as coal, flour and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand. No illustration of the mischief of such contracts is perhaps more apt than a monopoly of anthracite coal, the region of the production of which is known to be limited." See also *Hooker* v. *Vandewater*, 4 Denio, 351, 352; *Stanton* v. *Allen*, 5 Denio, 434; *Saratoga Bank* v. *King*, 44 N. Y. 87.

In *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio St. 666, 672, the principal question was as to the legality of an association of substantially all the manufacturers of salt in a large salt producing territory. After adverting to the rule that contracts in general restraint of trade are against public policy, and to the agreement there in question, it was said: "Public policy, unquestionably, favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public. [28] . . . The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, the courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

In *Craft* v. *McConoughy*, 79 Illinois, 346, 349, 350, which related to a combination between all the grain dealers of a particular town to stifle competition, and to obtain control of the price of grain, the Supreme Court of Illinois said: "While the argument, upon its face, would seem to indicate that the parties had formed a copartnership for the purpose of trading in grain, yet, from the terms of the contract, and the other proof in the record, it is apparent that the true object was, to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage, and expense of shipment. In other words, the four firms, by a shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country. That the effect of this contract was to restrain the trade and commerce of the country, is a proposition that cannot be successfully denied. We understand it to be a well-settled rule of law, that an agreement in general restraint of trade is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable." "While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the right of competition, were all the **[29]** guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection."

These principles were applied in *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 269, 292, 297, which involved the validity of a corporation formed for the purpose of operating gas works, and of manufacturing and selling gas, and which, for the purpose of destroying competition, acquired the stock of four other gas companies, and thereby obtained a monopoly

in the business of furnishing illuminating gas to the city of Chicago and its inhabitants. The court, in declaring the organization of the company to be illegal, said: "The fact that the appellee, almost immediately after its organization, bought up a majority of the shares of stock of each of these companies, shows that it was not making a mere investment of surplus funds, but that it designed and intended to bring the four companies under its control, and by crushing out competition to monopolize the gas business in Chicago." "Of what avail," said the court, "is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?"

So, in *India Bagging Association* v. *Kock*, 14 La. Ann. 168, where the court passed upon the legality of an association of various commercial firms in New Orleans that were engaged in the sale of India bagging, it was said: "The agreement between the parties was palpably and unequivocably a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

In *Santa Clara Mill & Lumber Co.* v. *Hayes*, 76 California, 387, 390, which related to a combination, the result of certain contracts among certain manufacturers, the court found that the object, purpose, and consideration of those contracts was to form a combination among all the manufacturers of lumber **[30]** at or near a particular place, for the sole purpose of increasing the price of that article, limiting the amount to be manufactured, and giving certain parties the control of all lumber manufactured near that place for the year 1881, and of the supply for that year in specified counties. It held the combination to be illegal, observing that "among the contracts illegal under the common law, because opposed to public policy, were contracts in general restraint of trade; contracts between individuals to prevent competition and keep up the price of articles of utility."

It further said that while the courts had nothing to do with the results naturally flowing from the laws of demand and supply, they would not respect agreements made for the purpose of "taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities."

A leading case on the question as to what combinations are illegal as being in general restraint of trade, is *Richardson* v. *Buhl*, 77 Michigan, 632, 635, 657, 660, which related to certain agreements connected with the business and operations of the Diamond Match Company. From the report of the case it appears that that company was organized, under the laws of Connecticut, for the purpose of uniting in one corporation all the match manufactories in the United States, and to monopolize and control the business of making all the friction matches in the country, and establish the price thereof. To that end it became necessary, among other things, to buy many plants that had become established or were about to be established, as well as the property used in connection therewith. Chief Justice Sherwood of the Supreme Court of Michigan said: "The sole object of the corporation is to make money by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation—an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or neces- [31] sities of over 60,000,000 people. The article thus completely under their control, for the last fifty years, has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country. It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes and in carrying out its object that the contract in this case was made between those parties, which we are now asked to aid in enforcing. Monopoly in trade, or in any kind of business

in this country, is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise or public work under governmental control in the interest of the public. Its tendency is, however, destructive of free institutions and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution, and is not allowed to exist under express provisions in several of our state constitutions. . . . All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies and intolerable; and ought to receive the condemnation of all courts."

In the same case, Mr. Justice Champlin, with whom Mr. Justice Campbell concurred, said: "There is no doubt that all the parties to this suit were active participants in perfecting the combination called 'The Diamond Match Company,' and that the present dispute grows out of that transaction, and is the fruit of the scheme by which all competition in the manufacture of matches was stifled, opposition in the business crushed, and the whole business of the country in that line engrossed by the Diamond Match Company. Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. [32] The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful and against public policy." See also *Raymond* v. *Leavitt*, 46 Michigan, 447, and *Texas Standard Oil Co.* v. *Adoue*, 83 Texas, 650.

This extended reference to adjudged cases relating to unlawful restraints upon the interior traffic of a State has been made for the purpose of showing that a combination such as that organized under the name of the American Sugar Refining Company has been uniformly held by the courts of the States to be against public policy and illegal because of its

necessary tendency to impose improper restraints upon trade. And such, I take it, would be the judgment of any Circuit Court of the United States in a case between parties in which it became necessary to determine the question. The judgments of the state courts rest upon general principles of law, and not necessarily upon statutory provisions expressly condemning restraints of trade imposed by or resulting from combinations. Of course, in view of the authorities, it will not be doubted that it would be competent for a State, under the power to regulate its domestic commerce and for the purpose of protecting its people against fraud and injustice, to make it a public offence punishable by fine and imprisonment, for individuals or corporations to make contracts, form combinations, or engage in conspiracies, which unduly restrain trade or commerce carried on within its limits, and also to authorize the institution of proceedings for the purpose of annulling contracts of that character, as well as of preventing or restraining such combinations and conspiracies.

But there is a trade among the several States which is distinct from that carried on within the territorial limits of a State. The regulation and control of the former is committed by the national Constitution to Congress. Commerce among the States, as this court has declared, is a unit, and in respect of *that* commerce this is one country, and we are one people. It may be regulated by rules applicable to every part of the United States, and state lines and state jurisdiction cannot **[33]** interfere with the enforcement of such rules. The jurisdiction of the general government extends over every foot of territory within the United States. Under the power with which it is invested, Congress may remove unlawful obstructions, of whatever kind, to the free course of trade among the States. In so doing it would not interfere with the "autonomy of the States," because the power thus to protect interstate commerce is expressly given by the people of all the States. Interstate intercourse, trade, and traffic is absolutely free, except as such intercourse, trade, or traffic may be incidentally or indirectly affected by the exercise by the States of their reserved police powers. *Sherlock* v. *Alling*, 93 U. S. 99, 103. It is the Constitution, the supreme law of the land, which invests Congress with power to protect commerce among the States against burdens and exactions arising from unlawful restraints by whatever authority imposed. Surely a right secured or granted by that instrument is under the protection of the government which that instrument creates. Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405.

It has been argued that a combination between corporations of different States, or between the stockholders of such corporations, with the object and effect of controlling not simply the manufacture but the price of refined sugar throughout the whole of the United States—which is the case now before us—cannot be held to be in restraint of "commerce among the States" and amenable to national authority, without conceding that the general government has authority to say what shall and what shall not be *manufactured* in the several States. **[34]** *Kidd* v. *Pearson*, 128 U. S. 1, was cited in argument as supporting that view. In that case the sole question was, whether the State of Iowa could forbid the *manufacture* within its limits of ardent spirits intended for sale ultimately in other States. This court held that the manufacture of intoxicating liquors in a State is none the less a business within the State subject to state control because the manufacturer may intend, at his convenience, to export such liquors to foreign countries or to other States. The authority of the States over the manufacture of strong drinks within their respective jurisdictions was referred to their plenary power, never surrendered to the national government, of providing for the health, morals, and safety of their people.

That case presented no question as to a *combination* to monopolize the sale of ardent spirits manufactured in Iowa to be sold in other States—no question as to combinations

in restraint of trade as involved in the buying and selling of articles that are intended to go, and do go, and will always go, into commerce throughout the entire country, and are used by the people of all the States, and the making or manufacturing of which no State could forbid consistently with the liberty that every one has of pursuing, without undue restrictions, the ordinary callings of life. There is no dispute here as to the lawfulness of the business of refining sugar, *apart from the undue restraint which the promoters of such business, who have combined to control prices, seek to put upon the freedom of interstate traffic in that article.*

It may be admitted that an act which did nothing more than forbid, and which had no other object than to forbid the *mere* refining of sugar in any State, would be in excess of any power granted to Congress. But the act of 1890 is not of that character. It does not strike at the manufacture simply of articles that are legitimate or recognized subjects of commerce, but at *combinations* that unduly restrain, because they monopolize, *the buying and selling of articles* which are to go into interstate commerce. In *State* v. *Stewart*, 59 Vermont, 273, 286, it was said that if a *combination* of persons "seek to restrain trade, or tend to the destruction of the material prop- **[35]** erty of the country, they work injury to the whole people." And in *State* v. *Glidden*, 55 Connecticut, 46, 75, the court said: "Any one man, or any one of several men acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase. . . . The combination becomes dangerous and subversive of the rights of others, and the law wisely says it is a crime." Chief Justice Gibson well said in *Commonwealth* v. *Carlisle*, Brightly, (Penn.,) 36, 41: "There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and action, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest or that of any other individual beyond the limits of fair competition; but

the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual." These principles underlie the act of Congress, which has for its sole object the protection of such trade and commerce *as the Constitution confides to national control*, and the question is presented whether the *combination* assailed by this suit is an unlawful restraint upon interstate trade in a necessary article of food which, as every one knows, has always entered, now enters and must continue to enter, in vast quantities, into commerce among the States.

In *Kidd* v. *Pearson* we recognized, as had been done in previous cases, the distinction between the mere transportation of articles of interstate commerce and the *purchasing* and *selling* that *precede transportation.* It is said that manufacture precedes commerce and is not a part of it. But it is equally true that when manufacture ends, that which has been manu- **[36]** factured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation, and are as much commercial intercourse, where articles are bought *to be* carried from one State to another, as is the manual transportation of such articles after they have been so purchased. The distinction was recognized by this court in *Gibbons* v. *Ogden*, where the principal question was whether commerce included navigation. Both the court and counsel recognized buying and selling or barter *as included in commerce.* Chief Justice Marshall said that the mind can scarcely conceive a system for regulating commerce, which was "*confined* to prescribing rules for the conduct of indivuals in the actual employment of buying and selling, or of barter." pp. 189, 190.

The power of Congress covers and protects the absolute freedom of such intercourse and trade among the States as may or must succeed manufacture and precede transportation from the place of purchase. This would seem to be conceded;

for, the court in the present case expressly declare that "*contracts to buy*, sell, or exchange goods *to be transported among the several States*, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the States, or put in the way of transit, *may be regulated*, but this is *because they form part of interstate trade or commerce*." Here is a direct admission—one which the settled doctrines of this court justify—that contracts to buy and the purchasing of goods *to be transported from one State to another*, and transportation, with its instrumentalities, are all *parts* of interstate trade or commerce. Each part of such trade is then under the protection of Congress. And yet, by the opinion and judgment in this case, if I do not misapprehend them, Congress is without power to protect the commercial intercourse that such purchasing necessarily involves against the restraints and burdens arising from the existence of *combinations* that meet purchasers, from whatever State they come, with the threat—for it is nothing more nor less than a threat—that they *shall not* purchase what [37] they desire to purchase, *except at the prices fixed by such combinations*. A citizen of Missouri has the right to go in person, or send orders, to Pennsylvania and New Jersey for the purpose of purchasing refined sugar. But of what value is that right if he is confronted in those States by a vast *combination* which absolutely controls the price of that article by reason of its having acquired all the sugar refineries in the United States in order that they may fix prices in their own interest exclusively?

In my judgment, the citizens of the several States composing the Union are entitled, of right, to buy goods in the State where they are manufactured, or in any other State, without being confronted by an illegal combination whose business extends throughout the whole country, which by the law everywhere is an enemy to the public interests, and which prevents such buying, except at prices arbitrarily fixed by it. I insist that the free course of trade among the States cannot coexist with such combinations. When I speak of trade I mean the buying and selling of articles of every kind that are recognized articles of interstate commerce. Whatever improperly obstructs the free course of interstate

intercourse and trade, as involved in the buying and selling of articles to be carried from one State to another, may be reached by Congress, under its authority to regulate commerce among the States. The exercise of that authority so as to make trade among the States, in all recognized articles of commerce, absolutely free from unreasonable or illegal restrictions imposed by combinations, is justified by an express grant of power to Congress and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State.

Undue restrictions or burdens upon the purchasing of goods, in the market for sale, to be transported to other States, cannot be imposed even by a State without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a *State* within whose limits the business of refining sugar is exclusively carried on may not constitutionally im- [38] pose burdens upon purchases of sugar *to be transported to other States*, how comes it that combinations of corporations or individuals, within the same State, may not be prevented by the national government from putting unlawful restraints upon the purchasing of that article *to be carried from the State in which such purchases are made?* If the national power is competent to repress *State* action in restraint of interstate trade as it may be involved in purchases of refined sugar to be transported from one State to another State, surely it ought to be deemed sufficient to prevent unlawful restraints attempted to be imposed by combinations of corporations or individuals upon those identical purchases; otherwise, illegal combinations of corporations or individuals may—so far as national power and interstate commerce are concerned—do, with impunity, what no State can do.

Suppose that a suit were brought in one of the courts of the United States—jurisdiction being based, it may be, alone upon the diverse citizenship of the parties—to enforce the stipulations of a written agreement, which had for its object to acquire the possession of all the sugar refineries in the United States, in order that those engaged in the combina-

tion might obtain the entire control of the business of refining and selling sugar throughout the country, and thereby to increase or diminish prices as the particular interests of the combination might require. I take it that the court, upon recognized principles of law common to the jurisprudence of this country and of Great Britain, would deny the relief asked and dismiss the suit upon the ground that the necessary tendency of such an agreement and combination was to restrain, not simply trade that was completely internal to the State in which the parties resided, but trade and commerce among all the States, and was, therefore, against public policy and illegal. If I am right in this view, it would seem to follow, necessarily, that Congress could enact a statute forbidding such combinations so far as they affected interstate commerce, and provide for their suppression as well through civil proceedings instituted for that purpose, as by penalties against those engaged in them.

[39] In committing to Congress the control of commerce with foreign nations and among the several States, the Constitution did not define the means that may be employed to protect the freedom of commercial intercourse and traffic established for the benefit of all the people of the Union. It wisely forbore to impose any limitations upon the exercise of that power except those arising from the general nature of the government, or such as are embodied in the fundamental guarantees of liberty and property. It gives to Congress, in express words, authority to enact all laws necessary and proper for carrying into execution the power to regulate commerce; and whether an act of Congress, passed to accomplish an object to which the general government is competent, is within the power granted, must be determined by the rule announced through Chief-Justice Marshall three-quarters of a century ago, and which has been repeatedly affirmed by this court. That rule is: "The sound construction of the Constitution must allow to the national legislature the discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are

appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. The end proposed to be accomplished by the act of 1890 is the protection of trade and commerce among the States against unlawful restraints. Who can say that that end is not legitimate or is not within the scope of the Constitution? The means employed are the suppression, by legal proceedings, of combinations, conspiracies, and monopolies, which by their inevitable and admitted tendency, improperly restrain trade and commerce among the States. Who can say that such means are not appropriate to attain the end of freeing commercial intercourse among the States from burdens and exactions imposed upon it by combinations which, under principles long recognized in this country as well as at the **[40]** common law, are illegal and dangerous to the public welfare? What clause of the Constitution can be referred to which prohibits the means thus prescribed in the act of Congress?

It may be that the means employed by Congress to suppress combinations that restrain interstate trade and commerce are not all or the best that could have been devised. But Congress, under the delegation of authority to enact laws necessary and proper to carry into effect a power granted, is not restricted to the employment of those means "without which the end would be entirely unattainable." "To have prescribed the means," this court has said, "by which government should, in all future time, execute its powers, would have been to change entirely the character of that instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." Again: "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to

inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415, 423.

By the act of 1890, Congress subjected to forfeiture "any property owned under any contract or by any combination, or pursuant to any conspiracy, (and being the subject thereof,) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country." It was not deemed wise to subject such property to forfeiture before transportation began or after it ended. If it be suggested that Congress might have prohibited the *transportation* from the State in which they are manufactured of any articles, by whomsoever at the time owned, that had been **[41]** manufactured by combinations formed to monopolize some designated part of trade or commerce among the States, my answer is that it is not within the functions of the judiciary to adjudge that Congress shall employ particular means in execution of a given power, simply because such means are, in the judgment of the courts, best conducive to the end sought to be accomplished. Congress, in the exercise of its discretion as to choice of means conducive to an end to which it was competent, determined to reach that end through civil proceedings instituted to prevent or restrain these obnoxious combinations in their attempts to burden interstate commerce by obstructions that interfere *in advance of transportation* with the free course of trade between the people of the States. In other words, Congress sought to prevent the coming into existence of combinations, the purpose or tendency of which was to impose unlawful restraints upon interstate commerce.

There is nothing in conflict with these views in *Coe* v. *Errol*, 116 U. S. 517, 529. There the question was whether certain logs cut in New Hampshire, and hauled to a river that they might be transported to another State, were liable to be *taxed* in the former State before actual transportation to the latter State began. The court held that the logs might be taxed while they remained in the State of their origin as part of the general mass of property there; that "for *this purpose*"—taxation—the property did not pass from the jurisdiction of the State in which it was until transportation began. The scope of the decision is clearly indicated by the following clause in the opinion of Mr. Justice Bradley: "How can property thus situated, to wit, deposited or stored at the place of entrepôt for future exportation, be taxed in the regular way as part of the property of the State? The answer is plain. It can be taxed as all other property is taxed, in the place where it is found, if taxed or assessed for taxation in the usual manner in which such property is taxed; and not singled out to be assessed by itself in an unusual and exceptional manner because of its situation." As we have now no question as to the *taxation* of articles manufactured by one of the combinations condemned by the act of Congress, and **[42]** as no one has suggested that the State in which they may be manufactured could not *tax* them *as property* so long as they remained within its limits, and before transportation of them to other States began, I am at a loss to understand how the case before us can be affected by a decision that personal property, while it remains in the State of its origin, although it is to be sent at a future time to another State, is within the jurisdiction of the former State for purposes of taxation.

The question here relates to restraints upon the freedom of interstate trade and commerce imposed by illegal combinations. After the fullest consideration I have been able to bestow upon this important question, I find it impossible to refuse my assent to this proposition: Whatever a State may do to protect its completely interior traffic or trade against unlawful restraints, the general government is empowered to do for the protection of the people of all the States—for this purpose one people—against unlawful restraints imposed upon interstate traffic or trade in articles that are to enter into commerce among the several States. If, as already shown, a State may prevent or suppress a *combination*, the effect of which is to subject its domestic trade to the restraints necessarily arising from their obtaining the absolute control of the sale of a particular article in general use by the community, there ought to be no hesitation in allowing to Congress the right to suppress a similar *combination* that imposes a like

unlawful restraint upon interstate trade and traffic in that article. While the States retain, because they have never surrendered, full control of their completely internal traffic, it was not intended by the framers of the Constitution that any part of interstate commerce should be excluded from the control of Congress. Each State can reach and suppress combinations so far as they unlawfully restrain its interior trade, while the national government may reach and suppress them so far as they unlawfully restrain trade among the States.

While the opinion of the court in this case does not declare the act of 1890 to be unconstitutional, it defeats the main object for which it was passed. For it is, in effect, held that the statute would be unconstitutional if interpreted as em- **[43]** bracing such unlawful restraints upon the purchasing of goods in one State to be carried to another State as necessarily arise from the *existence* of combinations formed for the purpose and with the effect, not only of monopolizing the ownership of all such goods in every part of the country, but of controlling the prices for them in all the States. This view of the scope of the act leaves the public, so far as national power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one State to another State. I cannot assent to that view. In my judgment, the general government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one State only, but throughout the entire country, in the buying and selling of articles—especially the necessaries of life—that go into commerce among the States. The doctrine of the autonomy of the States cannot properly be invoked to justify a denial of power in the national government to meet such an emergency, involving as it does that freedom of commercial intercourse among the States which the Constitution sought to attain.

It is said that there are no proofs in the record which indicate an *intention* upon the part of the American Sugar Refining Company and its associates to put a restraint upon trade or commerce. Was it necessary that formal proof be made that the persons engaged in this combination admitted,

in words, that they intended to restrain trade or commerce? Did any one expect to find in the written agreements which resulted in the formation of this combination a distinct expression of a purpose to restrain interstate trade or commerce? Men who form and control these combinations are too cautious and wary to make such admissions orally or in writing. Why, it is conceded that the object of this combination was to obtain control of the business of making and selling refined sugar throughout the entire country. Those interested in its operations will be satisfied with nothing less than to have the whole population of America pay tribute to them. That object **[44]** is disclosed upon the very face of the transactions described in the bill. And it is proved—indeed, it is conceded—that that object has been accomplished to the extent that the American Sugar Refining Company now controls ninety-eight per cent of all the sugar refining business in the country, and therefore controls the price of that article everywhere. Now, the *mere existence* of a combination having such an object and possessing such extraordinary power is itself, under settled principles of law—there being no adjudged case to the contrary in this country—a direct restraint of trade in the article for the control of the sales of which in this country that combination was organized. And that restraint is felt in all the States, for the reason, known to all, that the article in question goes, was intended to go, and must always go, into commerce among the several States, and into the homes of people in every condition of life.

A decree recognizing the freedom of commercial intercourse as embracing the right to buy goods to be transported from one State to another, without buyers being burdened by unlawful restraints imposed by combinations of corporations or individuals, so far from disturbing or endangering, would tend to preserve the autonomy of the States, and protect the people of all the States against dangers so portentous as to excite apprehension for the safety of our liberties. If this be not a sound interpretation of the Constitution, it is easy to perceive that interstate traffic, so far as it involves the price to be paid for articles necessary to the comfort and well-being of the people in all the States, may pass under the

absolute control of overshadowing combinations having financial resources without limit and an audacity in the accomplishment of their objects that recognizes none of the restraints of moral obligations controlling the action of individuals; combinations governed entirely by the law of greed and selfishness—so powerful that no single State is able to overthrow them and give the required protection to the whole country, and so all-pervading that they threaten the integrity of our institutions.

We have before us the case of a combination which absolutely controls, or may, at its discretion, control the price of all [45] refined sugar in this country. Suppose another *combination*, organized for private gain and to control prices, should obtain possession of all the large flour mills in the United States; another, of all the grain elevators; another, of all the oil territory; another, of all the salt-producing regions; another, of all the cotton mills; and another, of all the great establishments for slaughtering animals, and the preparation of meats. What power is competent to protect the people of the United States against such dangers except a national power—one that is capable of exerting its sovereign authority throughout every part of the territory and over all the people of the nation?

To the general government has been committed the control of commercial intercourse among the States, to the end that it may be free at all times from any restraints except such as Congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one State. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish. "Powerful and ingenious minds," this court has said, "taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that

the original powers of the States are retained if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived." *Gibbons* v. *Ogden*, 9 Wheat. 1, 222.

While a decree annulling the contracts under which the [46] combination in question was formed, may not, in view of the facts disclosed, be effectual to accomplish the object of the act of 1890, I perceive no difficulty in the way of the court passing a decree declaring that that combination imposes an unlawful restraint upon trade and commerce among the States, and perpetually enjoining it from further prosecuting any business pursuant to the unlawful agreements under which it was formed or by which it was created. Such a decree would be within the scope of the bill, and is appropriate to the end which Congress intended to accomplish, namely, to protect the freedom of commercial intercourse among the States against combinations and conspiracies which impose unlawful restraints upon such intercourse.

For the reasons stated I dissent from the opinion and judgment of the court.

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[637] DUEBER WATCH-CASE MANUF'G CO. *v.* E. HOWARD WATCH & CLOCK CO. ET AL.[a]

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

[66 Fed., 637.]

MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE—ANTI-TRUST LAW OF 1892.—An action was brought in the United States circuit court for the Southern district of New York by a manufacturing company against numerous competitors, in various states, alleging

[a] Demurrer sustained by Circuit Court, Southern district of New York (55 Fed., 851). See p. 178.

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the formation of a combination, and an attempt to create a monopoly, "in violation of the statutes of this state and the United States," whereby plaintiff's business was injured. The formation of the combination was laid on and prior to November 16, 1887, but it was alleged that after the passage of the act of congress of July 2, 1890, defendants ratified, renewed, and confirmed their previous contracts, combinations, etc. Judgment was demanded for treble damages "under and by virtue of the statute." Plaintiff was not a resident of the district where the action was brought, and the case was heard upon the demurrer of a defendant who was also a nonresident, but was "found" within the district; thus making a case in which jurisdiction is expressly conferred by section 7 of the said act of July 2, 1890. The demurrer was sustained, and in all the assignments of error it was contended that the facts charged in the complaint made out a case under that act. *Held*, that the action must be deemed to be founded upon the said act of July 2, 1890.[a]

SAME.—In an action brought by a manufacturer of watch cases against numerous other manufacturers thereof, residing in various states, to recover treble damages under the act of congress of July 2, 1890 (26 Stat. 209), prohibiting unlawful restraints and monopolies of interstate commerce, the complaint alleged that the plaintiff operated an extensive factory, first in Kentucky and afterwards in Ohio; that previous to November 16, 1887, it sold all its goods to a great number of dealers "throughout the United States and Canada"; that prior to that date defendants had agreed with each other to maintain arbitrary and fixed prices for their watch cases; that, for the purpose of compelling plaintiff to join with them therein, defendants on said date mutually agreed that they would not thereafter sell any goods to persons who bought or sold goods manufactured by plaintiff; that they caused notice thereof to be served upon the many dealers [638] in such goods throughout the United States and Canada, who had formerly dealt in plaintiff's goods, whereupon many of such dealers withdrew their patronage from plaintiff; that after the passage of the act of July 2, 1890, defendants ratified, renewed, and confirmed their previous agreements, and served notice of such ratification upon all said dealers in plaintiff's goods, whereby said dealers were compelled to refuse to purchase plaintiff's watch cases. *Held*, that the complaint failed to state a cause of action under the statute; Lacombe, Circuit Judge, holding that no monopolizing or combination to monopolize interstate commerce, contrary to the second section of the act, was shown, for the reason that the allegations did not preclude the inference that each defendant may have sold his entire product in the state where it was manufactured; and that

[a] Syllabus and statement copyrighted, 1895, by West Publishing Co.

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the contracts did not produce an unlawful restraint of trade, under the first section, because the combination and agreement to fix arbitrary prices did not appear to include all manufacturers of watch cases, but was only a partial restraint in respect to an article not of prime necessity, and therefore came within the recognized limits of lawful contracts; and that the further agreement not to sell to customers of plaintiff was a lawful means of enlarging and protecting the business of the defendants. Shipman, Circuit Judge, concurring on the more technical ground that the acts of the defendants, whether viewed as an attempt to create a monopoly or as a contract in restraint of trade, were not shown to concern interstate commerce, because there were no allegations showing the residence of any dealers who withdrew their patronage from complainant, and it therefore did not directly appear that any of them resided outside of the state where plaintiff's goods were manufactured. Wallace, Circuit Judge, dissenting on the ground that the allegations were sufficient to show that the attempts to monopolize and restrain did operate upon interstate commerce; and that, while the contracts might not be unlawful in themselves, yet the purpose for which they were alleged to be made, namely, to compel plaintiff to join in the agreement for fixing arbitrary prices, and to injure and destroy its business if it refused to do so, was oppressive and unjust, and rendered the acts of defendants unlawful under both sections of the statute.

This was an action by the Dueber Watch-Case Manufacturing Company against the E. Howard Watch & Clock Company and numerous other individuals and corporations, to recover damages alleged to have been caused to plaintiff's business by the alleged unlawful acts and combinations of defendants. The case was first heard in the circuit court upon the demurrer of the E. Howard Watch & Clock Company to the first amended complaint, and the demurrer was sustained, the opinion of the circuit court therein being reported in 55 Fed. 851. A demurrer was afterwards sustained to the second amended complaint, but no opinion was written, and plaintiff now brings error to review this latter judgment.

Robert Sewell, for plaintiff in error.

Edward B. Hill and *Elihu Root*, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

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LACOMBE, Circuit Judge.

The complainant corporation is a citizen of Ohio, the demurring defendant corporation a citizen of Massachusetts, engaged in the business of manufacturing and selling watch movements, and having a place of business in the city of New York, state of New York. Of the nineteen other defendants, ten are individuals whose citizenship is not set forth in the complaint. It is averred that they are engaged in business, two of them in New York City under one firm name, two others in **[639]** Philadelphia and New York City under another firm name, three others in the city of New York under another firm name, and three others in Cincinnati under still another firm name. The nine remaining defendants are corporations, two of them citizens of Massachusetts, two citizens of New York, two citizens of Connecticut, two citizens of Illinois, and one a citizen of Pennsylvania.

The complainant avers that plaintiff is a corporation duly created and existing under the laws of Ohio, and engaged in the business of manufacturing gold and silver watch cases. That at the times mentioned in the complaint it owned and operated an extensive factory at Newport, Ky., and subsequently at Canton, Ohio; that it maintained the same at great expense, and had the capacity to manufacture and offer for sale in the open market 25,000 watch cases per month. In the third paragraph it is averred "that prior to November 16, 1887, plaintiff had a ready market throughout the United States and Canada for all the goods it could manufacture, and in fact sold all of said goods to a great number of dealers therein throughout said territory, and thereby fully earned and realized to itself a substantial legitimate profit of at least $75,000 per annum." Next follow averments as to the incorporation and partnership of the several defendants, who, it is stated, are respectively engaged in the business of manufacturing or selling watches, watch cases, or watch movements. In the eighteenth paragraph it is averred that on or about November 16, 1887, the defendants, and others to plaintiff unknown, at and in the city of New York, mutually agreed together each for himself with

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all the others that "they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever who thereafter should buy or sell any goods manufactured by this plaintiff." It is further averred that thereafter defendants caused notice of this agreement or compact to be given to the many dealers in watches, watch cases, and watch movements throughout the United States and Canada; and gave said notices to "many of the then and theretofore purchasers and dealers in plaintiff's goods manufactured as aforesaid"; whereupon a large number of such purchasers and dealers withdrew their patronage, and ceased thereupon entirely to purchase and deal in any wise in plaintiff's goods. The complaint further alleges that after said November 16, 1887, defendants refused to sell their goods to purchasers of and dealers in plaintiff's goods who had offered to buy defendants' goods, stating as the reason for their refusal that said dealers also bought and sold and dealt in plaintiff's watches, notifying such purchasers and dealers that if they would promise not to deal in plaintiff's goods, then, and so long as they kept such promise, they might purchase the goods of the defendants or either of them; otherwise not. In the twenty-third paragraph it is alleged that prior to November 16, 1887, the defendants had agreed among themselves, "and which said agreement has been in operation and effect between them ever since, that they would agree upon and agree to maintain an arbitrary fixed price to the public for all the goods manufactured by them, and in pursuance of said agreement the said defendants had agreed **[640]** upon an arbitrary price, and fixed the same for all the goods manufactured by them." The agreement of November 16, 1887, is alleged to be "in addition to and furtherance of said prior agreement, and made and entered into for the sole purpose of compelling this plaintiff to join with them in said first-named agreement." All these acts of defendants are alleged to have been done "for the purpose of establishing a monopoly in the supply of watches to the public, contrary to the policy of the law, and in violation of the statutes of this state and the United States, and to cut off this plaintiff from any participation in such business unless it joined in

said illegal and vicious conspiracy, and the acts of defendants thereunder, in furtherance thereof, as alleged, and to crush competition, and enable the defendants to maintain the prices fixed as they pleased by them as aforesaid for their commodities with regard only to their private emolument and profit, contrary to the benefit of the public; the said defendants, by the said combination, conspiracy, and agreements and acts thereunder, maliciously intending to injure this plaintiff, and drive it out of business, and prevent it from selling its watch cases," etc. It is further alleged that "by the extended influence and power acquired by the combination over the trade" defendants forced and prevented persons from dealing with the plaintiff, or purchasing its goods, under the threat of a refusal themselves to deal with such purchasers; that said threats were effectual, and did prevent a great number of persons who otherwise would have purchased large quantities of the goods of the plaintiff from purchasing the same, and did effect in fact against the plaintiff a complete boycott and ostracism from the trade, and prevented the lawful and ordinary competition of business which plaintiff had a right to enjoy. The concluding paragraph of the complaint alleges that after the passage by congress of the act of July 2, 1890, "all the former purchasers and dealers in plaintiff's watch cases and other dealers in watch cases were, as plaintiff is informed and believes, ready and willing to buy large quantities of said plaintiff's goods, and this plaintiff would have regained all the business and the profits thereof whereof it had been deprived by the acts aforesaid of defendants; but that said defendants, after the passage of the said act of congress, ratified, confirmed, renewed, and continued the contracts, agreements, and combinations hereinbefore alleged, and in like manner, and with the same intention as hereinbefore alleged, served notices of their ratification, confirmation, renewal, and continuance of said agreements and combinations upon all said dealers in plaintiff's watch cases, whereby said dealers have continued to this day, forced by said renewed threats of defendants, and compelled thereby, and not otherwise, to refuse to purchase plaintiff's watch cases, or to deal anywise therein, whereby the said defendants illegally

and maliciously damaged the plaintiff in the sum of $150,000." Judgment is demanded, not for the $150,000, but, "under and by virtue of the statute of the United States hereinbefore referred to, for three times the amount of damages so sustained by it in the premises, to wit, for the sum of $450,000."

[641] The federal statute of July 2, 1890 (26 Stat. 209), declared upon in the complaint is entitled "An act to protect trade and commerce against unlawful restraints and monopolies." The relevant parts of this statute are as follows:

"Section 1. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal." [Then follow provisions declaring the act a misdemeanor, and providing for punishment.]

"Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be guilty of a misdemeanor." [Then follow provisions as to punishment therefor.]

"Sec. 7. Any person who shall be injured in his business by any other person or corporation by reason of anything forbidden or declared unlawful in this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

This action is manifestly one under the act of July 2, 1890. It is brought in a district where neither the plaintiff nor the demurring defendant resides, but where the demurring defendant is found. In the face of a complaint so framed as to present a cause of action under the statute, a defendant, if "found" here, could not object to the jurisdiction. It is expressly given by the seventh section. It would be manifestly unfair to permit a plaintiff to bring a defendant into this court on a complaint declaring upon the statute, and thereafter, when such defendant has failed to question its jurisdiction under the statute, and has appeared generally in the case, to transform the cause of action into one at common law, and insist that defendant has waived any objection to the jurisdiction. Moreover, although the complaint contains allegations as to combinations and threats long prior to the passage of the act of 1890, the averment of pecuniary damage to the plaintiff, which is specified in the twenty-seventh or concluding paragraph, is averred to have been sustained

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in consequence of the "renewed threats" of defendants (that is, those renewed after the passage of the act), which compelled dealers to refuse to purchase plaintiff's watch cases or to deal in any wise therein. Moreover, judgment is demanded, not for plaintiff's actual damages, but for treble damages, "under and by virtue of the statute." The counsel for plaintiff in error asserts in his filed brief that "the action is founded solely upon the act of congress passed July 2, 1890, the [seventh] section whereof expressly provides that the circuit court of the United States shall have exclusive jurisdiction of such action." There are 23 separate assignments of error, in each and all of which it is contended that the facts charged in the complaint make out a case under the act of 1890. Therefore, unless the complaint sets forth a cause of action under the act of 1890, the demurrer should be sustained.

The only acts of defendants as to which plaintiff can in this action contend that they are "forbidden or declared to be unlawful by this act" are those done after its passage. They are set forth in the twenty-seventh paragraph, and are as follows: (1) Defend- **[642]** ants "ratified, confirmed, renewed, and continued" an agreement between themselves, that they would agree upon and agree to maintain an arbitrary fixed price to the public for all the goods manufactured by them. (2) They "ratified. confirmed, renewed, and continued" an arbitrary price, and fixed the same for all goods manufactured by them. (3) They "ratified, confirmed, renewed, and continued" an agreement that they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever who thereafter should buy or sell any goods manufactured by the plaintiff. (4) They served notices of such ratification, confirmation, renewal, and continuance of these three agreements upon all those persons who were former dealers in paintiff's watch cases. The remaining averments of the twenty-seventh paragraph refer not to defendants' acts, but to the consequences of those acts; the principal consequence being that the former purchasers and dealers in plaintiff's watch cases and other dealers in watch cases were compelled to refuse to purchase plaintiff's goods.

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The question to be decided is whether these acts are within either the prohibition of the first section of the statute of 1890 as a contract or combination in "restraint of trade," or within the prohibition of the second section as a "monopolizing" or as an "attempt to monopolize." Whatever differences of opinion there may be as to the meaning of these words when used in this statute, there is and can be no dispute as to one qualification expressed in the act,—the trade or commerce restrained or monopolized or attempted to be monopolized must be interstate or international. The statute expressly so says, and, whatever its phraseology, it must be so construed if it is to stand, since it is only such trade and commerce that congress has authority to regulate. No monopolizing or attempt or combination or conspiracy to monopolize any part of such trade or commerce is set forth in the complaint. The several manufacturers defendant are charged with an attempt to secure to each of them a sale of his or its own products to the exclusion of those of the plaintiff, but there is nothing to show that each defendant does not sell his or its entire product in the very state where it is manufactured. The sale within a state of articles manufactured in the same state is no part of interstate trade or commerce. *U. S.* v. *E. C. Knight Co.* (Jan. 21, 1895) 15 Sup. Ct. 249. The circumstance that, after manufactured products are thus sold within the state, they may be again sold for introduction into another state, and thus become a subject of interstate commerce, does not change the situation, for it is only when a commodity has begun to move as an article of trade from one state to another that commerce in that commodity between states has commenced. *Coe* v. *Errol*, 116 U. S. 517, 6 Sup. Ct. 475. The complaint, therefore, fails to charge an offense against section 2 of the act of 1890.

The complaint alleges that the acts of defendants subsequent to July 2, 1890, have forced and compelled persons who theretofore dealt in plaintiff's goods to refuse to purchase the same, and avers that prior to November 16, 1887, plaintiff sold its goods to a **[643]** great number of dealers throughout the United States and Canada, plaintiff manufacturing such goods first in Kentucky, and afterwards in Ohio. And plaintiff's counsel contends that this sufficiently

charges such a restraint of interstate and international trade as is obnoxious to the first section of the statute. The phrase used in the act of 1890, viz. "restraint of trade," is no new one. It had theretofore been used by courts applying the doctrines of the common law in determining the validity of contracts. It is to be presumed that the lawmakers, when they chose this phrase, intended that it should have, when used in the statute, no other or different meaning from that which had always been given to it in judicial decisions and in the common understanding. The title indicates that the phrase is so used, for the act is described as one "to protect trade and commerce against unlawful restraints and monopolies"; and, though the title to an act cannot control its words, it may furnish some aid in showing what was in the mind of the legislator. *U. S.* v. *Palmer*, 3 Wheat. 610. The "restraint of trade" which is obnoxious to the provisions of the first section must be of such kind as was, before the passage of the act, recognized as unlawful. *In re Greene*, 52 Fed. 104; *U. S.* v. *Trans-Missouri Freight Ass'n*, 58 Fed. 58, 7 C. C. A. 15. It may be assumed that the total amount of any given commodity which will be purchased by a community is limited, and when several sellers of such commodity enter into a combination in the form of a partnership, and by ingenious advertising, or by the devices of business competition, or by the offer of favorable terms to buyers, enlarge their own trade in such commodity, they restrain to some extent the trade of one or more of their competitors therein. But no one, not even the plaintiff in error, contends that the statute forbids any such acts, although, if the words be taken with absolute literalness, the phrase "restraint of trade" is broad enough to cover them. A most elaborate discussion of the meaning of this phrase "restraint of trade," with a careful review of all the leading authorities bearing upon the question, is found in the opinion of the United States circuit court of appeals for the Eighth circuit in *U. S.* v. *Trans-Missouri Freight Ass'n*, 58 Fed. 58, 7 C. C. A. 15. The conclusion reached by that court—and on that branch of the case there was no dissent—is that where it is a question as to private parties engaged in private pursuits, and not dealing in staple commodities of prime necessity, "it is not the existence of

the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade." And that "contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon the trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some extent to check competition." A like statement of the law is found in *Navigation Co.* v. *Winsor*, 20 Wall. 64, 66, where the supreme court holds that "an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it. **[644]** In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made."

It remains only to inquire whether the contract or combination set out in the complaint is in restraint of interstate or international trade in the sense in which the phrase "restraint of trade" is used in the act of 1890. The first alleged unlawful action of defendants charged upon them subsequent to the passage of the act is a renewal and confirmation of an agreement among themselves to "maintain an arbitrary fixed price to the public for all the goods manufactured by them," and a carrying out of such agreement by thus fixing and maintaining a price. The goods in question are not articles of prime necessity, as were the flour, coal, and other staple commodities referred to in many of the cases cited upon the argument; nor were the manufacturing defendants engaged in any public or quasi public business, as were the railroads or the gaslighting companies referred to in other cases. Each one of the defendants had an undoubted right to determine for himself the price at which he would sell the goods he made, and he certainly does not lose that right by deciding to sell them at the same price at which a dozen or so of his competitors sell the goods which they make. Collectively the defendants owe no duty to any one of their competitors to regulate the price they fix for their goods so as not to interfere with the price he fixes for his own. And it is difficult to see how the public is injuri-

ously affected by any such agreement between the combining manufacturers. If the price so fixed is the normal and usual one theretofore prevailing, certainly the public cannot complain; still less if the price be reduced. If a combination of the capital and business abilities and factory appliances of many different manufacturing establishments enables them to produce an equally good output at a reduced cost, so that they can sell such output cheaper than any single manufacturer could, surely the public does not suffer. If, on the contrary, the combining defendants fix the price too high, they restrain their own trade only; the public will buy the goods it wants, not from them, but from their competitors. There are no averments in the complaint to show that the defendants are all, or even substantially all, of the manufacturers of watch cases in the United States, or even in any single one of the different states wherein their manufactories are located. For aught that appears, they represent but a small part of the watch-case industry, and there is nothing to prevent the number of their competitors from increasing to whatever extent the public demand for such goods may require. This is no such case as that presented in *Arnot* v. *Coal Co.*, 68 N. Y. 558, where, as was said, "the region of the production of [anthracite coal] is known to be limited." There is nothing in the complaint nor in common knowledge to show that the production of watch cases may not be practically unlimited. An agreement, therefore, between some of the makers of watch cases to sell their commodities at a uniform price, which they fix upon with regard only to their private emolu- **[645]** ment and profit, is not an agreement in general restraint of trade, or unreasonably injurious to the public welfare, within the authorities.

The other contract or combination which plaintiff contends to be unlawful is the agreement of defendants not to sell goods of their manufacture to any one who thereafter should buy or sell goods manufactured by the plaintiff. To the extent that such refusal to deal with those persons who dealt with plaintiff induced such persons to cease dealing with the plaintiff, and to buy watch cases from one or other of the defendants, the agreement did not operate in general restraint of trade, the total amount of purchases and sales

remaining constant, so far as the complaint shows. It did, no doubt, operate in partial restraint of trade, viz. to restrain some part of plaintiff's trade in the watch cases it manufactured. But it does not follow that such restraint was unreasonable, nor heavier than the interest of the favored party required. An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or to sell to any one with whom he thinks it will promote his business interests to refuse to trade. That is entirely a matter of his private concern, with which governmental paternalism has not as yet sought to interfere, except when the property he owns is "devoted to a use in which the public has an interest"; and such public interest in the use has as yet been found to exist only in staple commodities of prime necessity. *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517, 12 Sup. Ct. 468. It is a business device, probably as old as business itself, to seek to increase the number of one's customers, and the extent of their purchases, by treating more favorably those who become exclusive customers. Certainly there is nothing unlawful or unfair in the statement to the trade by the maker of any kind of merchandise, "My goods are for sale only to those who will buy from me exclusively, not to others." And the case is in no way different if a half a dozen individuals combine into a partnership, or an hundred individuals combine into a corporation, and adopt the same method to enlarge their business. If this be so,—and no authority to which we are referred holds to the contrary,—it is difficult to see in what respect it is unlawful for a score of different manufacturers to enter into a like arrangement to push the sales of their own goods, or to secure some business benefit to themselves by increasing the number of their exclusive customers, when there is nothing to show that the parties so combining constitute substantially all, or even a majority, of the manufacturers of such goods, even in the half-dozen states where their factories are located, and when the field for manufacture is open to all. It is not an unlawful business enterprise for sellers to seek to secure the entire trade of individual buyers, and an agreement between sellers, who

wish to confine their dealings to such buyers only, not to sell to others, is not an unfair or unreasonable measure of protection for such trade. Nor can it be claimed that such an agreement between sellers who represent but a part of the trade is injurious to the public, which has all the rest of the trade to deal **[646]** with. "Unless an agreement involves an absorption of the entire traffic, * * * it is not objectionable to the statute [of 1890]. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least." *U. S.* v. *Nelson*, 52 Fed. 646. It is difficult to see wherein the agreement complained of is injurious to the public. Certainly it is not one in general restraint of trade. It seems to be a reasonable business device to increase the trade of one set of competitors at the expense, no doubt, of their business rivals, who are equally free to avail of similar devices to secure their own trade. As such it is not obnoxious to the statute. The agreements or contracts complained of being not unlawful, the giving notice to the world of their existence is no offense. The judgment sustaining the demurrer should be affirmed.

SHIPMAN, Circuit Judge (concurring).

I concur with Judge LACOMBE in the conclusion that the circuit court properly sustained the demurrer of the E. Howard Watch & Clock Company in the above-entitled cause. I am not now prepared to adopt, as a reason for that conclusion, what I understand to be Judge LACOMBE's opinion, that the agreement and conduct of the combined defendants, which are set forth in the complaint, do not constitute a violation of the first or second sections of the act of July 2, 1890. My reason for regarding the complaint as demurrable is the more technical one that the allegations in regard to the acts which the defendants committed, or in regard to the facts which are charged to have existed, do not show that the defendants restrained any interstate commerce, or monopolized any part of such trade or commerce. What the statute struck at was "combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations" (*U. S.* v. *E. C. Knight Co.* [Jan. 21,

1895] 15 Sup. Ct. 249), but it will not be contended that section 7 of the statute gives a cause of action to any person against another person who had merely planned to commit or unsuccessfully attempted to commit the prohibited acts. The illegal contract or attempted monopoly must have resulted in an injury of some sort to the plaintiff's interstate business. It should therefore appear directly, and not by way of inference, that the acts of the defendants, or their attempts to monopolize interstate commerce, resulted in its restraint or monopoly, to the plaintiff's injury. *Hutchins* v. *Hutchins*, 7 Hill, 104. "An action will not lie for the greatest conspiracy imaginable if nothing be put in execution, but, if the party be damaged, the action will lie. From whence it follows that the damage is the ground of the action." *Savile* v. *Roberts*, 1 Ld. Raym. 378. The important allegations in regard to the conduct of the combined defendants and the results of the acts are that the complainant owned an extensive watch-case manufactory in Kentucky, and subsequently in Ohio, and had the capacity to manufacture and offer for sale 25,000 watch cases per month, and that before November 16, 1887, it sold all of said **[647]** goods to a great number of dealers throughout the United States and Canada. It may be admitted that this substantially alleges that the complainant engaged in interstate commerce. It is also alleged that the defendants agreed, on or about said day, that they would not thereafter sell any goods manufactured by them to any person who should buy or sell any goods manufactured by the complainant, and that the many dealers in watch cases throughout the United States and Canada, and that many of the complainant's existing and previous customers, were notified of this agreement; that upon receipt of such notice a large number of the then and theretofore purchasers of the plaintiff's watch cases withdrew their patronage, and ceased thereupon entirely to purchase or deal in any wise in plaintiff's goods; that all the acts of the defendants were done and performed for the purpose of establishing a monopoly in the supply of watches to the public, contrary to the policy of the law, and in violation of the statutes of the state of New York and of the United States. But the residence of no withdrawing customer is alleged. No interference with in-

terstate commerce is shown, except by inferring that some of the withdrawing customers lived in another state than Ohio; and, if they had bought the complainant's goods, interstate transportation would have taken place. The general allegation that the acts done in pursuance of the compact of November 16, 1887, and before the passage of the act of 1890, were done for the purpose of establishing a monopoly in the supply of watches, in violation of the statutes of New York and of the United States, is not an allegation that the acts restrained, or that the attempt actually monopolized, interstate trade or commerce.

It is next alleged that after the passage of the act of July 2, 1890, "all the former purchasers and dealers in said plaintiff's watch cases and other dealers in watch cases were, as plaintiff is informed and verily believes, ready and willing to buy large quantities of said plaintiff's goods, and this plaintiff would have at once regained all the business and the profits whereof it had been deprived by the acts aforesaid of the defendants, but that said defendants, after the passage of the said act of congress, ratified, confirmed, renewed, and continued the contracts, agreements, and combinations hereinbefore alleged, and in like manner, and with the same intention as hereinbefore alleged, served notices of their said ratification, confirmation, renewal, and continuance of the said agreements and combinations upon all said dealers in plaintiff's watch cases, whereby said dealers have continued to this day, forced by said renewal threats of defendants, and compelled thereby, and not otherwise, to refuse to purchase plaintiff's watch cases, or to deal in any wise therein." The allegation is that the former purchasers and dealers, who were intimidated by the previous notices, and who had stopped purchasing, continued, in consequence of the new notice, to be intimidated, and were forced by the renewed threats to refuse to purchase the plaintiff's watch cases. The names of the states in which these intimidated persons resided are not given. No new diversion of trade and no [648] new interference with interstate commerce are alleged. Admitting that the complaint sufficiently avers renewed acts of the defendants, there is the same absence of allegation that any customer, old or new, outside of the state of Ohio, refused to purchase, or that

interstate commerce was interfered with. The complaint was, of course, not based upon the theory in the pleader's mind that the statute prohibited an attempted monopoly and a consequent injury, whether the trade or commerce monopolized was domestic or interstate, but he seems to have been cautious in regard to averring that the attempted monopoly had affected interstate commerce. Where a plaintiff declares upon a statute, especially upon one penal in its character, imposing, as this one does, three times all actual damages as a punishment for offenses against its provisions, his complaint should contain explicit averments, which would, if not controverted, bring his cause of action within the provisions of the statute. The pleader in this case has failed to thus aver that trade between the states or with foreign countries has been restrained by action of the defendants, and the judgment of the circuit court sustaining the demurrer should, in my opinion, be affirmed.

WALLACE, Circuit Judge.

I agree with the majority of the court that this action must be deemed to be founded upon the act of congress of July 2, 1890, and that the demurrer to the complaint was well taken unless the complaint sets forth a cause of action given by that statute. I dissent, however, from the conclusion that the complaint does not set forth such a cause of action. Briefly stated, the averments of the complaint are that prior to the time of the enactment of the statute the plaintiff was engaged in manufacturing and selling watches in the states of Ohio and Kentucky, having a market therefor throughout the United States, and selling its goods to a great number of dealers in other states; that the defendants, also manufacturers of watches, had agreed among themselves to maintain an arbitrary fixed price for all their goods; that thereafter, in order to compel plaintiff to join them in that compact, and prevent it from selling its goods unless it did so, the defendants combined in an agreement not to sell any watches made by any of them to any dealers who should thereafter buy of the plaintiff, and notified the dealers in watches throughout the United States of the agreement; that thereafter the de-

fendants did refuse to sell such dealers as had bought of plaintiff, and thereby they prevented a great number of dealers from buying of plaintiff, and effected a complete boycott of its trade; and that, after the statute was passed, the same combination and acts were renewed and continued by the defendants, with the malicious purpose, and with the result, of suppressing plaintiff's trade. The complaint does not explicitly allege that this combination was entered into or these acts were done by the defendants for the purpose of preventing the plaintiff from selling to customers in other states; but from the facts alleged the conclusion is irresistible that this purpose was comprehended in the **[649]** conspiracy of the defendants, and the law presumes that they contemplated the ordinary and natural consequences of their acts. The statute declares various acts affecting trade or commerce among the several states or with foreign nations criminal, some of them being acts which are not criminal at common law. It also gives a civil remedy, cognizable by the federal courts, to any person or corporation injured by reason of such acts. The statute can have no application to acts affecting purely infra-state trade,—the commerce only between citizens of the same state,—not only because its language does not permit it, but because the power of commercial regulation given to congress by the constitution is restricted to interstate commerce, foreign commerce, and commerce with the Indian tribes. By one section it declares it to be a misdemeanor to monopolize, or attempt to monopolize, or combine or conspire to monopolize, any part of the trade or commerce among the several states or with foreign nations; by another it declares illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of such trade or commerce. The same punishment is affixed to each of the different offenses. The questions in the case are whether such a combination or conspiracy as is set forth in the complaint operates upon interstate trade or commerce, and whether it is in restraint of trade, within the meaning of that term as used by congress in the statute. I cannot doubt that a combination intended and adapted to strangle the trade between the dealer who sells his goods in one state and his customers in other states of the Union who

buy them,—a trade which necessarily involves the transportation of the goods from one state to another,—is intended and adapted to affect interstate commerce, and is, therefore, within the scope of the prohibition of the statute. The power of regulation is not confined to commerce which begins with the transit of goods, but operates upon all commerce of which the transit is an ordinary incident. This is illustrated by the legislation of congress in regard to trade-marks. The original trade-mark statute was held to be void because it was intended to embrace trade-marks used in infra-state commerce as well as in interstate commerce. *Trade-Mark Cases*, 100 U. S. 22. Thereupon congress passed another statute protecting trade-marks used in commerce with foreign nations or with the Indian tribes. In conferring jurisdiction of suits to protect such trade-marks upon the federal courts congress declared that such courts should not take cognizance unless the trade-mark in controversy "is used on goods intended to be transported to a foreign country," thus plainly indicating an intention to give a remedy although the trade-mark has not been used upon goods actually transported or in course of transportation. See *Ryder* v. *Holt*, 128 U. S. 525, 9 Sup. Ct. 145. It has been repeatedly said in the opinions of the supreme court that commerce among the states, as that term is used in the constitutional provision which vests in congress the power of regulation, includes the buying and selling of commodities, and the transportation incidental thereto. *County of Mobile* v. *Kimball*, 102 U. S. **[650]** 691–702; *Gloucester Ferry Co.* v. *State of Pennsylvania*, 114 U. S. 196–203, 5 Sup. Ct. 826; *Kidd* v. *Pearson*, 128 U. S. 1–20, 9 Sup. Ct. 6. The Knight Case does not disaffirm the proposition, but reiterates it. What the Knight Case decides is that a combination to control the manufacture of a product within a single state is not in restraint of interstate commerce, notwithstanding the fact that such commerce may be indirectly affected by it. The court say that the fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. But the court also

used this language: "Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and instrumentalities, and articles bought, sold, or exchanged, for purposes of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce." The acts charged against the defendants are intended and adapted to impinge upon the "contracts to buy, sell, or exchange goods to be transported among the several states," made and to be negotiated by the complainant with its customers in other states; and it cannot matter whether those contracts are negotiated in the state where the goods were produced or in the state where the customers of complainant reside.

Are the acts charged in restraint of trade? The primary purpose of the conspiracy set forth was doubtless to compel the plaintiff to join in a compact with the other defendants to maintain an arbitrary price or scale of prices for their goods, or otherwise to drive the corporation out of business; but its legitimate and necessary result was to likewise deprive dealers in watches generally, carrying on their business in many states, of the untrammeled exercise of their right to buy from the plaintiff. The books are full of cases in which a covenant not to carry on a business or vocation has been declared to be in restraint of trade, although the contract was only to restrict the covenantor. As is said in *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173: "The illegality of contracts affecting public trade appears in the books under many forms. The most frequent is that of contracts between individuals to restrain one of them from performing a business or employment." So conspiracies aimed at the trade or occupation of a single person have not only been declared civilly actionable, but criminal, because affecting the public as well as the immediate individual. In the early case of *Rex* v. *Eccles*, 3 Doug. 337, the indictment alleged that the defendants had conspired to "deprive and hinder" one "from following and exercising" his trade as a hatter; and Lord Ellenborough alluded to it as one for conspiracy "in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public." *Rex*

v. *Turner*, 13 East, 228, 231. Doubtless, in prohibiting contracts or combinations in restraint of trade it was the intention of congress to prohibit only those which were previously recognized at common law as belonging to that category, and not to prohibit **[651]** any which only effect a reasonable restraint. Such contracts or combinations as operate only in partial restraint of trade, are made for a just and honest purpose, and are for the protection of the legitimate interests of the parties, are consistent with the public convenience and the general welfare. And it is undoubtedly true that the tendency of modern judicial opinion is to regard with more liberality than formerly prevailed all contracts or combinations which are designed to protect parties from unnecessarily injurious competition, even though their indirect results may be to subject the public to a monopoly. I do not think the combination set forth in the complaint can be approved upon any such considerations. No body of manufacturers is justified in combining to coerce a competing manufacturer to join them and sell his goods at a price to be fixed by them, and to destroy his business in the event of his refusal to do so; and it matters not that they propose to destroy his business by peaceful methods of influencing his customers not to deal with him. "Men can often do by the combination of many what severally no one could accomplish, and even what, when done by one, would be innocent." *Morris Run Coal Co.* v. *Barclay Coal Co.*, *supra*. "Any one man, or any one of the several men, acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase." *State* v. *Glidden*, 55 Conn. 46, 8 Atl. 890. "Every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy, whether the means employed are actual violence or a species of intimidation that works upon the mind." *State* v. *Stewart*, 59 Vt. 273, 9 Atl. 559. The weight of authority supports the proposition that a combination is not only actionable, but is a criminal conspiracy, whenever the act to be done has the necessary tend-

Wallace, J., dissent.

ency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of confederates, and giving effect to their purposes, whether of extortion or of mischief. The doctrine of some of the adjudications that a conspiracy is not criminal unless its object is to compass some criminal purpose, or some purpose not criminal by criminal means, is not the prevailing opinion. It suffices to quote the language of Chief Justice Shaw in *Com.* v. *Hunt*, 4 Metc. (Mass.) 111, 123, as follows:

"Without attempting to review and reconcile all the cases, we are of opinion that, as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. We use the terms 'criminal or unlawful' because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy and punishable by indictment."

The statute upon which this action is founded discriminates between combination and conspiracy, and it not only makes both [652] criminal, but it makes contracts in which there is no element of a conspiracy or combination also criminal if in restraint of trade. It is therefore quite immaterial whether the acts charged in the complaint are sufficient to constitute a criminal conspiracy at common law. It suffices if the combination set forth is oppressive in its nature, and mischievous in its effects. I do not question the right of the defendants to combine for their own protection against unfair competition, and in that behalf, their commodity not being one of prime necessity, to agree not to sell to those who do not buy exclusively of them, or who buy of the complainant or some other obnoxious competitor; but I repudiate the doctrine that they can combine to induce the customers of a rival manufacturer not to deal with him unless he will join their combination. Upon the averments in this complaint, which are of course to be taken as true for the purposes of the demurrer, this case is one in which the defendants are acting not from motives of self-protection, but oppressively, and are actively concerting to destroy the business of a rival by inducing other dealers not to trade with him because he will not sell his goods at their prices. In

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People v. *Fisher*, 14 Wend. 1, the defendants were indicted under a statute making it criminal for two or more persons to conspire to commit any act "injurious to trade or commerce." They were journeymen shoemakers, and had concerted together to fix the price of making coarse boots, agreeing that if a journeyman shoemaker should make any such boots at a compensation below the rate established he should pay a penalty, and, if any master shoemaker should employ a journeyman who had violated their rules, that they would refuse to work for him, and would quit his employment. In sustaining the indictment, and declaring such acts criminal, the court used this language:

"The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair, but he has no right to say that another mechanic shall not make them for less. The cloth merchant may say that he will not sell his goods for less than so much per yard, but has no right to say that another merchant shall not sell for a less price. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to effect such an object are injurious not only to the individual particularly oppressed, but to the public at large. * * * The interference of the defendants was jurious not only to the individual particularly oppressed, but to the public inconvenience and embarrassment."

This language exactly fits the present case. For these reasons I think the complaint states a good cause of action, and the judgment sustaining the demurrer should be reversed.

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[130] NATIONAL HARROW CO. *v.* QUICK ET AL.[a]

(Circuit Court, D. Indiana. March 23, 1895.)

[67 Fed., 130.]

MONOPOLIES AND COMBINATIONS—CONTROL OF PATENTS—PUBLIC POLICY—EQUITY.—A corporation organized for the purpose of securing assignments of all patents relating to "spring-tooth harrows," to grant licenses to the assignors to use the patents upon payment of a royalty, to fix and regulate the price at which such harrows shall be sold, and to take charge of all litigation, and prosecute all infringements of such patents, is an illegal combination, whose pur-

[a] Rehearing denied April 13, 1895; affirmed by Circuit Court of Appeals May 4, 1896 (74 Fed., 236), but the question of unlawful combination was not considered.

poses are contrary to public policy, and which a court of equity should not aid by entertaining infringement suits brought in pursuance thereof.[a]

PATENTS—INVENTION—PRIOR ART—SPRING-TOOTH HARROWS.—The Reed patent, No. 201946, for improvements in spring-tooth harrows, consisting substantially in the adjustment of a curved tooth to a curved seat on the harrow frame, and fastened thereto by a curved clip having biting edges, *held* valid, in deference to prior decisions sustaining the same, although the court was of opinion that, in view of the prior state of the art, no invention was displayed; but *held*, further, that the patent should be limited to the very terms of the specifications and claims, and that it is therefore not infringed by harrows made in accordance with the Miller patent, No. 444248.

This was a bill by the National Harrow Company against Frank Quick and E. Lindahl for infringement of a patent relating to spring-tooth harrows.

N. H. Stuart and *Howard & Roos*, for complainant.

V. H. Lockwood, for defendants.

BAKER, District Judge.

This is a bill in equity to recover damages, and to restrain the alleged infringement of letters patent No. 201946, issued April 2, 1878, to Dewitt C. Reed, for alleged new and useful improvements in harrows, which complainant now holds by divers mesne assignments.

The defenses interposed and relied on at the hearing are: (1) That the complainant is a combination or trust attempting to hold and use its naked legal title as assignee for purposes contrary to public [131] policy, and that a court of equity ought not to aid its unlawful purposes by entertaining the present bill; (2) that the alleged improvements secured by the patent do not involve invention; (3) that the defendants do not infringe.

The complainant is a corporation purporting to be organized under the laws of the state of New Jersey. The purpose of its organization, as shown by the proofs, is to become the assignee of all the patents held by the different

[a] Syllabus copyrighted, 1895, by West Publishing Co.

corporations and business firms in the United States which are engaged in the manufacture and sale of spring-tooth harrows; to grant licenses to such corporations and firms to use the patents so assigned upon the payment by them of a royalty of one dollar for each harrow manufactured and sold; to take charge of all litigation of its licensees in relation to such patents, and to prosecute all infringements of any patent so assigned; to pay all costs and expenses of such litigation; and to fix and regulate the price at which such harrows shall be sold by its licensees. The complainant corporation is not organized for the manufacture and sale of harrows under the patents assigned to it, nor has it ever engaged in their manufacture and sale. A majority of all the corporations and firms engaged in the manufacture and sale of spring-tooth harrows in the United States have assigned the patents owned by them, respectively, to the complainant, and have received from it licenses to manufacture and sell harrows under the patents severally assigned by them to it. The patent in suit is one of those so assigned to the complainant by D. C. & H. C. Reed & Co., who have received an exclusive license from the complainant to manufacture and sell harrows under that patent practically in all the territory covered by it. So far as I can perceive, the complainant is organized to receive assignments of the legal title of harrow patents, to grant back licenses to their assignors to use and enjoy the same, to collect from each member of the combination or trust one dollar as a license fee for each harrow manufactured and sold, to regulate and control the price at which harrows may be sold by the members of the combination, and to prosecute and defend all suits involving the alleged infringement of such assigned patents.

It seems to me that such a combination is illegal, and that its purposes are violative of sound public policy. The common law forbids the organization of such combinations, composed of numerous corporations and firms. They are dangerous to the peace and good order of society, and they arrogate to themselves the exercise of powers destructive of the right of free competition in the markets of the country, and, by their aggregate power and influence, imperil

the free and pure administration of justice. *Strait* v. *Harrow Co.* (Sup.) 18 N. Y. Supp. 224; *Richardson* v. *Buhl*, 77 Mich. 632, 43 N. W. 1102; *Emery* v. *Candle Co.*, 47 Ohio St. 320, 24 N. E. 660; *State* v. *Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155.

Complainant says that its title to the patent in question is valid, and that it has a lawful right to its protection from invasion by a stranger, regardless of the objects and purposes of the combination which it represents. On the other hand, the defendants contend that to give its title protection would be to give aid to the unlawful pur- [132] poses of the combination. In suits at law it is doubtless true, as a general proposition, that a wrongdoer will not be permitted to dispute the legal title of one in possession of money or property by showing that the title thereto was unlawfully acquired, or that the owner intends to apply it to an unlawful use. I have strong doubts whether this rule ought to apply to a suit in equity, where nothing but clean hands and a good conscience will move the court to act. The combination represented by the complainant is not illegal in any other sense, except that the law will not lend its aid to the accomplishment of its purposes. The common law does not prohibit the making of such combinations. It merely declines, after they have been made, to recognize their validity, by refusing to make any decree or order which will in any way give aid to the purposes of such combinations. It seems to me that the court cannot sustain the present bill without giving aid to the unlawful combination or trust represented by the complainant. The question is not free from doubt, but in a case of doubt I feel it my duty to resolve it in such a way as will not lend the countenance of the court to the creation of combinations, trusts, or monopolies. They have already grown to alarming proportions, and courts, to the full extent of their powers, ought to discountenance and repress them.

Turning to the patent in question, we find that the "invention relates to improvements in harrows, and more particularly to that class of harrows wherein the teeth are spring teeth or of bow form." It "consists more particularly in a novel means for adjusting the said tooth so as to give to its point a greater or less depth of cut, which is effected

by making that portion of the tooth which is adjacent to the frame curved and resting on a curved seat, and securing it thereto by a clip or its equivalent, by the loosening of which the tooth may be thrown forward or pushed back beneath its fastening, thus lowering or raising its point. The cross-bar or loop portion of the clip is formed concave upon its underside, and with a concavity greater than the corresponding portion of the harrow tooth; so that, when brought down to a firm bearing upon the tooth, this cross portion of the clip will find a firm bearing at its edges upon its curved seat. Instead of employing a continuous clip, that part resting upon the tooth may be simply a bar or plate perforated at its ends for the passage of bolts, which bolts are drawn snugly by nuts upon the other side of the frame. So, also, a plate might rest upon the harrow tooth, and be held in its place by an ordinary clip, of uniform dimensions throughout, the plate not being perforated, but simply grooved along that portion where the clip passes, in order to hold the clip in its place. Other forms will readily suggest themselves, the principal feature of my invention being that the tooth shall rest upon a curved seat, and be capable of being adjusted longitudinally through its said seat, and thereby either elevate or depress its working point. I am aware that it is not new with me, broadly considered, to adjust a harrow tooth longitudinally upon its frame, so as to vary the depth of the cut thereof, and hence I do not include the same in my invention. What I claim is: (1) The combination, with a harrow frame and harrow tooth secured thereon, [133] so as to be longitudinally adjusted, of a fastening clip formed as described, whereby only its two transverse edges have a bearing against the tooth, substantially as set forth. (2) The combination, with a harrow frame provided with a curved seat, of a curved tooth and clip or its equivalent, D, substantially as and for the purposes described."

The patentee does not claim the curved tooth, nor the curved seat, nor the curved or concave clip with its biting edges, nor the longitudinal adjustibility of the harrow tooth upon its frame, as his invention. Each of these elements was old and well known. The problem which he proposed to himself was to adjust a curved tooth to a harrow beam so that

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it could be readily moved in the direction of its length, and thus elevate or depress the point of the tooth. The invention consists in resting the harrow tooth upon a curved seat, and fastening it in place with an adjustable curved or concave clip having biting edges. In view of the prior state of the art, disclosed in the record, and which may be found fully set out in *Reed* v. *Smith*, 40 Fed. 882, I am of the opinion that the adjustment of a curved tooth to a curved seat on the harrow frame, and fastened thereto by a curved clip having biting edges, does not amount to invention. It seems to me that a skillful mechanic, familiar with the construction of harrows, could have devised the method of adjusting and fastening the tooth covered by the patent by the simple exercise of mechanical skill. While such is my opinion, I feel bound to hold this patent to be valid out of deference to many former adjudications in which it has been sustained. It ought not, however, to receive a construction broader than the very terms of the specification and claims require.

As said in *Reed* v. *Smith*, supra:

"We find it impossible to escape the conclusion that the clip, which lies at the foundation of the plaintiff's patent, is limited to a curved clip with biting edges, designed to hold the tooth rigidly to its seat."

The patent then embraces a curved clip, having biting edges, in connection with a curved tooth and a curved seat for the same. The specification declares that "the principal feature of the invention is that the tooth shall rest upon a curved seat."

The defendants are alleged to have infringed by the sale of harrows manufactured under letters patent No. 444248, dated January 6, 1891, issued to Huson V. Miller for an alleged improvement in spring-toothed harrows. In this patent the harrow beam has a channel crossing its underface, in which channel a flat metal plate is fastened by a pin, and the tooth is placed in the channel, and rests against the metal plate at its outer edges, and is fastened by an ordinary flat clip, which comes in contact with the tooth at a point situated centrally in relation to the edges of the plate, and upon its convex side. When the clip is drawn down upon the convex side of the tooth, it presses the concave side of the

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tooth firmly upon the outer edges of the plate, thus holding the tooth in place. The tendency of the pressure of the clip is to slightly elevate the point of the tooth. While the result produced by each device is the same, [134] the means used to produce it differ. In the defendants' device the tooth does not rest on a curved seat, nor is it held in place by a curved clip having biting edges. The patent office evidently considered the difference between the two devices so substantial that the Miller patent was not regarded as an infringement of the complainant's patent.

In view of the narrow construction which I feel constrained to put upon the complainant's patent, I do not regard the Miller patent as embodying an infringing device; and, as that device is the one used in the harrows sold by the defendants, they cannot be held liable for infringement. The bill is therefore dismissed for want of equity, at complainant's costs.

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[698] UNITED STATES *v.* CASSIDY ET AL.

(District Court, N. D. California. April 1 and 2, 1895.)

[67 Fed., 698.]

CONSPIRACY TO COMMIT OFFENSES AGAINST THE UNITED STATES—REV. ST. § 5440.—The statute relating to conspiracies to commit offenses against the United States (Rev. St. § 5440) contains three elements, which are necessary to constitute the offense. These are: (1) The act of two or more persons conspiring together; (2) to commit any offense against the United States; (3) the overt act, or the element of one or more of such parties doing any act to effect the object of the conspiracy.[a]

SAME—CONSPIRACY DEFINED.—A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. *Pettibone* v. *U. S.*, 13 Sup. Ct. 542, 148 U. S. 203, cited.

SAME—MANNER OF CONSPIRING.—The common design is the essence of the charge; but it is not necessary that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writ-

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ing, state what the unlawful scheme was to be, and the details of the plan or the means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design.

SAME—PARTIES TO CONSPIRACY.—Where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part any one was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators.

SAME.—Any one who, after a conspiracy is formed, and who knows of its existence joins therein, becomes as much a party thereto from that time as if he had originally conspired. *U. S.* v. *Babcock*, Fed. Cas. No. 14487, 3 Dill. 586, cited.

SAME—EVIDENCE—ACTS OF ONE PARTY.—Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the conspiracy.

SAME—DECLARATIONS BY PARTIES.—Any declaration made by one of the parties, during the pendency of the illegal enterprise, is not only evidence against himself, but against all the other conspirators, who, when the combination is proved, are as much responsible for such declarations, and the acts to which they relate, as if made and committed by themselves. This rule applies to the declaration of a co-conspirator, although he may not himself be under prosecution.

SAME—CONSPIRACY AS DISTINCT OFFENSE.—The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy to commit crime requires an additional restraint to those provided for the commission of the crime itself. It therefore makes criminal the conspiracy itself, with penalties and punishments dis- [699] tinct from those it attaches to the crime which may be the object of the conspiracy.

SAME—MEANS CONTEMPLATED—ALLEGATIONS AND PROOFS.—It is not incumbent upon the prosecution to prove that all the means set out in the indictment were in fact agreed upon to carry out the conspiracy, or that any of them were actually used or put in operation. It is sufficient if it be shown that one or more of the means described in the indictment were to be used to execute that purpose.

SAME—OVERT ACTS.—While at common law it was not necessary to aver or prove an overt act in furtherance of a conspiracy, yet, under the statute relating to conspiracies to commit an offense against the United States, the doing of some act in pursuance of the conspiracy

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is made an ingredient of the crime, and must be established as a necessary element thereof, although the act may not be in itself criminal. *U. S.* v. *Thompson*, 31 Fed. 331, 12 Sawy. 155, cited.

SAME.—It is not necessary, however, to a verdict of guilty, that the jury should find that each and every one of the overt acts charged in the indictment was in fact committed; but it is sufficient to show that one or more of these acts was committed, and that it was done in furtherance of the conspiracy.

OBSTRUCTING THE MAILS.—REV. ST. § 3995.—Although the law, which now appears in Rev. St. § 3995, and which makes it an offense to obstruct and retard the passage of the United States mails, was originally passed prior to the introduction into the United States of the method of transporting mail by railroads, and the phraseology of the law conforms to conditions prevailing at that time (March 3, 1825), yet it is equally applicable to the modern system of conveyance and protects alike the transportation of the mail by the "limited express" and by the old-fashioned stagecoach.

SAME.—The statute applies to all persons who "knowingly and willfully" obstruct and retard the passage of the mails or the carrier carrying the same; that is, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the mail, and who perform the acts with the intent that such shall be their operation. *U. S.* v. *Kirby*, 7 Wall. 485, cited.

SAME.—The statute also applies to persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails. In such case, an intent to obstruct and retard the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S.* v. *Kirby*, 7 Wall. 485, cited.

SAME—MAIL TRAINS.—A mail train is a train as usually and regularly made up, including not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such train, as a mail train, would include the Pullman car is a part of its regular make up. Therefore, if such a train is obstructed or retarded because it draws a Pullman car, it is no defense that the parties so delaying it were willing that the mail should proceed if the Pullman car were left behind. *U. S.* v. *Clark*, Fed. Cas. No. 14805, 23 Int. Rev. Rec. 306, followed.

SAME.—Any train which is carrying mail, under the sanction of the postal authorities, is a mail train, in the eye of the law.

SAME—INTENT.—It is not necessary that defendants should be shown to have had knowledge that the mails were on board of a train which they have detained and disabled. On the contrary, they are chargeable with an [700] intent to do whatever is the reasonable and natural consequence of their acts; and as the laws make all railways postal routes of the United States, and it is within every

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one's knowledge that a large portion of the passenger trains carry mail, it is to be presumed that any person obstructing one of those trains contemplates, among other intents, the obstruction of the mail. *U. S.* v. *Debs*, 65 Fed. 211, followed.

COMBINATIONS TO OBSTRUCT INTERSTATE COMMERCE—ACT JULY 2, 1890.—The word "commerce," as used in the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies, and in the constitution of the United States, has a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities.

SAME.—While the primary object of the statute was doubtless to prevent the destruction of legitimate and healthy competition in interstate commerce, by the engrossing and monopolizing of the markets for commodities, yet its provisions are broad enough to reach a combination or conspiracy that will interrupt the transportation of such commodities and persons from one state to another. *U. S.* v. *Workingmen's Amalgamated Council*, 54 Fed. 995, cited.

SAME—PULLMAN CARS.—Pullman cars in use upon railroads are instrumentalities of "commerce." *U. S.* v. *Debs*, 64 Fed. 763, cited.

CONSPIRACIES—COMBINATIONS OF RAILROAD EMPLOYES—UNIONS AND PROTECTIVE ASSOCIATIONS—STRIKES.—The employés of railway companies have a right to organize for mutual benefit and protection, and for the purpose of securing the highest wages and the best conditions they can command. They may appoint officers, who shall advise them as to the course to be taken in their relations with their employer, and they may, if they choose, repose in their officers authority to order them, or any of them, on pain of expulsion from their union, peaceably to leave the employment because the terms thereof are unsatisfactory. But it is unlawful for them to combine and quit work for the purpose of compelling their employer to withdraw from his relations with a third party, for the purpose of injuring that third party. *Thomas* v. *Railway Co.*, 62 Fed. 817, followed.

SAME.—A strike, or a preconcerted quitting of work, by a combination of railroad employés, is, in itself, unlawful, if the concerted action is knowingly and willfully directed by the parties to it for the purpose of obstructing and retarding the passage of the mails, or in restraint of trade and commerce among the states.

CRIMINAL LAW—REASONABLE DOUBT.—A reasonable doubt is one arising out of the evidence; not an imaginary doubt, a fanciful conjecture, or strained inference, but such a doubt as a reasonable man would act upon or decline to act upon when his own concerns are involved,—a doubt for which a good reason can be given, which reason must be based upon the evidence or want of evidence.

SAME—PROVINCE OF JURY—CREDIBILITY OF WITNESSES.—The jury are the exclusive judges of the credibility of the witnesses. A witness

Statement of the Case.

is presumed to speak the truth, but this presumption may be repelled by the manner in which he testifies, by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives, and by contrary evidence. But the power of the jury to judge of the effect of evidence is not arbitrary; it must be exercised with legal discretion, and in subordination to the rules of evidence.

This was an indictment against John Cassidy, John Mayne, and others, under Rev. St. § 5440, for conspiracy to commit offenses against the United States, namely, the offense of obstructing the [701] mails of the United States, and the offense of combining and conspiring to restrain trade and commerce between the states of the Union and with foreign countries. The prosecutions grew out of the great Pullman strike, which occurred during June and July, 1894, and which was mainly supported and carried on through the organization known as the "American Railway Union." The charge delivered by Judge MORROW in this case is believed to be the longest ever delivered in a criminal case in this country, and only exceeded in any case by the charge of Lord Chief Justice Cockburn in the Tichborne Case. While only two of the defendants were tried, the case was treated as a test case, both by the government and by the strikers, and it involved, as a practical result, the disposition of some 132 other cases. Most of the defendants were recognized leaders of the strike in California. The character of the charge—conspiracy to retard the United States mails and restrain interstate commerce—brought up the entire strike, so far as the Pacific coast was concerned. Two hundred and sixteen witnesses were examined, and the trial occupied five months, beginning November 12, 1894, and ending April 6, 1895. The testimony covered nearly 6,000 pages of typewritten matter, and was practically a record of all the incidents relating to the strike. The charge was delivered on April 1 and 2, 1895.

H. S. Foote, Special Assistant United States Attorney, and *Samuel Knight*, Assistant United States District Attorney.

Geo. W. Monteith, for defendants.

Charge to the Jury.

MORROW, District Judge (charging jury).

Gentlemen of the Jury: I congratulate you on the approaching termination of this case. For five months you have been required to give your constant, and, I might say, exclusive, attention to the daily proceedings in this court. The trial of the case has been protracted, but I am not prepared to say that any greater time has been occupied than was necessary, under the circumstances, to secure the testimony of the 216 witnesses who have appeared before you upon the stand. The nature of the charges against the defendants now on trail, covering, as they do, the whole field of the railroad strike of last summer in this district, necessarily involves the closest scrutiny into every feature of that affair. In this examination you have displayed a patient interest of such a commendable character as to call for the special acknowledgment of the court. You are, indeed, entitled to the gratitude of every good citizen of the community for the sacrifices you are making, and for the service you are rendering in the faithful performance of a public duty.

In submitting the case to your consideration, it becomes my duty to call your attention to the character of the charges against the defendants, and the provisions of law under which the prosecution is being conducted. It is the duty of the court to declare the law; it is your exclusive province and responsibility to apply the law so declared to the facts as you, upon your conscience, believe them to be established.

[702] The indictment contains two counts, which, in general terms, charge that the defendants conspired, combined, and agreed together, and with divers other persons, to obstruct and retard the passage of the United States mails, and the carrier carrying the same, and also that they engaged in a combination and conspiracy in restraint of trade and commerce among the several states of the United States, and with foreign countries. The crime of conspiracy is besed upon section 5440 of the Revised Statutes of the United States, which provides as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment, in the discretion of the court."

Charge to the Jury.

To make this statute as clear to you as possible, I will call your attention to its three essential provisions. The first element is the act of two or more persons conspiring together; the second is to commit any offense against the United States; and the third is what is termed the "overt act," or the element of one or more of such parties doing any act to effect the object of the conspiracy. With respect to the first element, we find that a conspiracy has been described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means. *Pettibone* v. *U. S.*, 148 U. S. 203, 13 Sup. Ct. 542. The common design is the essence of the charge, and while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. A combination formed by two or more persons, to effect an unlawful end, is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows

of its existence, joins therein, becomes as much a party thereto, from that time, as if he had originally conspired. *U. S.* v. *Babcock*, 3 Dill. 586, Fed. Cas. No. 14487. Furthermore, where several persons are proved to have combined together for the same **[703]** illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy. It is also true that any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proved, are as much responsible for such declarations and the acts to which they relate as if made and committed by themselves. This rule, you will understand, applies to the declaration of a co-conspirator, although he may not be under prosecution, his declaration being equally admissible with those of one under indictment and prosecution.

The confederacy to commit an offense is the gist of the criminality under the law. The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy of two or more persons, to commit crime, requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments distinctive from those prescribed for the crime which may be the object of the conspiracy. You will readily understand why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionately demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community to which they belong.

The second essential element in the offense described by the statute is the purpose of the conspirators to commit an offense against the United States. The indictment charges

that the defendants conspired with others to commit two offense against the United States,—one to obstruct and retard the passage of the United States mail and the carrier carrying the same; and the other, that they engaged in a combination and conspiracy in restraint of trade and commerce among the several states of the United States and with foreign countries. The first charge is based upon the provisions of section 3995 of the Revised Statutes, which provides as follows:

"Any person who shall knowingly and willfully obstruct and retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall, for every such offense, be punishable by a fine of not more than one hundred dollars."

This section of the Revised Statutes was originally section 9 of the act of March 3, 1825 (4 Stat. 104), and, having been passed prior to the introduction into the United States of the method of transporting mail by railroads, the phraseology of the law conformed to the conditions prevailing at that time, but it is equally applicable to the modern system of conveyance, and protects alike the transportation of the mail by the "limited express," as it does the carriage by the old-fashioned stagecoach. There are, however, certain **[704]** provisions of law directed specifically to the transportation of the mail by railroad trains, to which I desire to call your attention.

Section 3964 of the Revised Statutes provides as follows:

"The following are established post-roads: * * * All railroads or parts of railroads which are now or hereafter may be in operation."

Section 3, Act March 3, 1879 (20 Stat. 358), provides "that the postmaster general shall, in all cases, decide upon what trains and in what manner the mails shall be conveyed." Section 4000 of the Revised Statutes provides that:

"Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same."

There is still another provision of law applicable to the transportation of mails on the Pacific railroads, which is as follows:

"That the grants aforesaid are made upon the condition that said company shall * * * transport mails * * * upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the

Charge to the Jury.

preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service), and all compensation for services rendered to the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid." Act July 1, 1862, to aid in construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, § 6 (12 Stat. 493).

Recurring, now, to section 3995 of the Revised Statutes, making it an offense to obstruct and retard the passage of the mails, and you will observe that the statute applies to those persons who "knowingly and willfully" obstruct and retard the passage of the mails, or the carrier carrying the same; that is to say, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the passage of the mail, and they perform the acts with the intention that such shall be their operation *U. S.* v. *Kirby*, 7 Wall. 485. "It would be no defense under this statute," said an eminent judge in a recent case, "that the obstruction was effected by merely quitting employment, where the motive of quitting was to retard the mails, and had nothing to do with the terms of employment. *Thomas* v. *Railway Co.*, 62 Fed. 822.

The statute also applies to those persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails. In such case, the intention to obstruct and retard the passage of the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S.* v. *Kirby*, *supra*.

The second offense, which, it is charged in the indictment, was the object of the conspiracy, was to restrain trade and commerce among the several states and with foreign nations. This offense is described in an act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (26 Stat. 209), which provides as follows:

[705] "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

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"Trade" has been defined as "the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." The word "commerce," as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *County of Mobile* v. *Kimball*, 102 U. S. 702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 826. Pullman cars in use upon the roads are instrumentalities of commerce. *U. S.* v. *Debs*, 64 Fed. 763. The primary object of the statute was, undoubtedly, to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. *U. S.* v. *Patterson*, 55 Fed. 605. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities and persons from one state to another. *U. S.* v. *Workingmen's Amalgamated Council*, 54 Fed. 995, 1000.

We come, now, to consider the third element involved in the crime of conspiracy, as it is declared in the statute under consideration; that is to say, the overt act, or the element of one or more of the parties to the conspiracy doing any act to effect its object. At common law, it was neither necessary to aver nor to prove an overt act in furtherance of a conspiracy. *Bannon* v. *U. S.*, 15 Sup. Ct. 467. The offense was complete when the unlawful concert and agreement was entered into and concluded, although nothing was done in pursuance thereto, or to carry it into effect. It was one of the few cases in which the law undertook to punish criminally an unexecuted intent or purpose to commit a crime. *U. S.* v. *Walsh*, 5 Dill. 58, Fed. Cas. No. 16636. But, under the statute of the United States now under consideration, the doing of some act in pursuance of a conspiracy is an ingredient of the crime,

and must be established as a necessary element of the offense, although the act need not be in itself criminal or amount to a crime. *U. S.* v. *Thompson*, 12 Sawy. 155, 31 Fed. 331.

With this general statement and explanation of the statute involved in this case, I will proceed to consider the allegations in the indictment, which, as I said before, contains two counts.

The first count charges that the defendants conspired both to obstruct and retard the passage of United States mails, and to unlawfully engage in a combination and conspiracy in restraint of trade and commerce, while the second count charges a conspiracy in re- **[706]** straint of trade and commerce alone. Otherwise, both counts are, in substance and form, identical. In general terms, the two counts charge: (1) Formation of the conspiracy; (2) legal corporate existence of the Southern Pacific Company, and its means, manner, and methods of transporting the mails and interstate commerce; (3) means conspired to be used in effecting the object of the conspiracy; (4) overt act charged; (5) concluding with an allegation of unlawful intent.

Bearing these general features of the indictment in mind, you will now be able to understand the meaning of the various allegations of the indictment, as I proceed to refer to them somewhat more in detail.

Taking up the first count: The formation of the conspiracy is alleged, and it is charged that John Cassidy, John Mayne, Fred Clarke, and James Rice, with divers others, names unknown, did conspire to obstruct and retard the passage of the mails of the United States, and to restrain trade and commerce among the several states and with foreign nations. (2) The legal corporate existence of the Southern Pacific Company, and its means, manner, and method of carrying the mails and interstate commerce, are set out. It is averred that the Southern Pacific Company was a railroad corporation, duly organized and existing under the laws of the state of Kentucky, engaged in the business of a common carrier of the mails of the United States, and of passengers, freight, express matter, and other commodities, comprising and constituting trade and commerce, within the meaning of the act entitled "An act to

protect trade and commerce against unlawful restraints and monopolies, approved July 2, 1890." The lines of railroad over which it carried on its mail and interstate commerce; the manner and means employed and necessary to its doing so, viz. yards, depots, tracks, trains of cars, and other equipment suitable for the transportation of the United States mails, passengers, freight, and express matter, and other commodities,—are also set out. (3) Then follow the means conspired to be used in effecting the object of the conspiracy. These are, briefly: First. By forcibly taking and keeping possession and control of all yards, depots, tracks, and trains of cars upon said lines of railway, and by forcibly holding and detaining the same. Second. By causing to be assembled, and assembling with, large crowds of persons in said depots and yards of said Southern Pacific Company, at various points and places upon said lines of railway, in said state and Northern district of California, to wit: 1. At the city and county of San Francisco. 2. City of Sacramento. 3. City of Oakland. 4. City of San José. 5. City of Stockton. 6. Town or Red Bluff. 7. Town of Dunsmuir, county of Siskiyou. 8. City of Vallejo, county of Solano. 9. Town of Lathrop, county of San Joaquin. 10. Town of Palo Alto, county of Santa Clara. By gathering in great numbers in said yards and depots, and other places, around, in, and upon the trains, cars and engines of the said Southern Pacific Company, and upon the tracks of the railways, preventing the movement and passage of said engines, cars, and trains. Third. By threats, intimidation, personal assaults, and other force and violence, to prevent the engineers, firemen, conduct- **[707]** ors, brakemen, switchmen, and other employés of said Southern Pacific Company from discharging their duties, and from moving and operating said engines, trains, and railways. Fourth. By forcibly disconnecting air brakes upon such trains,—mail, passenger, and freight. Fifth. By putting out the fires in the engines drawing the same. Sixth. By throwing switches, in order to prevent the passage of such trains through depots and stations. Seventh. By opening drawbridges over navigable and other streams, upon which drawbridges the tracks of said railway cars were situated. Eighth. By burning and destroying bridges, trestles, and culverts, over which such trains necessarily and usually

would pass. Ninth. By loosening, removing, and displacing the rails of the tracks of said railroads. Tenth. By greasing the rails of the said tracks. Eleventh. By stopping trains upon railway crossings and upon switches, and by forcibly refusing to allow such trains to be hauled from such crossings and switches. Twelfth. By compelling the employés of said railroad company to leave their trains, shops, and the work of said company, while in the performance of their duty. Thirteenth. By using all such other forcible means as to them should seem expedient to prevent, for an indefinite period, the use of the said railways for the transportation of the mails of the United States and interstate commerce.

It will be well to observe, at this point, that the indictment does not charge that the defendants did, in fact, use or put in operation the means herein set out, in effecting the object of the conspiracy; the charge is that such were the means conspired to be used for that purpose. Now, when you come to consider the testimony, you will probably find that some of it tends to show that certain persons did, in fact, use such means to prevent the movement of railway trains. This testimony was admitted, not to prove that such acts had been committed, but because of the relevancy of such testimony to the charge in the indictment,—that such means were to be used in effecting the object of the conspiracy. In other words, it tends to show that a conspiracy was formed to obstruct and retard the passage of the United States mails, and to restrain trade and commerce among the several states and with foreign nations, and that such means were to be used to carry the conspiracy into effect.

This brings us to a feature of this charge of conspiracy which you will bear in mind. It is not incumbent upon the prosecution to prove that all of the means set out in the indictment were, in fact, agreed upon to carry out the conspiracy, or that any of them were actually used or put into operation. It will be sufficient if it be established to your satisfaction, and beyond a reasonable doubt, that one or more of the means described in the indictment were to be used to execute that purpose.

After stating the means by which the conspiracy was to be effected, the indictment then sets out the overt acts; that is

to say, it charges the doing of certain acts to effect the object of the conspiracy. They are as follows: That on the 6th day of July, 1894, the defendants, at Palo Alto, (1) forcibly took possession and control of the yards, depots, buildings, tracks, engines, and cars, and other appliances and [708] property, of the Southern Pacific Company: 1. By causing to be assembled, and assembling with, a large crowd of persons in said depots, buildings, and yards of the Southern Pacific Company; and by gathering with said crowds of persons in said depots, buildings, and yards, around, in, and upon the aforesaid trains, cars, and engines, and upon the tracks of the railways. 2. By threats, intimidations, personal assaults, or other acts of force and violence, in, upon, and towards the engineers, firemen, conductors, brakemen, switchmen, agents, and other employés of said company having charge of said depot, buildings, and other property, etc. It is further charged (2) that, on the 6th day of July, 1894, said defendants, at Palo Alto, forcibly and violently prevented the movement of all trains of the Southern Pacific Company to, from, or through the town of Palo Alto: 1. By gathering in crowds, etc. 2. By placing physical obstructions upon said track. 3. By displacing the switches. 4. By forcibly and violently assaulting, threatening, and intimidating said engineers, firemen, conductors, brakemen, switchmen, agents, and other employés, while engaged as aforesaid. 5. By uncoupling the cars of said trains and disconnecting the same. 6. By removing said cars from said tracks. 7. By withdrawing the water from the boilers and tanks of said engines, and putting out and removing the fires therein. 8. By displacing and removing valves, pins, bolts, plates, and other appliances and portions of the machinery of said engines and cars, and of the rails of said railways, thereby loosening said rails. 9. By other violent, forcible, and unlawful acts and means to the grand jurors unknown. It is further charged (3) that said defendants, at the time and place above indicated, unlawfully, forcibly, and violently occupied and held possession and control of said yards, depots, tracks, engines, trains of cars, and other appliances and property of the Southern Pacific Company, by the means aforesaid, and by said means excluded the Southern Pacific Company and its employés from the possession, use, and control thereof, and by said

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means prevented the movement of said trains from and including July 6 to and including July 10, 1894.

The same observation, which I have just made to you with respect to the establishing of one or more of the means alleged to have been concocted and conspired to be used, is applicable to the overt acts charged. It is not necessary to a verdict of guilty that you should find that each and every one of the overt acts charged have, in fact, been committed. If you are satisfied beyond a reasonable doubt that one or more of these overt acts have been committed, and that they were done in furtherance of the conspiracy alleged to have been entered into by and between these defendants, and to carry out or effectuate in some way the object of the conspiracy, that is all that the law requires. The indictment concludes with allegations of intent, viz.: That the defendants, by the acts and means aforesaid, knowingly and willfully obstructed and retarded the passage of the mails and the carrier carrying the same, and restrained interstate commerce from the 6th of July to and including the 10th day of July, 1894, at Palo Alto. The second count, as stated above, is confined to charging a conspiracy to restrain trade and commerce [709] alone; otherwise it is identical in form and substances with the count just elaborated upon.

Having directed your attention to the different provisions of law involved in the charges against these defendants, and having also stated to you, in brief terms, the several allegations of the indictment, you are now prepared to consider the testimony in the case in its proper light, for the purpose of determining the guilt or innocence of the defendants; but in referring to the testimony you will distinctly understand that you are the exclusive judges of the facts, and that it is not my province or purpose to intrude upon your jurisdiction in any particular or to any degree. If, in any of my rulings during the progress of this trial, I have appeared to indicate that any controverted fact has been established, or if I now assume or appear to consider or treat any fact as proved, unless it may be an admitted fact, you will disregard such assumption, and act entirely upon your own judgment and conscience in determining the facts of the case.

From what has been stated, it will appear to you that you

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are brought to the consideration of three questions which may be properly suggested to you as a guide for your deliberation: (1) Has the government proved the existence of a conspiracy alleged in the indictment? (2) If it did exist, were any of the alleged acts performed by one or more of the parties to the conspiracy? (3) If such a conspiracy existed, were the defendants parties to it?

Taking these questions in their order, you will first consider whether the conspiracy charged in the indictment has been established.

GENERAL CONSPIRACY.

This is the important question in this case, and is a question of fact for you to determine, subject to such rules of law as the court will give you to assist you in arriving at a correct conclusion. The evidence on this point is largely circumstantial, and involves a consideration of the acts of members of the American Railway Union; the course and methods of the association in boycotting the Pullman cars, and subsequently declaring a strike against the Southern Pacific Company; and, generally, the attitude and conduct of the strikers and those acting with them during the time the strike was in operation.

AMERICAN RAILWAY UNION.

The evidence tends to show that the American Railway Union is a fraternal organization, composed of railroad employés below a certain grade. The headquarters of the association are located at Chicago, Ill. In June and July last Eugene V. Debs was its president; Geo. W. Howard, vice president; and Sylvester Keliher, secretary. The union is divided up into local unions. In the constitution of the order, introduced in evidence, the principles and purposes, so far as they are pertinent to this feature of the case, are stated as follows:

"It is a self-evident truth that 'in union there is strength,' and, conversely, without union weakness prevails; therefore the central benefit to be derived from organization is strength,—power to accomplish that which defies indi- [710] vidual effort. The American Railway Union includes all railway employés, born of white parents,

organized within one great brotherhood. There is one supreme law for the order, one roof to shelter all, and all united when unity of action is required. The reforms sought to be inaugurated and the benefits to be derived therefrom, briefly stated, are as follows:

"First. The protection of members in all matters relating to wages and their rights as employés is the principal purpose of the organization. Railway employés are entitled to a voice in fixing wages and in determining conditions of employment. Fair wages and proper treatment must be the return for efficient service, faithfully performed. Such a policy insures harmonious relations and satisfactory results. The order, while pledged to conservative methods, will protect the humblest of its members in every right he can justly claim; but, while the rights of members will be sacredly guarded, no intemperate demand or unreasonable propositions will be entertained. Corporations will not be permitted to treat the organization better than the organization will treat them. A high sense of honor must be the animating spirit, and even-handed justice the end sought to be attained. Thoroughly organized in every department, with a due regard for the right wherever found, it is confidently believed that all differences may be satisfactorily adjusted; that harmonious relations may be established and maintained; that the service may be incalculably improved; and that the necessity for strike and lockout, boycott and black-list, alike disastrous to employer and employé, and a perpetual menace to the welfare of the public, will forever disappear.

"Second. In every department of labor, the question of economy is forced to the front by the logic of necessity. The importance of organization is conceded, but, if it costs more than a workingman is able to pay, the benefits to accrue, however great, are barred. Therefore, to bring the expenses of the organization within the reach of all is the one thing required,—a primary question which must be settled before those who stand most in need can participate in the benefits to be derived; hence to reduce the cost to the lowest practical point is a demand strictly in accord with the fundamental principles of economy, and any movement which makes it possible for all to participate in the benefit ought to meet with popular favor.

"Third. The organization will have a number of departments, each of which will be designed to promote the welfare of the membership in a practical way and by practical methods. The best thought of workingmen has long sought to solve a problem of making labor organizations protective, not only against sickness, disability, and death, but against the ills consequent upon idleness and those that follow in its train. Hence there will be established an employment department, in which it is proposed to register the name of every member out of employment. The department will also be fully informed where work may be obtained. It is doubtful if a more important feature could be suggested. It evidences fraternal regard without a fee, benevolence without alloy."

Section 54 of the constitution of the American Railway Union (entitled "Laws of Protection") provides for what is called a "board of mediation," and defines its powers. It is as follows:

"The board of mediation of each local union shall elect a chairman. The chairman of the local board of mediation shall be a member of the general board of mediation of the system or line on which they are employed. The general board of mediation shall elect a chairman and secretary. The general board of mediation shall meet on

the second Tuesday of September of each year at the headquarters of the road on which they are employed, for the transaction of such business that may emanate from the local board of mediation. All complaints and adjustments of a general character shall be handled by the general board of mediation. All complaints and adjustments must be taken up first by the local union; if accepted by a majority vote, it shall be referred to the local board of mediation for adjustment; and, if failing, the case shall be submitted to the chairman of the general board of mediation; failing in which, they shall notify the president of the general union, who shall authorize the most available member of the board [711] of directors to visit and meet with the general chairman of the board of mediation, and issue such instructions as will be promulgated by the directors."

The right of employés of railway companies to organize in this way for their own benefit and protection is not questioned. They are entitled to the highest wages and the best conditions they can command, and they may organize an association or union for that purpose. There is no controversy on this point. It is a benefit to them, and it is not prejudicial to the interests of the public, that they should unite in their common interests and combine for such lawful purposes. In *Thomas* v. *Railway Co.*, 62 Fed. 817, Judge Taft, in the circuit court of the United States for the Southern district of Ohio, speaking of the relation of railway employés to the American Railway Union, says:

"If they (the employés) stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employé may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, they may order them, upon pain of expulsion from their union, peaceably to leave the employ of their employer, because any of the terms of their employment are unsatisfactory."

This is clearly the law; but there is a just and reasonable limitation to the power and privilege of railway employés, even under the protection of such an organization. They are not entitled to interfere with the rights and property of others, and by force and intimidation compel a carrier of United States mails or of interstate commerce to suspend the operations of such necessary and lawful business; or, to

state the proposition a little more exactly, they have no privilege or right to violate a law of the United States.

Now, with respect to the general charge of conspiracy contained in this indictment, I will direct your attention to some of the testimony which the government claims tends to establish that element of the case.

TIME WHEN THE BOYCOTT TOOK EFFECT.

It is admitted that in the latter part of June, 1894, a convention of the American Railway Union, assembled at Chicago, resolved to boycott the Pullman Company; this boycott to take effect in five days, should the difficulties existing between that company and its employés not be settled at the expiration of that period. On June 26, 1894, the president of the general union sent the following telegram, which was received by the American Union Lodge, known as "Local Union No. 310," having its headquarters in Oakland: "Pullman boycott in effect to-day noon, by order of convention." The telegram was signed by E. V. Debs, the president of the union. G. D. Bishop, secretary of local union No. 310, at Oakland, identifies [712] this telegram. The boycott was therefore declared at noon of June 26, 1894, which fell on a Tuesday.

Mr. Knox, who was an employé of the Southern Pacific Company at Sacramento, and a member of the American Railway Union at that place, being called as a witness for the defense, testified that he was chairman of the mediation committee; that the duties of the committee were to settle the differences between the employés and the corporation. He relates the circumstances connected with the commencement of the boycott, as follows:

"On the 26th of June we were asked to boycott the Pullman cars, and the union took action on it, and the mediation committee were ordered to call at Mr. Wright's office,—this was about 11:20 at night,—and notify him of the action of the union. 'Mr. Knox, Mr. Compton, and Mr. Mullen composed the mediation committee. We went down, and saw Mr. Wright, and told him what action the union had taken, and went back and reported again to the union. We were authorized then to lay off from our work, and to attend to this boycott; to notify the members, and the like. I went down and asked Mr. Halloran for leave of absence until the trouble was over with, and it was granted me. I was laying off at the time of the strike. Obtained leave of absence about two o'clock or 2:30 in the morning of the 27th

of June. The object of the boycott was this: That the American Railway Union had a big lodge at Pullman, Illinois. The Pullman Company had reduced the wages of their employés so that they could hardly live. * * * Received a message from President Debs, asking us to boycott the Pullman cars, and the mediation committee went down to the depot after the meeting. We ordered the boycott. We decided to boycott Pullman cars. We were notified to go down and tell Mr. Wright of the action of the union, which we did. Then we reported back to the union again, and told them what Mr. Wright said, and, after that, the meeting was adjourned, and we went from there to the depot to carry out our instructions. We were given full power to act in the matter. When we got to the depot, or shortly after we arrived there, Mr. Halloran, the yardmaster, and Mr. Small, and several of the officials, showed up around there, and wanted to know what the trouble was. Mr. Halloran called me off to one side, and asked me, as a favor, not to ask the men to boycott the Pullmans on 2, 4, and 16. He said that if we did not wish to handle the Pullman cars, if we would agree not to call him a scab, he would switch the cars. After consulting with the balance of the mediation committee, it was decided to let the Pullman cars on 2, 4, and 16 go through to their destinations without boycotting them. We told him we would switch the cars instead of him. We did not ask him to do any work. On the morning of the 27th, about 8:30, I went through the shops,—there were a great many shopmen belonging to our union,—to see what action they had taken in reference to working on Pullman cars. I found a great many of the men idle. They were not working on the Pullman cars. We told them to go and complete their work; to never mind boycotting the work; to keep on with it. * * * After going through the shops, and notifying the men to keep on with their Pullman work, we then went back to the depot. There was a train due to leave there at 10:25 in the morning, known as 'No. 84.' She has a Pullman car off of No. 2, that comes from Chicago, and another one to put on there at Sacramento. There is a first-class car put on at Sacramento. The other is a tourist car. The one that came through from Sacramento was loaded and the other one was empty. We asked the switchmen not to handle the Pullman car, because it was empty, and it was not necessary for it to go. We thought it was proper to boycott the empty Pullmans. They refused to put Pullman cars on. Mr. Halloran then came to us, and said he would take the engine and go to couple on, and we should come up and ask him not to couple on, and tell him we did not want him to scab on us, and he would not couple on. With that understanding he took the engine, and went around on the track where the Pullman car was, and started to coupie on. We went over, and told him we did not like to have the yardmaster [713] scabbing on us; it did not look well. He said, 'Of course, I will have to yield;' and he went up to the office, and asked us if we would go with him. We went with him. Mr. Jones asked him if he could not get some one else to put on the Pullman cars. He said, 'No; they are all A. R. U. men.' Mr. Jones said, 'Cannot you hire some one else?' He said, 'No; they are all A. R. U. men.' That train stood there until leaving time. Then it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of the office, and turned the plug on the hind end of the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks. They refused to allow the engine to go without the Pullman car on. We tried to induce Mr. Wright to let her go, because it was a mail train, and we did not want to be no parties to holding the mail. He refused. We went to him, and asked him if he would not let this other Pullman car go on 104, because the passengers were very anxious to get through.

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He said they would, and they switched the loaded tourist car off of 84, and put it on 104. That is about all that happened on the 27th. * * * That train was made up at Sacramento. It runs between Sacramento and Oakland, by Tracy, and around that way. The Pullman cars go to Los Angeles. They carry the Pullmans down to Lathrop, and then they go to Los Angeles. The balance of the train comes into Oakland. It starts from Sacramento. The Pullman car, though, that goes through, that comes from Chicago,—that loaded one,—the tourist car. They sent it out on another train at night, 5:30. '104' it is called. Sent it out in the evening,—on the same day. There was nothing left of that train, then, except the mail, baggage, express, and passenger cars. There was no one in the passenger cars. They went off on the next train,—the passengers; the through passengers from Chicago that went on the next train. There were a good many of the local that went on the next train, too. That only runs to Tracy. It does not come clear around to San Francisco, but stops there. Know C. A. Newton. I had a conversation with him on the night of the 26th, and I might have had on the 28th. I would not say for certain. Had a conversation with him on the night of the 26th, at which I showed him a telegram. The telegram read: 'Boycott declared on Pullman cars. E. V. Debs.'"

C. A. Newton, called for the United States, night yardmaster at Sacramento, for the Southern Pacific Company, contradicts Mr. Knox on this point, and says that Mr. Knox handed him a telegram, which he read. That the telegram read: "H. A. Knox, Sacramento. Boycott declared against Pullman. Hold all Pullmans. E. V. Debs." That he handed the telegram back to Knox, who left the room where they had met, with the exclamation, "That is hell." The witness Knox further states:

"About 12:30, I think it was, on the morning of the 28th, I received a message from Los Angeles, saying that some men were discharged for refusing to handle Pullman cars, and saying that the Los Angeles Union had decided to strike for the reinstatement of those men, and asked us to participate in the strike. The committee having full power to act, we considered the matter, and came to the conclusion it was a just fight, and we would take it up and help them out. In that message from Los Angeles they asked us if we would notify all concerned, which we did. I went down to the depot, and that special that Mr. Newton was testifying about—the officers' special—was just pulling out of the depot. I had had a conversation with the engineer and the fireman before that, and they told me if there was any strike they wanted a finger in the pie, so I ran up and got on the engine, and told the engineer and fireman about what had occurred. They said, 'Well.' Some one stopped them; I don't know who. They were stopped from the hind end of the train, and they said, 'Cut us off, and we will go to the house,' so somebody cut the engine off. I don't know who it was. No one was with me on the cab of the engine,—only the engineer and fireman. Did not offer any threats or intimidation or violence. * * * The [714] engine was cut off, and the engineer was taking it around to the roundhouse. I was in the depot by that time. Mr. Wright wanted to know what was the matter with the special. I told him, as near as I could find out, the engineer was

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going to strike with us. He had Mr. Newton stop him there in front of the depot, and he had a conversation with the engineer, and they finally agreed to go on with the special, and asked us if we would couple on. We told him, 'Yes; if they wanted to go.' I told Mr. Wright I thought it was foolish for them to go. They would go just as far as Rocklin, and that was no place to stay. There were no accommodations there at all. He said, 'For God's sake, let them go out of Sacramento, if they don't get over the American river bridge.' I thought to accommodate him. We would not ask the conductor and brakeman to boycott the officers' special. We would let them go as far as Rocklin. I knew they would not get any further than that, because the men had already quit up there. I got on the engine, and rode up through Sixth street yard with them, to see that the switches were all set, and everything ready to go. I rode with the engineer on the engine. After I got back from Sixth street the committee then went up to the Western Union & Postal Telegraph Company, and we sent a good many dispatches notifying them that we had struck."

(These telegrams will appear further on.)

Newton testified as follows with relation to the special car,—or officers' special, as it was called,—and with reference to the statements made by Knox at the time:

"I know Mr. Knox personally. He used to work for me. Mr. Mullen, I knew him personally, too. Mr. Compton I did not know until after the strike. I saw Mr. Knox about the 26th of June. * * * The first train that came into the yard after that conversation I had with Mr. Knox (referring to above) was a special that came from Oakland. It got in about 12:25 on the morning of the 29th. It was a special passenger train, that ran out of its ordinary time. It was composed of two officers' cars and the engine. * * * Saw Mr. Knox on the arrival of the officers' train, a little while after it got in, when it got ready to leave. Knox came running through the depot and hollered out: 'Stop that train! Stop that train! Not a son of a bitch of a wheel will turn on the system.' This was on the morning of the 29th, about 12:25."

This, it will be observed, flatly contradicts Knox as to what occurred at that time.

The witness Newton testifies further as to Knox's attitude, as follows:

"Did not have any direct conversation with Knox. When No. 3 came in, going east, there was quite a number of shopmen around there, standing in groups, I guess to the extent of forty or fifty. They came in charge of United States Marshal Long. This was along in the morning, about daylight, probably four o'clock, on the 29th. That was a mail train,—the regular Eastern overland,—the Atlantic express; the 'fast mail,' they call it. After No. 3 pulled out, the groups got moving towards the depot,—after she pulled out,—and some one in the groups made the remark to Mr. Knox why he did not hold the train,—what he let her go out for. He said he did not have force enough to hold her, but when seven o'clock came he would call out the shop men, and he would have force enough to hold anything that came along."

Knox testifies that:

"The strike was formally declared about 12:30 or 1 o'clock on the morning of the 29th of June by the Los Angeles Union. In Sacramento it was left in the hands of the committee. The committee had full power to act. The committee decided to strike to have those men in Los Angeles reinstated. As soon as they got the message they consulted probably for 25 or 30 minutes, and went on and did as requested by the message, to notify all those concerned. That was about 12:30 or 1 o'clock on the morning of June 29th. Had not at that time received any notification from Oakland. Did not act [715] on anything but the notification from Los Angeles. The members that were out on the road,—we notified all the unions along, Truckee, and Rocklin, and Dunsmuir, and all over the system,—we notified them that we had struck; that we had ordered a general strike in Sacramento, and those in Sacramento—the shop men—were all notified the next morning after they went to work, perhaps 8 o'clock or 8:30."

The attitude of the mediation committee, as representatives of the American Railway Union, is stated by Knox as follows:

"Mr. Baldwin and Mr. Knight wanted to know our position that we had taken in the matter, and between us we explained it as thoroughly as possible to them, and told them that, in the first place, we had boycotted the Pullman cars on legal advice; and, if I am not mistaken, I told them who our advice was from,—Mr. Ingersoll; and Mr. Knight said that a Pullman car, as long as it was attached to a mail car regularly made up, was part of a mail car. Of course we had an opinion from a very eminent lawyer and attorney, and we thought he knew as much about it as Mr. Knight did. Consequently we told him we would not handle any trains with Pullman cars attached during the boycott, and, now that the strike had been ordered, we would not handle any trains at all, except mail trains, until those men that had been discharged had been reinstated. That was about the gist of our conversation all the way through. It was repeated several times."

Again he says:

"I told Mr. Baldwin our men would not work on Pullman cars. That is all I told him. * * * We were doing nothing with reference to preventing the movement of trains; only quit work, that is all. * * * We were trying to induce the men that showed up to strike with us. That was the understanding between Mr. Wright and myself. * * * I told Mr. Baldwin that our men would not work on Pullman cars. Did not make the statement that we would not allow Pullman cars to move."

As to the power possessed by the mediation committee, Knox says:

"The committee had full power to act. The union had given them full power to act."

On cross-examination Knox testifies as follows:

"We discriminated between Pullmans that were full of passengers and Pullmans that were empty, on the 27th and 28th of June. After

the strike was ordered, we did not. All Pullmans were treated alike, and everything else, except mail. It grew from the Pullman cars to every other form of cars except the mail cars. After those men were discharged it did; did not matter what the destination of the cars was. We thought that we could control the A. R. U. organization, and we did. Anything that we knew anything about we controlled their action, through the strike. Anything that was done by any of the officers of the A. R. U. organization during the strike was done with the full consent, and was under the policy of our organization, as far as Sacramento was concerned. We were given full power to act. That power has never been taken away from us yet. Had control on the 3d of July, but do not know whether there was an A. R. U. man who moved the Pullman cars on that day or not. Could not swear to it. I do not think there were very many of them.

It appears that on July 5th, and during the strike, Knox, Compton, and Mullen, of the mediation committee, appeared before the Citizens' Protective Association of Sacramento, and made a statement concerning the attitude of the American Railway Union. Cornelius C. Howell, who was present at the meeting, testifies as follows:

"Was in Sacramento the latter part of June and the early part of July last. I was employed by the Industrial Improvement & Manufacturers' As- [716] sociation of Sacramento. I was looking up manufacturers' industries to locate at Sacramento for that company or association. Became a member of the Citizens' Protective Association, I believe on the 3d of July. That association formed for to get together and see if they could not do something to open up the commerce connected with the city, and such other business as might be necessary, owing to the condition that things were in at that time from the cause of the strike that had been ordered on the 29th of June, or the strike that occurred on the 29th of June. I was secretary of the organization from the day that we organized, up until, I think, the 15th or 20th of July; somewhere along there. Performed the duties of secretary at meetings. Recollect a meeting held on or about the 5th day of July last. It was called by the association to see if they could not do something in order to open up the commerce. Members of the mediation committee of the A. R. U. were present at that meeting. They were Mr. Knox, Mr. Compton, and Mr. Mullen. After discussing the ways and means to adjust matters, it was decided that it would be better to bring these people before the association, this mediation committee, and find out the condition of affairs,—what the causes were of all the trouble,—and see if we could not do something to adjust matters; and in that connection it was agreed that we would admit them, and see what they had to say; they having, I believe, made a proposition to some member of the association that they would like to come before the association, as the mediation committee of the American Railway Union. They came before the meeting and made a statement. Parts of their statement were reduced to writing. This is a part of the record of the meeting of the Citizens' Protective Association held on the 5th of July. Not the entire statements, but I took down part of what they said, and then we dictated it out, and took the minutes to Mr. Knox in his room. Mr. Compton was present when I went there with the minutes. I asked him to read them over, and see if they were correct; that I did not wish to have them quoted as saying something before the association that they did not say, and,

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before they would become a part of the record, I wanted them to see if they were right. I read the minutes to them. These two were present at the time. They looked them all over; and wherever they wanted any changes made I run the pencil through them, as it appears here, and when they got through—they looked it all over and read it—I wrote this certificate attached, and Mr. Knox signed it, and Mr. Compton signed it, in my presence,—both of them in my presence. I left the paper with them so that they might show it to Mr. Mullen, another member of the committee. He returned, as I understand, after I left, signed the paper, and they sent it down to my office. We had offices in the same building. The interlineations or erasures were made just before that was signed, while Mr. Compton and Mr. Knox were standing at my side. I think they were made—in fact, I know—at the request of Mr. Knox. He did the talking."

This document reads as follows:

"SACRAMENTO, *July 7th, 1894.*

"When the committee returned and had introduced the mediation committee from the A. R. U. to the chairman, Mr. Katzenstein, he in turn introduced Mr. Knox, Mr. Mullen, and Mr. Compton to the association, and invited Mr. Knox to address the association, which he had come to meet. Mr. Knox, among other things, after thanking the association for allowing him to be heard, stated among the grievances that the original cause for this strike was on behalf of the wage-earners at Pullman, Illinois. Mr. Geo. Pullman had been grinding down his men with such small wages that it was impossible for them to get along. Mr. Knox went into detail as to treatment of the employés received at the hands of the Pullman Car Co., at Pullman, Ill. That through the president of the A. R. U. order he had declared a boycott against the Pullman cars, and to effectually accomplish the object he had ordered the strike, and it had now resolved itself to this: That the A. R. U. order, which he represented, demanded that Pullman restore his men in Chicago to their old places, with the same scale of wages paid to them in 1893; or that the S. P. R. R. Co. purchase the one-quarter ownership of the Pullman Co., paint out the Pullman name from the cars, and restore all the men on the railroad and in all shops to their old position and wages. Senator Cox inquired of Mr. [717] Knox if he did not think this committee of citizens could be interested to an extent that something might be done to adjust matters between them and the railroad. Mr. Knox said it had gone so far that nothing could be done until the whole question was settled, and that he had given his ultimatum. Mr. McClatchy asked Mr. Knox what condition affairs were in at this time or what the situation was. Mr. Knox then stated that he would allow the mail and express to be moved, but that no passenger cars or freight cars of any kind or description would he consent to have moved until such time as the demand he made had been complied with. Mr. Mullen said, in part, after Mr. Knox had taken his seat, that this was a fight between capital and labor, and that from the chief justice of the United States down through all the branches—judicial and legislative departments—of the government, they were corrupt, and that labor could not get its just dues, and that his association had taken this way of forcing justice to assist their fellow men in obtaining for honest labor a proper compensation. Mr. Cox then asked what he could suggest. To this Mr. Knox replied that they might intercede with the government, and see if they could not move the mails and express to accommodate the business of the country. He said that that would help us out. 'We are in this fight to win, but we are as anxious to have it settled as you are, and we want to go to work,

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but will not until this question is settled as I have outlined. There is a revolution going on in this country. To-day it is a principle that we are contending for. Should we give up, they would make us crawl on our bellies after them.' Mr. Compton stated, among other things, that the A. R. U. organization would not resort to any desperate means, so long as the Railroad Co. would deal with them without using armed force. That their organization was composed of law-abiding citizens, and would not commit any overt acts. At this point Mr. Ray tried to have his resolution read, but was declared out of order, and the resolution remained on the table. Several attempts were made by others, but without effect; whereupon Mr. Avery moved that a vote of thanks be tendered this committee for having made this association of business men so frank and fair a statement in relation to their position with the railroad company and this general boycott. The motion being seconded, it was unanimously carried, after which the committee retired.

"We have read the foregoing statement of the records kept by Mr. Howell of our statements, and certify to their correctness.

"Committee: H. A. KNOX, *Chairman.*
"THOS. COMPTON.
"JAS. MULLEN."

Mr. Knox was asked if he signed the statement produced by Howell. He said he did; that there were some alterations, but they were not material.

Continuing, Howell further stated:

"Saw Knox after the 7th. I had no conversation with him, although I saw him a number of times, after the time I went to his room and he signed that paper, until the 9th of July. I saw him then before the executive committee of the Citizens' Protective Association, at the Orangevale office in Sacramento. George B. Katzenstein, Mr. Van Vorhees, Gen. Llewellen Tozier, Mr. Frank Miller, Mr. J. V. McClatchy, of the Sacramento Bee, and I am not sure but I think Senator Cox was present at that meeting. The executive committee was composed of nine members, but they were not always there. Mr. Knox was there. I was there. I think Mr. James Mott was there. He is the manager of the Crocker Company up there. During the time of this strike we were in the habit of meeting every day, sometimes twice a day, and we had received information from some source that the government was going to take charge of affairs, and we had heard a good many rumors. We sent for Knox. We brought him there to see what position he was going to take in view of the fact that the troops were to be expected there. This was the 9th of July. These gentlemen met Mr. Knox in the capacity of the executive board of the Citizens' Protective Association. Mr. Katzenstein, the chairman of the executive committee, asked Mr. Knox some questions in relation to the position that his [718] association expected to take or that he expected to take after the troops got there. My recollection is that Mr. Katzenstein in one of the questions said that it was reported, and so published, that Mr. Debs, of Chicago, had issued a proclamation advising all men to keep away from these public places, from collecting at the depots, and so forth, and he asked him why that rule could not be enforced by the A. R. U. here. Mr. Knox handed Mr. Katzenstein a telegram. The telegram, as near as I can remember,—the substance of the telegram,— was about this: To pay no attention to newspaper rumors; that they were sure to win; that everything was progressing all right in their interests, or words to

that effect. Mr. Katzenstein asked him this further question: That in view of the fact that the troops were ordered there, and would probably be there the next day, or the morning after, and as the matter was passing out from the civil authorities to the military, and in view of the fact that he was a citizen, the same as the balance of the people he had come there to meet, what position he would take; to which he said, as near as I recollect, that, so far as he was concerned himself, he could not do anything, for there were two or three injunctions against him. But, so far as his men were concerned, which was over 2,000, he had no control of them, and he did not believe they would allow any train to go out of the depot with Pullman cars attached. Then Mr. Katzenstein further asked him, as near as I can recollect, * * * that in view of the fact of the military coming there, and if it would be a question between the principles of his order and the protection of the citizens and his family and so forth, which course he would pursue. He said that the principles of the order of the A. R. U. stood first with him in relation to this business, or in relation to this strike. Mr. Katzenstein, as near as I can remember, called his (Knox's) attention to the proclamation, as it was published in the paper. I don't remember Mr. Knox saying anything in relation to the cause of the proclamation. He produced that telegram. It was read. He handed it out, and talked in about the same strain that was expressed in the language of the telegram. I would not undertake to repeat what he said. I remember distinctly he stated you could not depend on the proclamation. He did not believe there was any truth in it, and used this telegram as evidence to corroborate his statement."

V. S. McClatchy, called on behalf of the United States, testified:

"I am one of the proprietors and business manager of the Evening Bee, Sacramento."

A paper being shown the witness, he said:

"That paper is a statement made by the secretary of the Citizens' Protective Association, under instructions from its executive committee. * * * The paper was drawn up by Mr. Howell, secretary of the Citizens' Protective Association, under instructions of its executive committee, and purported to embody the statements made by the mediation committee of the American Railway Union before the Citizens' Protective Association at its meeting, I think, of July 5th. Mr. Howell was instructed to draw this paper up and present it to the mediation committee for their approval and signature. * * * I saw it signed by two gentlemen. I did not see the third member of the committee sign it. * * * Mr. Knox, who was chairman of the committee, signed it, and, as certain as I can be at this time, the second one was Mr. Compton. The third member, who I think was Mr. Mullen, was not present. * * * At this time I saw those two names signed Mr. Howell was present. He then left it with Mr. Knox, who was to obtain the signature of the third gentleman. * * * I have in my possession another statement signed by Knox, relative to the strike. * * * Mr. Knox made certain statements before the executive committee of the Citizens' Protective Association, I think about July 9th,—I do not want to be certain of the date,—and under instructions I prepared a report of Mr. Knox's remarks before the committee, or some of them, and submitted it to him for approval prior to its being published in the newspaper. Mr. Knox approved it, after minor amendments, and it was published. * * * Mr. Knox signed

it in my presence. * * * Mr. Knox's signature was obtained in the afternoon, shortly before the Bee would go to press. In order to insure its publication [719] that day, it had to be cut up in what printers call 'short takes.' * * * It was signed before being cut up. It can be readily pasted together."

After further testimony tending to identify the document, it was introduced, and is as follows:

"Chairman H. A. Knox, of the Sacramento mediation committee of the A. R. U., had a short conference this afternoon with the executive committee of the Citizens' Protective Association, at the request of the latter. The work of the committee so far had been directed towards preventing a conflict at Sacramento that could only result in bloodshed, without settling the main issue, and to this end had brought influence to bear on both the Southern Pacific Company and its striking employés to prevent any aggressive measures on either side. The position of the United States government, however, in ordering the opening of the road and the use of federal troops for such purpose, has practically taken all discretion out of the hands of the railroad company and the United States marshal. Mr. Knox was asked, therefore, if the United States government insisted on taking charge at Sacramento and running trains, would the A. R. U. permit it to be done without obstacle, or would it oppose by force the government officials and troops? Mr. Knox stated that personally he would do all he could to prevent a conflict with the government, and, if it moved trains, would not oppose, whether with Pullmans attached or not, and would so advise his men. He said, however, that if the government insisted on moving Pullmans without a settlement of the main question, he could not control the men under him, as they had notified him—over 2,000 strong—that they would not obey orders in that event, and would engage the troops. He said the position of the A. R. U. was in no way changed. It would not permit the running of any trains unless the demands of the organization, as outlined at a former conference with the citizens' committee, and published in the Bee of Friday last, were complied with. His attention being called to the declaration of Eugene V. Debs, head of the A. R. U., calling on all members not to attempt interference with trains or railway property, Mr. Knox said that he had not received officially any such notice, and had been warned by Debs to pay no attention to newspaper reports, unless officially reported to him. He could not, therefore, take any notice of the proclamation referred to, and doubted its genuineness. [Signed] H. A. Knox."

Mr. Knox denies having signed the statement produced by Mr. McClatchy. In this regard he testifies as follows:

"I never signed that statement in the world. That statement, or part of it, was when they called me before their committee in the afternoon, I think, of the 9th. It was simply said verbally, part of it, and part of it was not. I never signed the statement, and they have got more in there than I ever said. * * * The statement is about correct, until we get down to where it says: 'He said, however, that if the government insisted on moving Pullmans without a settlement of the main question, he could not control the men under him, as they had notified him, over 2,000 strong, that they would not obey orders in that event, and would engage the troops.' I never made any such statement as that."

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Barry Baldwin, the United States marshal for the Northern district of California, was at Sacramento during the strike, and testifies as follows respecting statements made to him by members of the mediation committee and others, in relation to the attitude of the American Railway Union:

"I know Mr. Knox, Mr. Compton, and Mr. Mullen. Know Mr. Worden. I saw them on the evening of the 1st of July at the depot, in a caboose, in the yard there, right at the depot, on the tracks. I was told that they were a committee; that they were the leaders of the committee of the strikers. Found Mr. Worden there at the time. * * * I went there officially, in order to protect the mails,—to protect the trains carrying the mails; in [720] order to allow the railroad officials to run the trains carrying the mails. We heard that they were being prevented from doing so. This was Sunday evening, the 1st of July, about eight o'clock in the evening. * * * It was a caboose on the tracks adjacent to the depot building,—the yard at Sacramento; possibly a hundred yards from the river,—fifty to a hundred yards. The parties in the car went to find Mr. Knox. Mr. Knox was not in the car at the time. They found Mr. Knox, and Mr. Knox came in presently, after a little; and they requested a number of people there, who had no business with their committee, to withdraw. A number of people in there withdrew, leaving, I suppose, some six to ten inside the car. It was dark in the car. It was lighted afterwards, but poorly lighted. Mr. Knox was present, and also Mr. Worden, and I believe Mr. Compton, and Mr. Mullen, and several others whom I don't know,—did not recognize at the time. * * * I stated to them the purpose for which I had come to Sacramento, and they asked me whether Pullman cars were to be moved with the train. Knox was the spokesman, and did most of the speaking. The others spoke a little, some of the others, and especially Mr. Worden, who was continually talking and interrupting. I told them who I was, and my purpose in going to Sacramento. * * * My business there was to see them and talk to them, and see what the trouble was, and why these trains could not be moved, and why they were preventing them from being moved. They objected to Pullman cars being moved, claiming that they were willing that the trains should go with the mails and other passenger cars, but not with Pullman cars. They said they had advice that Pullmans were no part of a train,—no part of a mail train; and they gave me to understand that they would not be allowed to go,—to be moved. They said they had eminent legal advice. That they had paid $250 for the advice. They did not state who had advised them. * * * I told them that I should perform my duties, and see that the trains were moved. I told them that the trains should be moved as often as made up, with Pullman cars attached where it was customary to place them. I told them that I was certain they were not right in doing it,—in opposing the proper authorities and defying the law. They continued in the attitude that they could not allow Pullman cars to move. I told them my purpose in being there was to protect those mail trains, and trains carrying the mails,—United States mails. * * * Had conversation with Mr. Worden on my way up from the caboose out across the tracks. He asked if we knew who he was, and I then first learned his name. He said that his name was Worden; that every one knew him there, and he was prominently connected with the movement. * * * It was the A. R. U. people that were organized there. They were the mediation committee of the A. R. U. They were the committee. I

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treated them officially as leaders of the movement,—ostensible leaders of the movement.

The same witness further testifies, as to the action and attitude of the mediation committee, substantially as follows:

"I saw the members of the mediation committee again (the second time) on the evening of the 2d, at the Golden Eagle Hotel, at my room. Saw Knox, Mullen, and Compton. They came to see me as the mediation committee of the A. R. U. They came to see me as U. S. marshal. They came to see me at the room I occupied. I informed them that it was my intention to go down the next day, and clear the depot grounds of the crowds that were there, in order that the railroad company could move their trains,—the mail trains, or trains carrying the mails,—and that I hoped that the strikers would not offer any resistance; that I was there by lawful authority to do this; it was my duty to do it. Then we talked the matter over. They said that they had no wish to use any violence. They asked me to go down. They said they would do all they could to get the strikers to vacate the depot grounds. They asked me to go down myself, or with as few deputies as possible, for they thought there was less danger of a conflict if I did that; that I could get on better alone than to take down a number of deputies; that it might irritate the people, and we would not get on well. But they said they would assist me as much as they could in inducing the crowd to clear away from the depot, and allow the trains to be operated. [721] They said that if they did this they wanted me to allow them to send a committee of three to induce the engineers, or those that were to work the trains, in together, to persuade them not to go out with the Pullman cars; to go inside of the line I might form. I told them that I did not know that I would object to their doing that, so long as they did not intimidate them,—so long as they were not too persistent, and would not continue to talk to them too long, or in any other way threaten them, by numbers of talk; and also, if the people they were talking to did not wish to hear them, did not wish to listen to them, and requested them to leave, why, they should leave. But I told them that I could not promise even that I would let them do that; that I could not say at that moment; that there might be some objection arise at the time on the part of the railroad company, and I might have to further consider the question as to their right to be present at the depot grounds, but at that time I did not see any objection to it, as long as they did it peaceably."

Mr. Knox, in his testimony, details this interview in the caboose as follows:

"Mr. Baldwin and Mr. Knight wanted to know our position that we had taken in the matter, and between us we explained it as thoroughly as possible to them, and told them, in the first place, we had boycotted the Pullman cars on legal advice; and, if I am not mistaken, I told them who our advice was from,—Mr. Ingersoll; and Mr. Knight said that a Pullman car, as long as it was attached to a mail car regularly made up, was part of a mail car. Of course, we had an opinion from a very eminent lawyer and attorney, and we thought he knew as much about it as Mr. Knight did; consequently we told him we would not handle any trains with Pullman cars attached during the boycott, and, now that the strike had been ordered, we would not handle any trains at all, except mail trains, until those men that had been discharged had been reinstated. That was about the

gist of our conversation all the way through. It was repeated several times."

T. W. Heintzelman, master mechanic in the employ of the Southern Pacific Company at Sacramento, called for the United States, testified as follows:

"I know Knox and Compton. They were out on a strike. Before the strike, Knox was a switchman, and Compton was a machinist working in the shop. * * * I was present during a part of a conversation between Knox and Mr. Small at the roundhouse on June 30th. Mr. Small was the superintendent of motive power. * * * I heard Knox remark that they were in the strike to win, and they were going to win by any means."

E. C. Jordan, locomotive engineer at Sacramento, called for the United States, testified to attending a meeting on June 29, 1894, at which Knox was present, as follows:

"In relation to a telegram he said he would get, it was asked him as to what his jurisdiction was in this matter; and he stated that his jurisdiction extended from Sacramento to El Paso and to Portland and to Ogden, out of Sacramento. * * * There were three orders present,—Conductors, the Engineers, and Mr. Knox, of the A. R. U. * * * The meeting was held for the purpose, as I understood it, of taking some action to bring the strikers or the A. R. U. men and the company together, in order to devise some means by which the strike could be adjusted in some manner to start the road."

The following telegrams, purporting to have been signed and sent by H. A. Knox to various unions within his jurisdiction, respecting the state of affairs at Sacramento, and transmitting advice to other local unions with reference to the action they should take, were in- [722] troduced by the prosecution for the purpose of showing the concert of purpose and action among the different branches of the American Railway Union.

"June 27, 1894. To I. B. Hoffmire, Portland, Or.: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 27, 1894. To E. V. Debs, Pres. A. R. U., Chicago: Will we stop loaded sleepers? Ans. H. A. Knox."

"June 27, 1894. To W. H. Clune, Los Angeles: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 27, 1894. To J. M. Wagner, Ogden, Utah: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 28, 1894. To M. C. Roberts, Dunsmuir, Cal.: Be ready to go out at moment's notice. H. A. Knox."

"June 28, 1894. To E. V. Debs, Chicago, Ill.: The ORC and BRI are going to take train out to-night. We are going to stop everything. Answer. H. A. Knox."

"June 28, 1894. To J. M. Wagner, Ogden, Utah: Be ready to go out at moment's notice. H. A. Knox."

"June 28, 1894. To M. C. Roberts, Dunsmuir: Don't know, but if any, you hold. H. A. Knox."

"June 29, 1894. To E. P. Condrey, Rocklin: Yes; stay in Rocklin. H. A. Knox."

"June 29, 1894. To C. B. McClintock, Truckee, Cal.: Hold Nos. 4 & 2 sure. H. A. Knox."

"June 29, 1894. To G. W. Lindsay, Wadsworth, Nev.: Hold No 4 there sure. H. A. Knox."

"June 29, 1894. To E. P. Condrey, Rocklin: General tie up ordered. Notify all concerned. Answer. H. A. Knox."

"June 29, 1894. To McClintock, Truckee: General tie up ordered. Notify all concerned. H. A. Knox."

"June 29, 1894. To E. V. Debs, Pres. A. R. U., Chicago: General tie up ordered on S. P. system. All out. H. A. Knox"

"June 29, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Everything on system at standstill. Company makes their death struggle to-night. H. A. Knox."

"June 30, 1894. To F. Almas, Summit, Cal.: No; stop at once. H. A. Knox."

"June 30, 1894. To J. C. Church, Carlin, Nev.: Ice until further orders. Everything stopped. H. A. Knox."

"June 30, 1894. To J. T. Roberts, Oakland, Cal., A. R. U.: Have any troops left, and where are they going? H. A. Knox."

"June 30, 1894. To J. T. Roberts, A. R. U., Oakland: Has train left with deputy marshals? Rumor here. H. A. Knox."

"June 30, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: This motion was adopted by B. of L. E. and O. R. C.: That the basis of the settlement be that all discharged men who have taken part in the Pullman boycott be reinstated, and guaranty given men won't be discharged for same cause. Pullman boycott to remain in force, and strike declared off. This is the grandest victory ever won, and everybody is on our side. H. A. Knox."

"July 1, 1894. To A. W. Wallace, Rocklin, Cal.: There was, but we stop at other points. Not wheel moving. H. A. Knox."

"July 1, 1894. To J. T. Roberts, A. R. U., Oakland, Cal.: Keep me posted on everything that leaves there. H. A. Knox."

"July 1, 1894. To W. H. Clune, Sec., Los Angeles, Cal.: How are engineers and conductors standing with us down your way? H. A. Knox."

"July 2, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Did you give permission to move Mrs. Stanford? H. A. Knox."

"July 2, 1894. To H. L. Walthers, Dunsmuir, Cal.: She can go via Davis, not by Sacramento."

"July 2, 1894. To H. L. Walthers, Dunsmuir, Cal.: Troops coming here. Stand firm; we are. Ans. H. A. Knox."

"July 3, 1894. To E. E. Barton, Ogden, Utah: We understand Co. tried to brake block, but we fooled them. H. A. Knox."

[723] "July 3, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Hunt up the National Pres. of the Marine Engineers. Confer with him. Steamers are a terrible damage to us. H. A. Knox."

"July 4, 1894. To McClintock, Sec. A. R. U., Truckee, Cal.: Big army here. You come with all guns and volunteers. Come by train without orders at once. H. A. Knox."

"July 4, 1894. To E. E. Barton, Ogden, Utah: Good. Same here. We have 4,000 beside the city. Stand firm. H. A. Knox."

"July 4, 1894. To Arthur Wallace, Rocklin, Cal.: Soldiers on this end of American river. Don't stop. Bridge O. K. H. A. Knox."

"July 4, 1894. To Arthur Wallace, Rocklin, Cal.: Come. Bring all hands. Rush. H. A. Knox."

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"July 4, 1894. To H. L. Walthers, Dunsmuir, Cal.: One thousand cavalrymen and militiamen here. Come with whole outfit by train, without orders, at once. H. A. Knox."

"July 4, 1894. To W. H. Walthers, Dunsmuir, Cal.: Don't close the Western Union office. That will hurt our cause. And take guard away from the Postal office. H. A. Knox."

"July 4, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: We have the troops on our side. They have refused to obey commands, and we are stayers from away back,—bound to succeed. H. A. Knox."

"July 5, 1894. To C. B. McClintock, Truckee, Cal.: Please allow merchants to take perishable freight from cars, but agent must check it to them. H. A. Knox."

"July 5, 1894. To Madden & Turner, Dunsmuir, Cal.: All quiet here. We are sure to win. H. A. Knox."

"July 5, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: It is reported the U. S. marshal and Gen. Dimond, of state troops, has turned our affair over to Washington Have attorney there to work on it. We have everything our own way, and have not broke the law, only by keeping about 5,000 men in sight. Please advise us what to do. Not a wheel moving. H. A. Knox."

"July 6, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Any truth in report of strikers and soldiers having battle in Chicago? Please ans. We are as firm as rock. H. A. Knox."

"7/7/1894. To J. M. Wagner, Ogden, Utah: All quiet. Stand firm. H. A. Knox."

"July 7, 1894. To Wm. O. Leary, Pres. Miners' Union, Virginia City, Nev.: Resolutions received, and return thanks. We are bound to win. We are as solid as rock. H. A. Knox, Chairman."

"July 8, 1894. To W. H. Clune, Los Angeles, Cal.: Force them to stop, or tell them when we settle, their firemen will run their engines. We done that, and you bet it brought them to time. All quiet here. We are solid as rock. H. A. Knox."

"July 9, 1894. To W. H. Clune, Los Angeles, Cal.: Everything very quiet here. Nothing moving here. How is things there? Stand firm, and don't let nothing go. H. A. Knox."

"July 9, 1894. To Chas. Fink, Oakland, Cal.: We sent Geo. Hale to Vallejo, but if there at Oakland he is O. K. H. A. Knox."

"July 11, 1894. To W. G. Boyce, Pres. Miners' Union, Silver City, Nev.: Thanks for sympathy. We are under heavy expense. Financial aid would be gratefully received. H. A. Knox, Chairman."

"July 11, 1894. To Chick Featherson, Summit, Cal.: I received orders from E. V. Debs to order strike on entire system. Hence my order. Sacto. is solid yet. H. A. Knox."

"July 11, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Sorry you are in jail, but be strong, and we will carry the strike on if they put all of you in jail. Lots of soldiers here, but everything quiet so far. Every man out here, but a few scab engineers. H. A. Knox."

"July 11, 1894. To J. S. Walton, Oakland, Cal.: Adopt code. Lots of soldiers here, but everything quiet yet. H. A. Knox."

"July 12, 1894. To J. Balder, Truckee, Cal.: Train of soldiers getting ready to leave here for Truckee. Everything quiet. H. A. Knox."

"July 12, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: I will stand [724] by A. R. U. as long as life lasts. I refused to run for railroad commissioner, because I thought so much of the fight. We are doing nothing but what is proper. We are going to fight it out on this line. We have 1,800 soldiers here, but no trains out yet. H. A. Knox."

"July 13, 1894. To Chairman A. R. U., Truckee, Cal.: Reports all

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fake. Stand pat. Freight left here, under protection of soldiers, for the East. H. A. Knox."

"July 13, 1894. To Clune, Chairman A. R. U., Los Angeles, Cal.: Reports all fakes. Strike is on in full force. Stay with them to the last. All O. K. here. H. A. Knox."

"July 13, 1894. To J. C. March, Carlin, Nev.: 1,800 soldiers here for two days, but have only got freight out east. Reports are all false. Stand pat. H. A. Knox."

"July 13, 1894. To F. M. Gillett, San Luis Obispo, Cal.: Reports all false. Stand pat. 1,800 troops here, but got only one train out in two days. Sure to win. H. A. Knox."

"July 13, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: United Press dispatch says you have declared strike off. I have sent messages all over denying it. Answer. H. A. Knox."

Telegrams have been introduced purporting to have been signed by H. A. Knox, addressed to E. V. Debs, at Chicago, and to other persons, in relation to the strike, dated July 14th, and subsequent dates; but Knox testifies that he was arrested on July 14th, and was in jail for three weeks, and he denies specifically having signed the 11 telegrams dated July 22d, which bear his name. It is possible that some member of the mediation committee, or other officer of the American Railway Union at Sacramento, acting for the committee, may have signed these telegrams in the name of Mr. Knox; but as the testimony in the case, and particularly the telegrams sent out by T. H. Douglass, who appears to have been chairman of the mediation committee after July 14th, indicate that the strike was declared off on July 21st, telegrams purporting to have been signed by Knox, and dated after July 14th, and particularly those dated July 22d, are certainly discredited, and I will not, therefore, refer to them further in this connection. In any view, they do not appear to be important.

George Vice testified, on the part of the defense, that he had been a locomotive fireman for the Southern Pacific Company in June last; that he belonged to the American Railway Union at Sacramento; was the vice president of it; thinks he was present the night that the telegram came from Chicago, announcing the fact that there was going to be a Pullman boycott. He admits signing the following telegram:

"Sacto., July 6, 1894. H. F. Michaels, Master Cactus Lodge, 94, Tucson, Ariz.: Firemen of following lodges out with A. R. U., to the man: 260, 143, 312, 91, 97, 19, 58, 98, 366, 193, and Roseburg. If you tie division up, will guaranty full protection of A. R. U. Not a wheel turned here for six days. Answer. Geo. Vice, Master 260."

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Also the following:

"Sacramento, Cal., July 16, 1894. J. Friant, Fresno, Cal.: Firemen here stand firm. Scabs scarce. We are winners. Geo. Vice."

Also the following:

"Sacto., July 16, 1894. Geo. W. Lindsay, Wadsworth, Nev.: Firemen here all firm. Scabs scarce. We're winners. You stand firm. Geo. Vice."

[725] He also admits sending the following:

"Sacramento, Cal., July 17, 1894. R. E. Nobel, Summit: Quit immediately and tie up everything. Come to Sacramento. We're sure winners. Answer. Geo. Vice."

The witness, being questioned about the wording of the telegram, testified further as follows:

"A Juror: Q. What did you mean by 'tie up everything'? A. Leave their work. Q. You said, 'Quit and tie up everything.' What do you mean by 'tie up everything'? A. Just to leave work. The Court: Q. You say, 'Quit and tie up everything.' 'Quit' seems to be your definition for 'tie up.' A. I meant the same thing by it. Q. 'Quit' and 'tie up' are the same thing? A. Yes, sir. Mr. Knight: Q. By 'tie up everything,' you mean leave work from everything? A. Leave the service. Q. From everything? A. Yes, sir. Q. What is the meaning of the word 'everything'? You said, 'tie up everything.' A. I suppose there is a whole lot of meaning to 'everything.' Q. What is your meaning in that connection? A. If a man is on a job, according to that,—if he is on an engine,—he will leave his work."

He also admits sending the following telegram:

"Sacramento, Cal., July 17, 1894. J. J. Brennan, Rocklin: Stand. Do not allow anybody to report for work. Stronger here than ever. We're sure winners. Geo. Vice."

The witness states:

"When this telegram was sent, it was only meant for the firemen. There were lots of firemen that did not belong to the A. R. U."

Admits writing and sending this telegram:

"Sacramento, Cal., July 17, 1894. Geo. W. Lindsay, Wadsworth, Nev.: Still firm, and will stay to last. Sure winners. Gaining recruits from scabs. Fillmore weakening. He interviews mediation board, and makes concessions. Geo. Vice."

Also this one:

"Sacramento, Cal., July 18, 1894. H. F. Michaels, Tucson, Ariz.: State situation. Tied up here tighter than ever. Use all means to do same there. We're winners. Geo. Vice."

Also this one:

"Sacramento, Cal., July 18, 1894. W. J. Featherson, Summit, Cal.: Quit immediately, and tie up everything. Come to Sacramento. We're sure winners. Answer. Geo. Vice."

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Also this one:

"Sacramento, Cal., July 21, 1894. F. P. Sargent, Terre Haute, Ind.: Eastern B. L. F. men taking our jobs. For God's sake, save us. S. P. will not re-employ us. Use all means to save us. Answer. Geo. Vice, Master 260."

The witness states that he had no authority to send telegrams for the American Railway Union; that he sent them by virtue of his being a master of the Brotherhood of Locomotive Firemen. He admits, however, that he was also an officer of the American Railway Union, being its vice president.

H. B. Breckenfeld, called for the United States, testified that he was chief train dispatcher for the Sacramento Division of the Southern Pacific, at Sacramento; that he knew Terry Douglass; that he knew that Douglass was connected with the A. R. U. during the recent strike, because Douglass appeared before Mr. Fillmore, or in his rooms, on one or two occasions, in connection with the strike; [726] that on one occasion Douglas came in an official capacity; that, when he did come in an official capacity, Douglass announced that they had decided to declare the strike off. This was in the latter part of July. Douglass' position in the American Railway Union was a member of the mediation committee. Douglass was not a member of the mediation committee right through the strike. The witness understood that they (Douglass and the two men who accompanied him on the occasion just referred to) took the place of the original mediation committee at Sacramento. On the occasion referred to they came into the rooms of Mr. Fillmore, and requested the stenographer who was present to prepare upon the typewriter a statement to that effect, which was read to them by the stenographer, and was signed by them. The witness was present when this was done. Witness knows the handwriting of Douglass. Identifies the signature of Douglass on the following telegrams:

"Sacto., July 14th, 1894. To F. P. Cox, Rocklin, Cal.: Men are determined. Situation good. T. H. Douglass."

"Sacto., July 16, 1894. To E. V. Debs, Chicago, Ill.: A committee of fruit growers has waited on us. Are you any nearer a settlement? Ans. quick. T. H. Douglass."

"Sacto., July 16, 1894. To S. Brennan, Rocklin, Cal.: Message from Debs. Situation everywhere good. Switchmen have all quit here. T. H. Douglass."

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"Sacto., July 16, 1894. To R. A. Battenfield, Rocklin: Four trains tied up at Red Bluff. No crews to move. T. H. Douglass."

"Sacto., July 16, 1894. To E. V. Debs, Chicago, Ill.: Scabs coming from East. With few exceptions, men solid here. T. H. Douglass."

"Sacramento, Cal., July 17, 1894. To R. A. Battenfield, Rocklin, Cal.: Situation better than yesterday. Prospects brighten every hour to A. R. U. T. H. Douglass."

"Sacto., July 18th, 1894. To R. A. Battenfield, Rocklin: Did any train leave Rocklin this morning? T. H. Douglass."

"Sacto., July 18th, 1894. To W. Balder, Truckee, Cal.: Received message from James Hogan. He states situation firm everywhere. T. H. Douglass."

"Sacto., July 18th, 1894. S. J. Brennan, Rocklin: Situation has not changed. No work for shopmen. T. H. Douglass."

"Sacto., July 18th, 1894. To E. E. Barton, Ogden, Utah: Committee waited on J. A. Fillmore. Nothing satisfactory. Men remain firm. T. H. Douglass."

"Sacto., July 19, 1894. To G. W. Lindsay, Wadsworth, Nev.: No change in situation here. Remain firm. T. H. Douglass."

"Sacto., July 20, 1894. To James Hogan, Chicago, Ill.: True situation men wavering in many places. Give your views affairs. T. H. Douglass."

"Sacto., July 21st, 1894. To F. P. Cox, Rocklin, Cal.: Probably strike will be declared off at 2 p. m. T. H. Douglass."

"Sacramento, Cal., July 21st, 1894. To W. Balder, Truckee, Cal.: Expect strike to be settled by 2 p. m. T. H. Douglass."

"Sacramento, Cal., July 21st, 1894. To G. W. Lindsay, Wadsworth, Nev.: This lodge has declared strike off by unanimous vote. T. H. Douglass."

"Sacto., July 21, 1894. To S. J. Brennan, Rocklin, Cal.: This lodge has declared strike off. T. H. Douglass."

"Sacramento, Cal., July 21, 1894. To W. Balder, Truckee, Cal.: Strike has been declared off Pacific, unconditional. T. H. Douglass."

T. H. Douglass, called for the defendants, testified: That he was a brakeman last June and July, running between Sacramento and Truckee. That he belonged to the American Railway Union and Order of Railway Conductors. That he acted as chairman of the mediation committee, he thinks, from the 12th or 13th or 14th [727] of July. That the occasion of his so acting was because the original members on that committee were arrested. That John Hurley and G. H. Hale were on the committee with him. That he continued in that capacity until the strike was declared off. That he does not remember the day when the strike was declared off, but he thinks it was the 25th day of July. He attended a meeting of the American Railway Union on the 26th of June. There was a message read from E. V. Debs, declaring a boycott on Pullman cars. The union took action on the matter, and declared a boycott. Was in Truckee when the strike was ordered. First heard of it about 6:30

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in the morning. "The train master asked the crew if they would go out on No. 20. They told him, 'Yes.' After he [the train master] left, seven or eight men came in, and told us there was a strike ordered, and had not better go. Well, we did not go." Douglass admits having received and sent a number of dispatches during the strike.

BEGINNING OF THE STRIKE AT OAKLAND.

Thomas J. Roberts, a witness for the defendants, testified that he resided in West Oakland; that he had been employed for six years as a locomotive engineer for the Southern Pacific Company; that he was president of local union No. 310, of the American Railway Union, which was organized in May, 1894; that the first he knew of any trouble was a communication he received from Mr. Worden, who was delegate to the convention in Chicago. He says:

"I received a letter from him stating that the Pullman boycott had been declared, to take effect in five days, unless the trouble between the Pullman Company and their employés was settled. On the same day a telegram was read in our meeting—that was Tuesday, June 26th—from the president of our general union, saying, 'Pullman boycott in effect to-day noon, by order of convention.'"

He further says:

"It was the evening before we received the telegram, and, that being our regular meeting night, the secretary held the telegram until the meeting opened; and after the meeting had opened, and we got through with our preliminary work, the telegram was read, and the matter was discussed, and I think the telegram said the Pullman boycott was in effect that day at noon. Still we did not want to take any snap judgment on the company, and we decided not to put it into effect until 12 o'clock the following day, June 27th. That would be Wednesday. A motion was put and carried to that effect, and our secretary was instructed to notify the Southern Pacific officials that after Wednesday, June 27th, at noon, we would not handle any Pullman cars, or do any Pullman work."

Continuing, the witness testified:

"June 27th the boycott took effect, at noon. That afternoon we had some trouble in the passenger yard where I was employed. Some of the boys that were cleaning cars were instructed by some foreman that they were working under to clean some certain Pullman cars, and they refused to do so. They told him that they belonged to the American Railway Union, and that there was a boycott in effect, and that they could not clean the Pullman cars. He told them that if they did not want to do that there was nothing else for them to do, and that they could go home."

The men were reinstated at his request. They went on with their customary work. The strike was to take effect

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the morning of the 29th, at 12:30. It was for the reinstatement of the men who had [728] been discharged. By "strike," he means that the men were all to withdraw from the service of the company, and refuse to work. In case the men were reinstated, they would be returned to work. By "the men," he means the strikers. There was no resolution. That was the understanding,—his understanding. The secretary was instructed to notify all the unions on this system, or in this state; he is not sure which. All the action that was taken was that they advised the men to try and keep men from going to work and taking their places; to persuade those that were at work to quit. "Tie up" is all railroad phrase. It means to cease work. It is used by officials and train dispatchers. Perhaps a train at Port Costa may get orders, "Train No. 18 will tie up at Tracy." That means that they will not go any further.

The witness was shown a number of telegrams, among others the following, which he admits having sent:

"West Oakland, Cala., June 28, 1894. To F. P. Sargent, Terre Haute: Firemen's lodge here indorsed Pullman boycott. Will not handle their cars. T. J. Roberts."

"Oakland, Cal., June 30, 1894. To W. H. Russell, Secretary B. R. T., Bakersfield, Cal.: What is situation? Define position of B. R. T. T. J. Roberts."

"Oakland, Cal., June 30, 1894. To H. A. Knox, A. R. U., Sacramento, Cal.: No troops sent out from here. T. J. Roberts."

"Oakland, Cal., June 29, 1894. To E. H. Leon, San José, Cal.: Firemen out here. Do not work. Come home. T. J. Roberts."

"West Oakland, July 14, 1894. To F. P. Sargent, Terre Haute, Ind.: Authorized American Railway Union strike here. Shall B. L. F. men work during strike? T. J. Roberts."

"West Oakland, July 18, 1894. To F. B. Porter, Reno, Nev.: Solid here. Do not waver. Victory is ours. T. J. Roberts."

He was in frequent correspondence with the officers of different lodges of the American Railway Union throughout the state, and in some instances with the American Railway Union headquarters at Chicago, during the strike. Does not know particularly that he sent them by virtue of his official position as president of the American Railway Union in Oakland. It was merely for information. The union sent a great many official notifications of the strike throughout the state. He did not. The secretary sent them. The union ordered the secretary to notify the different local

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unions in the state of the strike here. They had no authority to send them in his name. They related to the strike. He got some messages from Knox, of Sacramento, and sent him some.

G. D. Bishop, called for the defense, testifies that he was the secretary of the American Railway Union at Oakland. The secretary was instructed, the night of the boycott, to notify other unions in reference to the boycott.

BEGINNING OF THE STRIKE AT RED BLUFF, TRUCKEE, AND DUNSMUIR.

John Kelly testified, as a witness on behalf of the government, that he went out on strike on June 28th or 29th; that he had been a fireman for the Southern Pacific Company; that he went out at Red Bluff; that he was a member of the American Railway Union; that that had to do with his going out on a strike.

J. P. Heaney, a witness called for the defendants, states that he [729] went to Red Bluff from Sacramento on June 28th; that he lived at Sacramento, and belonged to the Sacramento lodge of the American Railway Union; that he had been braking for the Southern Pacific Company; that there was no American Railway Union organization at Red Bluff. He testifies as to being advised of the strike by a telegram from Mr. Knox; that he had asked Mr. Knox if there was a strike ordered, and the latter had replied, "Yes, there is a general strike ordered by Eugene V. Debs." The witness states that he was appointed chairman of a committee at Red Bluff. The committee were composed of railroad employés who had struck. Although the witness is very uncertain as to the purpose of the meetings, and the appointment of the committee of which he was chairman, he admits that at least one of its objects was in order that there might be some authorized person to receive and send dispatches for the men out on strike at other points, and be a channel of communication between Mr. Knox and the men at Red Bluff. He received quite a number of dispatches from Mr. Knox, and from other places. Although Heaney admits having received a great many telegrams, his recollection as to their

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contents is extremely vague. But one of these telegrams was introduced on the part of the prosecution. It is as follows:

"3:15 p. m., July 3/94. Red Bluff, Cal. Received at Sacramento, Cal. Jack Heaney: Trains switched by official. Coaches detained by three thousand people. H. A. Knox."

One from Heaney reads as follows:

"Red Bluff, Cal., July 2, '94. H. A. Knox, Sacramento, Cal.: Shall we let Adams, engineer that brought No. 15 in, go back with Mrs. Stanford's special? He has no fireman. Heaney."

The following is a telegram from Dunsmuir, purporting to be signed by M. C. Roberts:

"Dunsmuir, Cal., June 28th, 1894. H. A. Knox, S. P. Depot, Sacramento, Cal.: Has Portland boycotted Pullman? Answer. M. C. Roberts."

Mr. Knox replied:

"Sacramento, Cal., June 28, '94. M. C. Roberts, Dunsmuir, Cal.: Don't know. But if any, you hold. H. A. Knox."

From Truckee comes the following telegram:

"Truckee, Cal., July 4, 1894. H. A. Knox, Sac.: Do you still want us? Train on mail line ready to go. C. B. McClintock."

Mr. Knox replied:

"July 4, 1894. To C. B. McClintock, Truckee, Cal.: Come without fail; coming from all points. H. A. Knox."

The following telegram purports to have been sent by F. H. Almus to Mr. Knox:

"Summit, Cal., June 30/4. Harry Knox, Chairman of A. R. U. Committee, Sac.: Will I continue service on work train or not? Answer. F. H. Almus."

Almus testified for the defendants, and stated that he was a member of the American Railway Union. Knox's reply is as follows:

"June 30, 1894. To F. Almus, Summit, Cal.: No. Stop at once. H. A. Knox."

[730] The following telegrams are from Los Angeles, signed by W. H. Clune:

"June 27/4. Los Angeles, Cal. G. D. Bishop, Secretary A. R. U. 310, W. Oakland, Cala.: Stand firm. Will boycott at Los Angeles this p. m. W. H. Clune, Sect. No. Eighty."

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"L. A. 7/2, 1894. To T. J. Roberts, Prest. A. R. U., Oakland, Cal.: Resolutions in press is fake. Out of one hundred engineers here, ninety-seven are with us to till the end. Trainmen, firemen, carmen, shopmen, section and bridge men,—solid. W. H. Clune, Secty."

STRIKE IN SAN FRANCISCO BY A. R. U. LODGE 345.

It is admited by the defense that the defendants John Mayne and John Cassidy were members of this lodge at the time of the strike. Rice and Clark, the two other defendants charged in the indictment, but who are not on trial, were also members of the same lodge. Charles Ault, called for the government, testified: That he was a member of the American Railway Union. That the number of his lodge was 345, San Francisco. It was the same lodge to which the defendants belonged. One Bradley was president, and another person, by the name of Elliott, was on the executive committee. This lodge went out on the strike, as a body, on June 29th,—the night of June 29th. It also appeared from the testimony of H. J. Bederman, a witness for defendants, that one J. E. Riordan was its secretary. McClintock was also a member of this lodge. The purpose which prompted the lodge to join the strike is stated by the testimony as follows: T. J. Roberts, president of the Oakland lodge, American Railway Union, testified that the union of which he was president authorized the secretary to send telegrams to different unions, as follows:

"American Railway Union three hundred ten declared strike. Takes effect twelve thirty a. m. to-day."

A telegram to this effect was sent to the lodge in San Francisco:

"Oakland, Calif., June 29, 1894. J. E. Riordan, 118 Sixth St., Room 71, S. F.: American Railway Union three hundred ten has declared strike. Takes effect twelve thirty a. m. to-day. T. J. Roberts, President.

Mr. Roberts, when examined, said that he had not personally authorized the sending of telegrams of such purport, and knew nothing about them. Some 21 others of a similar character were sent to different places.

Mr. Bishop, the secretary of the same organization, testified that these telegrams were sent out by direction of the union. They were authorized by the union. It will be

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noticed that the dispatch claimed by the government to have been sent to Riordan, of the San Francisco union, of which the defendants were members, is practically to the same effect. This witness acknowledged receiving the following telegram, purporting to come from J. E. Riordan:

"San Francisco, June 30, 1904. G. D. Bishop, Oakland: Committee out on organization Narrow Gauge. Your assistance required. J. E. Riordan."

He testified that he authorized the sending of the following telegram to J. E. Riordan on June 30, 1894:

"Oakland, Cal., June 30th, 1894. To J. E. Riordan, 118 6th St., S. F.: Will send men at once to confer with you. G. D. Bishop, Sec."

[731] H. J. Bederman, a witness called for the defendants, and employed as a switchman by the Southern Pacific Company last spring, testifies, substantially, that he belonged to Lodge 345, San Francisco, of the American Railway Union; that the defendants belong to the same lodge; that the occasion of the strike by his union was on account of some of the members being discharged for not handling Pullman cars; that an executive and press committee was appointed; that the executive had charge of almost everything concerning the strike of the men; that most of the men belonging to his union worked on the Coast Division; that the committees were appointed on the evening of June 29th; that all the power regarding the strike was delegated to the executive committee, so that this committee had charge of the strike; did not seem inconsistent to him in striking on a division where there were no Pullman cars; not a question of sympathy; they were members of the union; they were supposed to do what was right by every member; if one was discharged for a cause he was not guilty of, they would try and protect him; the union protected them; Mr. Riordan was secretary of the union.

George Elliott testified, on being called as a witness for the defendants, that he was a foreman switchman in the passenger yards of the Southern Pacific Company, at Fourth and Townsend streets; that he joined the American Railway Union (Lodge 345, San Francisco) on the night of the 29th of June, or the 30th; that he became chairman of the executive committee; that this committee were to do everything

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that was to be done in connection with the strike; they had full power; the question of Pullman cars never, to his knowledge, came up; they struck for the reinstatement of employés that had been discharged. On cross-examination he states that he struck because of the discharged employés; he believes some were discharged in Los Angeles, and some in Sacramento; simply struck to see justice done. On redirect examination, he said that he first got some information about the strike from Mr. Bederman; that he believes that Bederman read a message to him; he doesn't know whether it came from Oakland or Sacramento.

Edward F. Gerald, a witness called for the government, gave testimony tending to prove the handwriting of Mr. Riordan. He states, respecting the following telegrams, that he "thinks they are all Mr. Riordan's signatures":

"San Fransisco, 6/29, 1894. To Chas. E. Bradley, Engineer S. P. Co., Pajaro: Strike ordered to-day noon. Let trains come north. Notify San José and along the line. J. E. Riordan."

"June 29, 1894. F. Gillett, San Luis Obispo, S. P. Co. Caboose: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary 345, A. R. U."

"June 29, 1894. C. E. Bradley, Tres Pinos, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

"June 29, 1894. A. E. Pratt, Pacific Grove, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

"June 29, 1894. E. B. Stanwood, Castroville Station, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

"June 29, 1894. G. W. Gillett, Aptos, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

[732] "F. W. Clark, Pac. Grove: Greer O. K. Keep on good work. Tie up strong. J. E. Riordan."

"San Francisco, 6-30, 1894. G. D. Bishop, Oakland Yard S. P. Co. Committee out on organizing Narrow Gauge. Your assistance required. J. E. Riordan."

It is admitted on the part of the defendants that the following telegrams were signed by George Elliott, although, when the latter was cross-examined, he could not recollect as to whether he signed some of them, and denied that he signed others. The witness J. E. Dillon identified his handwriting.

"San Fran., 7/1, 1894. To R. Gillett, Aptos, Cal.: Not a wheel turning between here and Chicago. It is our fight sure. Will keep you posted. George Elliott, Chairman."

"7/2, 1894. To Ed Stanwood, Castroville Station: Everything is

coming our way. Not a wheel moving between here and Chicago. Victory is certain. George Elliott, Chairman A. R. U."

"7/2, 1894. To Ed Pratt, Pacific Grove: We are gaining strength rapidly. The fight is ours. Everything is coming our way. George Elliott, Chairman A. R. U."

"San Fran., 7/3, 1894. To R. W. Gillett, Aptos: No, sir. Allowing no trains to run we can help. Geo. Elliott, Chairman."

"San Francisco, 7/3, 1894. To J. Morehead, Pacific Grove: No, sir. Out to win, and going to. Will advise when settled. George Elliott, Chairman."

"7/3, 1894. To W. H. French, Aptos: You are all in to clear. Eugene V. Debs wires giving you full protection. Tie up everything at once. George Elliott, Chairman."

"7/3, 1894. To J. M. Smith, Tres Pinos: Fight is ours, and win we must. George Elliott, Chairman A. R. U."

"7/3, 1894. To W. Johnson, San José, Care Eureka Hotel: Do not move. Committee will see you to-morrow morning. George Elliott."

"7/3, 1894. To F. W. Gillett, San Luis Obispo: You are a brick. Debs wires that we will win. George Elliott."

I have now directed your attention to some of the testimony that tends to show the communications that passed between the various lodges of the American Railway Union and their members concerning the boycott and strike, and the concert of action that was had in pursuance of such communications. I have also called your attention to some of the statements of Knox and others as to the purpose of the boycott and strike, and the purpose they had in view in taking the action they did. To review all the testimony in the case bearing on this point would take too much time, and will not be necessary, in view of the argument of counsel for the defendants, who admits the concert of action claimed by the government, but denies that it involved a criminal purpose. With respect to these telegrams, and the testimony I have referred to in connection therewith, you will bear in mind that many of them have been admitted in evidence with the consent of counsel for defendants; the genuineness of others has been denied; and the testimony as to still others is, by reason of the contradictory nature of the testimony, involved in more or less uncertainty. As you are the sole judges of the credibility of the witnesses, and of all the evidence introduced in the case, whether it be oral or written or documentary, you will determine the genuineness of such of these telegrams as are in controversy, and this you will do from all the circumstances in the case. In passing upon the telegrams not admitted as genuine, you will be justified in resorting to all **[733]** those facts and circumstances in the

case which will tend to establish their genuineness, or, on the other hand, serve to show their want of genuineness. For example, you may consider the occasions and occurrences to which the telegrams purport to relate; whether they would have been sent, but for such occurrences; the relation they bear to the events which you may deem the evidence establishes to your satisfaction, and beyond a reasonable doubt; their tenor and subject-matter; the fact that the sender or the recipient, as the case might be, was connected with the American Railway Union. In fact, all those circumstances and incidents which may be rationally and naturally connected may be considered by you in passing upon their authenticity, and the probability of their having been sent and received by the parties whose names appear upon said messages. The importance and materiality of these telegrams as showing, or tending to show, that the conspiracy charged in the indictment did in fact exist, is for you to determine. There are two important facts, however, to which it is proper for the court to call your attention, in your consideration of this question, and these are that most, if not all, of these telegrams were sent, or purport to have been sent,—whether they were or not is, as I have stated, for you to determine,—by and to members of the American Railway Union, and in the greater number of instances by those in authority in that organization, and who the testimony I have referred to, and other evidence adduced during the trial, tends to show were actively concerned in the strike, and took part in it with the avowed purpose of preventing the movement of all Pullman cars. Another significant circumstance, to which I call your attention, is that you are to consider whether these telegrams related to any of the facts charged in the indictment as constituting the conspiracy to commit the acts with which these defendants are accused, and whether they had any bearing or connection in any way with the acts charged in the indictment as means to effect the object of the conspiracy, and with reference to which—or some of which—acts the prosecution has introduced evidence showing, or tending to show, the conspiracy and overt acts, and the connection of these defendants with such conspiracy and acts. If you are satisfied from the evidence that these messages related to, formed a

part of, or had any bearing upon the object of the conspiracy, and the means to effectuate such object, charged in the indictment, and the overt acts alleged to have been committed in furtherance of such conspiracy, it is a circumstance which you may consider in determining the existence of such conspiracy. You will consider whether they establish, or tend to establish, the concert or purpose and action which constitute important elements in this case as to the existence of the conspiracy charged; particularly, where a number of telegrams of similar purport and tenor are sent to different places at or about the same time, and all proceeding, or purporting to proceed, from the same person or local lodge of the American Railway Union. Thus, the telegrams sent by Knox, who, as testified to, was chairman of the mediation committee at Sacramento, [734] and whose jurisdiction as such extended over a good part of the Pacific coast, or of Roberts, the president of the Oakland lodge or union, or of Bishop, its secretary, or of Douglass, Vice, Elliott, Riordan, and such others as the evidence shows, or tends to show, sent telegrams of the same general character, these persons being officially connected with the American Railway Union,—whether these show, or tend to establish, a unity of design, a community of purpose, an express or tacit understanding to do the acts charged in the indictment.

It is claimed by the defendants that, while there may have been some concert of action on the part of the members of the American Railway Union with respect to the boycott and strike, the purpose of such concerted action was merely to advise members of that organization to quit work until the controversy between Pullman and his employés should be settled. As I have explained to you before, even this purpose would become a criminal conspiracy, if the concerted action were knowingly and willfully directed, by the parties to it, for the purpose of obstructing and retarding the passage of the mails of the United States, or in restraint of trade and commerce among the several states. The government claims, however, that the concerted action on the part of the American Railway Union had something more to it than merely advising its members to quit work. It is claimed that the language of the telegrams,

to which reference has been made, indicates that it was the purpose of the strikers to prevent the movement of railway trains belonging to the Southern Pacific Company, by actual and unlawful obstruction; and in this connection the question will arise in your minds, if these telegrams were intended merely to advise members of the American Railway Union to quit the service of the company, why did they not so state that purpose in plain language? It would have been an easy thing to have said, "We advise you to quit work." Why, then, telegraph such instructions as these,—if these telegrams were sent: "Stop all Pullman sleepers." "Tie up everything." "Hold Nos. 4 and 2 sure." "Tie up strong." Furthermore, if it were simply the purpose of the American Railway Union to advise its members to quit work, why did Mr. Knox use this language in his statement of the situation to the Citizens' Protective Association of Sacramento on July 7th, last? "Mr. Knox then stated that he would allow the mail and express to be moved, but that no passenger or freight cars of any kind or description would he consent to have moved until such time as the demand he made had been complied with." Why did Mr. Mullen, on the same occasion, say "that this was a fight between capital and labor, and that from the chief justice of the United States, down through all the branches—judicial and legislative departments—of the government, they were corrupt, and that labor could not get its just dues, and that his association had taken this way of forcing justice to assist their fellow men in obtaining for honest labor a proper compensation"? And why did Mr. Compton, at the same time, say "that the A. R. U. organization would not resort to any desperate means, so long as the railroad company would deal [735] with them without using armed force"? Was this language used on those occasions consistent with the peaceful and lawful methods of procedure now claimed by Mr. Knox to have been the purpose and action of the members of the American Railway Union during the period of the strike?

But it is claimed by the prosecution that the purpose of the strikers to interpose actual and unlawful obstructions

to the movement of railway trains, both passenger and freight, is further shown by certain acts alleged in the indictment and concerning which testimony has been introduced. I will therefore now direct your attention to that feature of the case.

One of the means alleged, in the indictment, that was adopted to promote, carry out, effect, and execute the conspiracy, was (1) that the conspirators were to "forcibly take and keep possession and control of all yards, depots, tracks, and trains of cars on said lines of railway and to forcibly hold and detain the same."

SACRAMENTO.

The following testimony relates to what occurred at Sacramento, and it is claimed that it tends to prove the feature of the charge now under consideration:

Felix Tracy, agent of Wells, Fargo & Co. at Sacramento, called for the government, testifies on direct examination that: On the 27th of June, train No. 84, which ran from Sacramento to San Francisco by the way of Stockton, on which the express was, was held in Sacramento, and not sent out. The main office in Sacramento was at Sixth and K. He went down to the depot office to ascertain why it was not sent out. He ascertained that the train was not going out, and that the express was held there. The express was taken out of the train and held until they could send it away by different modes of conveyance. The express matter was destined for points between Sacramento and San Francisco, also Los Angeles; and matter for New Orleans also goes out on that train, connecting at Lathrop or Tracy. He could not tell positively whether there was or not any express matter on that train for New Orleans without examining the record. On the morning of the 29th, the express on train No. 4, which is the overland train from the East by the way of Ogden, was held at Sacramento, and he transferred the express from this train to the steamer. Sent it from Sacramento; that is, that portion of it for San Francisco, down on the steamer from Sacramento. This train was held at Sacramento about 10 o'clock in the morning. His recollection is that there was some freight or express matter on this train from New York for one place. The witness thus relates the manner in which he transferred this express:

"I saw that the train was held there and not moved. I saw a large crowd there, and the time for the steamer to leave Sacramento was about ten o'clock; that is, the regular time. I was satisfied, if I was going to get that express to San Francisco, that I must act very quickly. I did not know whether the steamer would be permitted to leave, or whether I would be permitted to transfer the express from this car to the steamer. Consequently I ordered two wagons—the large two-horse wagon and the single wagon—to [736] the express car, with the idea that we might carry that express up to 6th and K. * * * I did not tell only one or two employés. I did not state to them what I was going to do. We loaded it in as quick as we could, and took the express over to the steamer, and transferred it to the steamer. There was a great deal of excitement both at the depot and the steamer landing. I heard men at the steamboat landing ask the employés of the steamer not to go out.

The witness further states: That a train which left San Francisco on the 28th of June was delayed at Rocklin. He sent up several days afterwards, and had the express brought back to Sacramento, and he saw himself that there was express there going to Ogden, and east of that, from San Francisco and other points. He saw the waybills. With reference to the detention of train No. 84 on the 27th of June, as testified to above by Tracy, Mr. Knox gives the following version of the cause of its detention, which I have heretofore referred to in another connection: He states that there was a train due to leave there at 10:25, known as No. 84. They asked the switchmen not to handle the Pullman car, because it was empty, and it was not necessary for it to go. They thought it was proper to boycott the empty Pullmans. They refused to put Pullman cars on. That train stood there until leaving time. Then it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of the office and turned the plug on the hind end of the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks. As to the detention of train No. 4 on the 29th, Mr. Knox testifies, in substance, that Mr. Saulpaugh, the engineer, declined to go out on the train, and that the fireman also refused to go with the Pullman cars, and that this was the cause of its not going out.

Barry Baldwin, United States marshal, who was at Sacramento from the 1st of July until the middle of August, called

for the United States, testified, on direct examination, upon being asked in what condition the tracks and the cars and engines in and about the depot at Sacramento were on the evening of Sunday, July 1st, that they were in great disorder. Engines were driven head to in places, and wheels blocked, and obstructions—cars—placed across the tracks. The cars were placed in such a manner as to impede the business. Saw no steam arising from any of the engines. They were in such a position that the trains and engines could not have free movement. Mr. Knox denies the truth of this statement, and in answer to the question: "Q. What was the condition of the yard?" says:

"It was simply trains had been run in there, and the men refused to put them away, because they would not work until those men had been reinstated, and they simply died on the track of their own free will. No one injured them at all. So far as any obstruction on the track, there were none at all, except that one block I spoke of under that engine to keep her from running down hill into another engine."

Mr. Baldwin further testified on his direct examination that the depot was constantly overrun with men; that it was in the possession of the strikers. Mr. Knox states that this is not correct; that the depot was in the possession of the railroad officials all the time. [737] Mr. Baldwin further states, in relation to the effort made on July 5th to couple the engine to delayed train No. 4, that it was standing on the track. It had come in there and had been stopped there. In the morning before commencing at all, he went to the mail car, and saw the postal clerk there, and made him open the car, and went into the car, and saw that the mail was there in the car, and that it was the mail that was ordinarily carried on that train, and had come down from the post office, and that is the way he ascertained. The crowd surged in through the depot. The crowd was heaviest around the engine, and standing in the way of the engine, and obstructing its coming up to the train. He had to get down and move them foot by foot to get the engine through. He got on the engine again, and it was moved up to the train, and, just as they reached the train, the crowd broke past and swept through the depot, and broke the train and rolled back the cars,—the passenger coaches. There were some seven cars rolled back. Possibly 500 people took part in rolling back these coaches. They

rolled them back at once with their hands, without any difficulty, there were so many of them.

Greenlaw, a witness for the defendants, testifies: That he heard cheering and hollering down at the east end of the depot. That he went down there. That when he got there the Pullman cars had been uncoupled. That there was quite a crowd around Marshal Baldwin when he got there. That he saw they were trying to get at Baldwin, and he did his best to defend him. That a fellow—he thinks it was Jack Harris—picked Marshal Baldwin up and started to carry him out of the crowd. While he was up in the air on Jack Harris' shoulder he drew his revolver. He said, "Let me down." Jack Harris let him down on the ground, and he shoved the pistol up under Greenlaw's nose. Greenlaw states that he said: "Don't point that thing at me. I have been trying to defend you." Marshal Baldwin said: "I will shoot the first man that lays his hand on me." Just then Mr. Galliner broke into the crowd,—a great, large man,—and he said: "What's the matter, Marshal Baldwin?" or, "Baldwin." Baldwin said: "These boys won't leave me alone." Galliner then said: "Leave him alone. He is all right, boys. Go away and leave him alone." That the crowd then dispersed and went over to the depot and Third street bridge. Mr. Baldwin also further testifies: That on July 4th there were larger crowds at the Sacramento depot than on the previous day. Nothing had been done towards cleaning up the yard; no work had been done from the previous day up to that time. That an attempt was made on that day by the militia to take possession of the depot. That at the termination of the militia's efforts the depot was still in the possession of the strikers. That from that time on to the 11th of July, in the morning, the depot, grounds, and tracks and yards around the depot were in the possession of the strikers. The witness Greenlaw, called for the defense, contradicts Mr. Baldwin's testimony on this point, and states that there were more outsiders at the depot than there were strikers; that the strikers were doing the same that the crowd was,—looking on. No effort was made to [738] keep them out. They just stood there in the depot. He did not see the militia make any effort to get in. In

relation to the stoppage of the movements of all trains between the 3d and 11th days of July, Mr. Baldwin states that there was nothing moved out (of the Sacramento depot) between those dates.

RED BLUFF.

The following testimony relates to the possession taken by the strikers of the yard, depot, and trains at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern Pacific Company at Red Bluff, called for the government, testified as follows: That he was roundhouse foreman at Red Bluff for the Southern Pacific Company in the months of June and July last; that he recollects an attempt to move the Sacramento local No. 12 from Red Bluff on or about the 29th day of June last; that it was composed of the day coach, smoker, and mail car; that he and Mr. Jones and Mr. Robb, the conductor, endeavored to move this train. After explaining the position of the train on the track by means of a diagram on the blackboard, he states:

"We were on the back of the mail car,—myself, Mr. Jones, and Robb. We set the levers to couple on. When we got very near there, Mr. Ray threw one of the levers down onto the coach, so that we could not couple it. There was Ray, Clodtfelder, and Shepler. He told us we could as well give it up. We had done our part, and they would do theirs. That we could not couple that train together. Clodtfelder was the man that made that remark. We stayed there and talked quite a while. Mr. Robb made the remark they were too many for us. We could not make it up. We would have to give it up. The engine stood there for about an hour, and the engineer brought her back to the roundhouse. The mail car stayed there a few feet away from the coach, not coupled."

J. P. Heaney, a witness called for the defense, testified: That he was a brakeman for the Southern Pacific Company in June and July last. That he belonged to the Brotherhood of Railroad Brakemen and the American Railway Union at Sacramento. That he went to Red Bluff on the 28th of June. The following morning (the 29th) he went to the depot. As he turned the corner he saw no engine there. He walked along leisurely, and when he got down to the depot he inquired why the engine was not out. He was told that a strike had been declared. He saw the fireman, and asked him what he thought about it. The latter said he did not know. The witness said: "Will we go, or will we not?" and he told the

fireman that he would like awful well to go, but that he would hate to go into Sacramento and have the boys holler "Scab" at him when he got there. That he would not do that for all the jobs he ever saw. That they talked around there a little while, and finally concluded not to go out. He took off his cap and uniform and gave the job up then. He was told that they were obstructing the mail; that that was a mail train. In answer to the question, "Who told you that?" he states:

"I don't know. I think it was some of our men who spoke to me about it. I think it was Montanya and Harper. They said it was a mail train, and we ought to go on it. I says: 'All right. If it is a mail train, we will go.' I went down and says: 'I will go with the mail car, and nothing else.' I [739] told Mr. Jones and Mr. Robb so,—that I would go with the mail car. I spoke to the fireman about it, and asked him what he thought. He says: 'Yes, we ought to go with the mail, anyhow.' I asked him to get the engine. He started to get the engine, came down,—the train was in on the side track,—and I let the engine in, and went up and cut the mail car from the coaches, and backed the engine up on it, coupled on, and pulled out on the main line. Put my uniform on again, and told Robb and Jones that I was ready to go. They said that I could not go with that train; to put the whole train on, or there would be nothing go. I says: 'That is all I intend to go with. If you won't let me go with that, I won't go.'"

J. C. Shepler, called for the defense, admits that he was present upon the occasion, on the morning of the 29th of June, related by the witness Day. He states that he had nothing to do with the uncoupling the mail from the rest of the train,—the Sacramento local No. 12.

The persons Ray and Clodtfelder, who are implicated by Day in the uncoupling of train No. 12 on the 29th of June, were not called as witnesses.

Day further testifies, with relation to the stoppage of the Oregon express, train No. 15, on the 1st day of July: That he was not down at the train when she came in. After she was there a little while he went down. He saw the train had been cut in three different parts. This was somewhere about 9. He went down to the rear end of the train to see Mr. Kilburn. He saw the two sleepers were cut off and backed down over one crossing, the two coaches and a tourist car were cut in another section and standing on the crossing, and the two mail cars and engine standing in front of the depot, on the main track. At the south end there were two Pullmans; next came a tourist car, day coach, and smoker, and an ex-

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press car and baggage car was with those coaches and smoker, and the next was two mail cars and engine,—one a mail car and the other a box car. Men were working there taking off the appliances for connecting the train. He saw Mr. Shade there at work; also saw Richard Roe, and a fireman of the name of Hill. Hill's first name is Joe. Mr. Heaney was around there. He did not see him doing anything. There was probably a couple of dozen around there. He saw Mr. Shade and Clodtfelder cut the hose and the Miller hooks behind the mail car. They did that in his presence, when he went down to get the engine to pull her up. He looked at the couplings in the afternoon. He saw the safety chains taken off, and the nuts and keys at the back of the Miller hooks had been taken off.

J. C. Shepler, the same witness whose testimony has been previously referred to on the part of the defense, denies that he assisted in taking any nuts or chains or bolts, or in any way interfering with the Portland express which came in on the 1st of July; that he saw no one in any way interfering with the couplings or brake chains, or any of the nuts or bolts connected with the train. He admits, however, that he saw a couple of chains lying on the ground there. He admits, also, that he was at the station when the train came in, and that there was a crowd about the train. He states that he does not know who uncoupled the train.

Joseph B. Hill, called for the defense, and the person referred to by the witness Day as the fireman who was engaged, with others, [740] in taking off the appliances for connecting the Portland express on July 1st, states that he was present when the express train came in; that there was quite a crowd about there. He denies that he ever did anything to prevent the coupling of the engine and mail car to the coaches of the Portland express.

J. P. Heaney, called for the defense, testifies that he was around the depot on the 1st of July when the Portland express came in, or shortly after it came in. He gives the following version of the uncoupling of the train:

"Mr. Jones came up there and wanted to know if we would put the train away. I believe I spoke up and said that we would put the train away if he would tell the engineer to obey our signals. He said he would. He went up there and told the engineer. After he told the engineer, we gave him a back-up signal, and cut the train in three pieces, so as to clear the different crossings there. There are three crossings there that have got to be cut. If we would run the train all down there, we would stop the wagon transportation. We cut the train in three pieces, and let it stand there."

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William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, testified that on June 29th an attempt was made to move the Red Bluff and Sacramento local. This train carried coaches, the ordinary baggage car, and a mail car. It carried no sleepers. This train is due to leave Red Bluff at 5:15 in the morning. He attempted to move the train. The strikers had cut the train in two,—cut the mail car off. He could not say who cut it off. He did not see them cut it off. He attempted to put it on again and start the train in regular form. Mr. Clodtfelder and Mr. Ray prevented him from coupling it. Mr. Day and Mr. Robb, the conductor, assisted him in trying to put that train together. Mr. Day is the foreman of the roundhouse. They backed the train together. He set the Miller hooks to couple; set one of them to couple, and stepped over to the other platform to couple the other hook. Threw the lever up, as it were. Clodtfelder held it and prevented him from doing it. Mr. Ray got onto the other platform and threw back the other lever, so that it would not couple. The effect of this was that they could not couple the cars together. They were endeavoring to couple the mail car and the coaches. The mail and express and baggage were all in the one car at that time. He knows that that train had not been cut in two in that manner under the authority of the company. At the time that he endeavored to put this train together, Clodtfelder told him: "You cannot couple this train. You have made your attempt. You have done your part. Now we will do ours." The witness told him that his overpowering force—there were 50 to 2 of them—prevented them from coupling it. There was quite a large crowd about at that time. They were all opposing the railroad. They sympathized with the men who were stopping the train. They refused to assist the witness in starting the train, although he called on quite a number of them. They said they would not move any trains until the matter was settled.

Clodtfelder and Ray said that the mail car could go. He thinks it was Clodtfelder who said that, or Demmick. Demmick was one of the leaders. They said the mail car could go by itself; no other cars of any kind,—Pullmans or day coaches,—none but the mail car. [741] Knows a man named Joe Hill. He was a fireman. He was on strike at that time. He went to couple this train together on the morning of the 29th. Hill also took an active part in preventing that. As they started the engine and mail car to couple onto the coaches, Hill tried to apply the air. By "applying the air" the witness means that he opened the automatic air valve of the air hose at the rear of the mail car. That would set the brakes if there had been air enough on the car, but there was not enough pumped, and they went ahead.

As previously stated, Hill denies that he interfered with this train in any way.

It is to be noticed that this testimony of William H. Jones is corroborative of that of J. C. Day, the preceding witness.

SOUTH VALLEJO.

The following testimony related to the possession by the strikers of the yard, tracks, and trains at South Vallejo:

Michael Keefe, yard engineer for the Southern Pacific Company at South Vallejo, called for the United States, testified as follows:

"The engines and yards of the Southern Pacific Company on the 10th and 11th of July were not in a condition for service. All the engines were killed; there was no steam in them."

The same witness further testifies:

"The number of my engine was No. 1. It was a switch engine. Some men took the engine away from me. One of them was Thomas Kelly; another was named Laurie; another was named Smith; another Hale. These men ran the engine off an open switch. They ran it off the track. This was on Tuesday, July 10th; about that time. They then hauled the fire, let the water out of the boiler, shut the engine down, let the water out of the tank, and disconnected the hose."

It would be hard for him to state the particular parts each man played. He did not exactly locate them at the time, or what they were doing, because he was talking with them. He tried to get on his engine. He got on the side. They

would not let him get on. He thinks it was Smith who would not let him get on. He prevented him getting on. Kelly was a fireman for the company up to the time of the strike. He was out on strike. Laurie also went out on strike. He was a fireman. Smith was a stranger to him. He was the man that came there. Smith and Hale were the ones that came to Vallejo and made that trouble. Does not know where Smith came from. Thinks Hale told him he came from Folsom. Thinks Hale said he was a baggage man, a train man. He did not say why he came to Vallejo. The same witness further testifies that on the following day, he thinks it was, engine 1,190 was killed at South Vallejo. She came from Calistoga that morning. She pulled a mail train. Does not think that there were any Pullman cars on that train. He saw the engine killed. He was on the engine. He ran the engine. Smith came there, with a good many others, and took the engine away from him, and killed it. They took it right [742] on the main track. They put the fire out, also disconnected the hose, and let the water out; also out of the boiler.

SAN JOSE.

The following testimony relates to the possession taken by the strikers of the depot, yard, tracks, and trains at San Jose:

James Hewitt, called for the United States, testified: That he was the engineer of the San Jose train No. 19, running between San Francisco and San Jose. That he left San Francisco at 5:10. Was due at San Jose at 7 o'clock in the evening. That it was a mail train, having a combination mail and express and baggage car. That it carried no Pullmans. That he arrived on time. Going into the yard, people rushed from the depot onto the track, and he had to stop. This happened about 400 or 500 feet this side of the depot. The people rushed up the track, and he had to stop or else run over them. Knows a man named McClintock, and also a man named Runyon. When he stopped, Mr. McClintock came up on the front part of the engine, and came through the window on the left-hand side. The window was open. He came in and stepped over to him, and says: "I will take charge of this engine, Jim." Then

Hewitt said to him: "Harry, you have got the main track blocked. This is as far as I am going. Let me put this train on the side track and put the engine in the round-house." Mr. Runyon stepped up and said: "No, sir. We will kill her right here." During this time there was a deputy United States marshal on the engine with the witness,—one on each side in the gangway. They tried to keep the crowd off. They overpowered the one on the left-hand side. McClintock asked him what business he was doing there, or what he was doing there. He said he was a deputy United States marshal, and showed him his badge. At that time they were trying to get hold of the fireman. McClintock, after he asked him to show his authority, which he did, says: "We can't help that. Boys, take him away." They took the fireman off of the engine. That left the witness and McClintock and Runyon on the engine, and a lot of boys came up over the baggage car and came up on the tender. After that the witness had some conversation with McClintock with regard to putting the engine away and putting the train on a side track. He told him they had the main track blocked. It was not necessary to hold him there. Wells-Fargo's agent stepped up on the right-hand side, spoke to McClintock, and asked him to pull the train down to the crossing, where they could get out their express, mail, and baggage. He says: "All right. Boys, cut off the baggage car." Which they did, and pulled down to the crossing or over the crossing, right in the front part of the depot, and stopped the engine there. One of the gang says: "No one shall move this engine but McClintock." The witness sat down on the fireman's side, and took hold of the bell cord. They got down to the depot. McClintock told him he had better get off and go home; that he would not be responsible for his life. The witness said: "You never mind about my life. I guess I can take care of myself." They got the engine as far as they could get her.

[743] W. S. Runyon, the person referred to by witness Hewitt in the testimony just quoted, was called on behalf of the defendants, and testified, in brief, that he was a locomotive fireman in the employment of the Southern Pacific Company in June last; that he belonged to the Brotherhood

of Locomotive Firemen, and also to the American Railway Union; that he was a member of the executive committee of the American Railway Union in San Francisco; that during the strike he went to San Jose, on the evening of July 5th; that he went there of his own accord, to suppress any acts of violence or any deeds of violence that might possibly be committed there, as he understood there were some very troublesome people in that locality. His statements as to what took place at San Jose, and his connection therewith, in his own words, are as follows:

"I left San Francisco shortly after five o'clock of the evening of July 5th, and got onto the train here in San Francisco, and rode until we got to San José. As we were going in the yard at San José, the train slowed up slightly, and when about midway between the round-house at San José and the depot she came to a standstill. The people in the coaches commenced to get out. I, in company with a Mr. McQuade, of the Southern Pacific, got out. There was a large delegation of people on the tracks and around the depot. Q. What was done? State what you saw there,—what occurred. A. As I said, the train stopped. I got out, in company with Mr. McQuade, and stood on the outskirts of the crowd. They were doing a lot of scuffling around one place and another, and talking, and so on, and finally a remark was made that they would do Hewitt up,—the man who had charge of the train. I edged my way through the crowd. In the near vicinity I saw a number of men who had those white ribbons on their coat lapels. I said to them: 'I am what you ordinarily term a "striker," and a member of the A. R. U. As you are sympathizers with us, I should like to get your assistance to suppress any violence that might be perpetrated on Mr. Hewett.' I got up to the engine, and, as I did, those gentlemen followed me. I says to Mr. Hewitt: 'You need not have any fear of doing you up, Jim. If I can possibly lend you any assistance, I shall certainly do so.' He was in a very excited condition; about as pale as my shirt bosom is at the present time. After a while the engine and the train was run down to a crossing or street just north of the depot. They stopped, and cut off all the coaches, with the exception of a combination car that they have for baggage and Wells-Fargo's matter. After they severed the connection between the baggage and smoker, the engine and baggage car went on the south side of the depot, to leave this here crossing clear. Mr. Hewitt changed his overalls. When he left his engine I stepped down behind him. As I did so, the other gentlemen who had the white ribbons on, and who I asked to accompany me, came along, and we walked alongside of Mr. Hewitt until he got through the crowd, and then he left. While he was walking through the crowd they jeered at him some, but there was no acts of violence. After Mr. Hewitt got away there was quite a number of men on the tender of the engine,—men and boys,—upon what is termed the 'running board.' I got them to disperse and leave the engine alone."

The witness admits seeing Mr. McClintock there at that time. The testimony of Mr. Hewitt as to what took place at the engine being read to him, he stated that some of the statements were correct and others not. He states that Mr.

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Hewitt suggested putting the train on the side track. He testifies that the statement said to have been made by him, viz.: "No, sir. We will kill her right here,"—is false. He states that there were several thousand people at that time there. In answer to the question: "Q. Hewitt states here that you and McClintock were trying to get hold of the fireman,"—he replied: "He is a liar. I did not. I had nothing to do with the fireman, and [744] did not see any one pull him off the engine at all. The fireman was off of the engine five or six minutes before I got on the engine."

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (2) "by causing to be assembled, and by assembling with, large crowds of persons in said depots and yards of said Southern Pacific Company, at various points and places on said lines of railway, in said state and Northern district of California, and by gathering in great numbers in said yards and depots, to wit, * * * and other places around, in, and upon the trains, cars, engines of the Southern Pacific Company, and upon the tracks of the railways, preventing the movement and passage of said engines, cars, and trains."

SACRAMENTO.

The following testimony relates to the assembling of crowds at Sacramento:

Felix Tracy, the agent of Wells, Fargo & Co., testified on direct examination: That there were no trains moving after the 29th of June. He saw a good many men down there at the station that were not at work,—railroad men. He saw them there, and he saw them in other parts of the city. There were more people at the depot from the 28th or 29th of June, up to the time of the United States soldiers going there,—some time about the 10th or 11th of July,—than usual, a good many more than usual. There were more there on the 3d of July, more there on the 4th of July, than it was customary to see there. He noticed that whenever he went down there. It will be remembered that Mr. Baldwin's testimony that there were crowds around the station is to the same effect. On the other hand, Mr. Knox denies emphatically that the depot was in the "possession of the strikers."

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Mr. Baldwin, United States marshal, testified on direct examination that the station and the tracks were overrun with people,—people in the caboose and cars, and around them, sitting on the steps.

Mr. Knox admits this, but denies that he or his committee of the American Railway Union had anything to do with their coming there.

James Sims, called for the defendants, testified that the American Railway Union committee used one of the cars as an office on the 29th of June.

Mr. Baldwin further testifies, as to the crowd around delayed train No. 4, on July 3, 1894, that they were on the track and across the track, and they would not move out of the way of the engine. He had to get down from the engine and get in front of the engine and push them back and move them back, and the engine came foot by foot. They were threatening, and one man threw a rock at them. The same witness further testifies that he was at the depot subsequent to July 3d, and that the strikers continued to occupy the depot grounds. Being asked how he knew they were strikers, the witness stated that there was a crowd there. He was around among these men, and they were constantly informing him that they were strikers,—that they were employés of the railroad [745] company out on a strike. He was constantly talking with them, and walking among them, and they would address him and talk about the disturbances. That is the way he ascertained that they were strikers. The crowds never left. There was always more or less of a crowd of men there, night and day. With reference to the character of the crowd that was there late in the afternoon of the 6th of July, he states that they were strikers. Some of them said they were there to protect the property of the railroad company, and take care of it; and they were around on the cars, and it was the same crowd in character, except that they were men. The cars of the railroad company were being occupied by men, by strikers. Some of them were occupied apparently for sleeping quarters. They occupied cabooses on the tracks in the yard.

Thomas Compton, one of the mediation committee at

Sacramento, called for the defense, testified that they "had our men stationed from one end of the yards to another, to see that the men did not get excited and do any damage to the property, and requested other men who came in on trains not to go out any more."

C. E. Leonard, a city trustee of Sacramento last June, and in the employ of the railroad company before the strike, testifies that there was a very large assemblage of people at the depot of the railroad company on the 3d of July.

SAN JOSE.

The following testimony relates to the assembling of crowds at San Jose:

Frank Arnold, a railway postal clerk on the route from San Francisco to San Luis Obispo, testifying as to the crowd at San Jose, says on direct examination that there were several thousand people around the train that came in on July 5th. They were all around the train,—inside of it, on the platform, swarming all over it. On cross-examination he says that they were occupying all the spaces in the depot, on the railroad car platforms, and so on.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (3) "by threats, intimidations, personal assaults, and other force and violence, to prevent the engineers, firemen, conductors, brakemen, switchmen, and other employés of said Southern Pacific Company from discharging their duties, and from moving and operating the said engines, cars, trains, and railways."

SACRAMENTO.

The following testimony relates to threats, intimidations, and acts of violence at Sacramento:

Mr. Baldwin, speaking of the strikers at the Sacramento depot on July 3d, testified on direct examination that they were threatening, and there was one man that threw a rock at them. It struck the cab of the engine, just below where Mr. Clark was standing—between Mr. Clark and himself. He further testifies that there were crowds around the semaphore. The crowd was demonstrative at this time. There were men threatening them as they took the engine

through,—hooting. He recollects one man saying, "I will fix you." He seemed [746] to be particularly addressing himself to the witness that time,—the people on the engine. Heard expressions of anger and defiance. They were angry.

Respecting this testimony of Mr. Baldwin, Greenlaw testifies that there was a good deal of yelling there. Some were "hollering." But he did not hear any threats made. He did not see any forcible means used to prevent the taking out of the train. No threats whatever were made towards Mr. Baldwin. He denies that he incited any people to do anything that day, or that he threatened Mr. Baldwin, or any one. He admits that he called some persons on the engine "scabs," but denies the statements imputed by Mr. Baldwin, in his testimony, to him.

While it is to be observed that Mr. Baldwin was not an employé of the railroad company, yet the testimony, if true, is significant with respect to the actions of the crowd towards Clark, the engineer, and the others on the engine.

Anthony Green, called for the defense, testified that he was captain of police of the city of Sacramento, and was such in June and July last; that he was present on the 3d of July at the depot; that he himself saw no acts of violence committed, but he admits, on cross-examination, that he did not see the cars actually shoved back by the crowd. He testified that he heard the crowd yelling at those who were in the cab of the engine that was being moved from the roundhouse to the delayed train No. 4; that such exclamations were used as follows: "Don't you go out;" "Don't you take that train out;" "Stand by one another;" "Don't be a scab;" "Don't take the places of those men who are working;" "Come out of there;" "Don't you take that engine out;" "Don't fire that engine;" "I appeal to you as a man;" "Come down out of there;" "Don't go out,"—and such questions as those, appealing to them; that he was in the cab himself several days, mornings and nights; that he stood in the first one.

RED BLUFF.

The following testimony relates to what occurred at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern

Pacific Company at Red Bluff, testified that he was not at liberty to go on the engine. He was told to keep away from the engine and let it alone. A brakeman by the name of Harper and two or three other men told him that. He does not know them. He thinks Harper was on strike. He was out with them. This occurred, according to the witness' testimony, on July 1, 1894. The same witness further states, after describing how engine No. 1248 was killed by Van Devinter, Richard Roe, and Harper, that he had a conversation with Van Devinter about the matter. He told him he was doing very wrong, and Van Devinter said he did not think it was any of his damned business what he was doing. They told him if he did not get out of the roundhouse they would have him carried out on a board. Harper made that remark. Richard Roe and Van Devinter, and one or two others he did not know, were present. This was at the time they were killing engines.

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SOUTH VALLEJO.

The following testimony relates to what occurred at South Vallejo:

Jeff Gage, passenger conductor for the Southern Pacific Company, running out between South Vallejo and Santa Rosa, whose engine was killed, testified as follows: That on the 12th day of July last he was stopped between North and South Vallejo, and his engine killed. This was near 7:30 or 7:35 in the morning. It could not have been far from that. He was running the train,—conductor. He left North Vallejo, and between North and South Vallejo he found an engine on the main line. The engine was called a "killed" engine,—no steam in it. As they pulled up near that engine, a crowd of men came out and fixed theirs the same way. They were obliged to stop by this "dead" engine. He thinks he must have been very near on time. He makes connection, with passenger and mail cars, with a boat that runs between North and South Vallejo and Vallejo Junction. At Vallejo Junction connection is made with the San Ramon passenger train. It is a mail train that runs between San Ramon and the Oakland pier. He asked a man named

Smith to let him couple on and push the dead engine on the siding, so that he could get the train down to the depot. This man refused to do it, saying he was there under orders, and had to obey his orders to stop the train where it was. Smith showed him a card with his (Smith's) name on it,—an A. R. U. card.

William James, fireman of one of the Alameda local trains, testified, in answer to the question, "Did you have any trouble at tower No. 2 that day?" as follows: "The train was stopped by a mob of men, and I was taken off the engine." He further states that about 75 or 100 men got in front of the engine. The engineer stopped when they gave him the stop signals. The crowd, all of them, gave signals,—all those that were on the track. He could not see who they were. They took him through the crowd, and wanted him to go and join the A. R. U. They took him half way to the roundhouse, he would judge about 400 feet. Engineer Willard came out and told them it was a free country, and he would go where he wanted to, and with that they let go of him.

Many witnesses on both sides have testified as to the personal assault claimed to have been made on Mr. James. The testimony is contradictory as to what actually took place at that time. I think, however, this feature of the case is sufficiently fixed in your minds to enable you to determine the actual facts of the case without any extended comments from me.

(With the usual admonition to the jury, an adjournment was here taken until to-morrow, Tuesday, April 2, 1895, at 10 o'clock a. m.)

TUESDAY, *April 2, 1895, at 10 o'clock a. m.*

When the court adjourned last evening, I was directing your attention to testimony tending to show the means conspired to be used in carrying out the conspiracy. First, I called your attention to the testimony tending to show, or to disprove, that the con- [748] spirators forcibly took and kept possession and control of all yards, depots, tracks, and trains of cars on said lines of railway, and forcibly held and detained the same; second, that they caused to be assembled,

and assembled with, large crowds of persons in said depots and yards of said Southern Pacific Company at various points and places on said lines of railway in said state and Northern district of California, and by gathering in great numbers in said yards, and depots, to wit, * * * and other places, around, in, and upon the trains, cars, engines of the Southern Pacific Company, and upon the tracks of said railways, preventing the movement and passage of said engines, cars, and trains; third, that by threats, intimidations, personal assaults, and other force and violence, they prevented the engineers, firemen, conductors, brakemen, switchmen, and other employés of said Southern Pacific Company from discharging their duties, and from moving and operating the said engines, cars, trains, and railways. I will now proceed to direct your attention to the testimony tending to show other means conspired to be used in carrying out the conspiracy.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (4) "by forcibly disconnecting air brakes upon such trains,—mail, passenger, and freight."

RED BLUFF.

The following relates to what occurred at Red Bluff:

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, testified on direct examination that the Oregon express reached Red Bluff about 4:30 or 4:35 in the morning of July 1st last; that it comes from San Francisco,—Oakland. Portland, Or., is its destination. She was on her regular trip. She was stopped at Red Bluff. The train was cut in two. The train came into the station, and they cut it in two; that is, they uncoupled it and uncoupled the hose. He was just passing there. He did not see the man who did it. There was a mob of men there. He elbowed his way through the crowd. As he passed, he heard the air holes pump as they do when they are open. The air was cut behind the mail car. The local cars followed first, then the baggage car, the express car, smoker, coaches, and Pullman. That is the way the train is made up. They all follow the mail car. They

were all in the rear of the part cut off. The effect of that cut was to stop the movement of the train. That was about 5:30, a few minutes after they arrived.

Without repeating the testimony given by the defense, it is sufficient to say that the witnesses on their behalf, with reference to the Red Bluff occurrences, deny having had anything to do with the stoppage of the Portland express.

SOUTH VALLEJO.

The following testimony relates to what occurred at South Vallejo:

Michael Keefe, yard engineer of the Southern Pacific Company at South Vallejo, testifying as to what occurred to his engine on [749] July 10th, says that they hauled the fire, let the water out of the boiler, shut the engine down, let the water out of the tank, and disconnected the hose. They ran the engine off the open switch. The testimony of this witness respecting what occurred to engine 1,190 on the following day has already been referred to under a previous head.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (5) "by putting out the fires in the engines, and drawing the same."

SOUTH VALLEJO.

The following testimony relates to what occurred at South Vallejo:

Jeff Gage, passenger conductor for the Southern Pacific Company, running between South Vallejo and Santa Rosa, whose engine was killed between North and South Vallejo on July 12th, called for the United States, testified, with reference to putting out the fires on his engine, as follows: That on the 12th day of July last he was stopped between North and South Vallejo, and his engine killed. They pulled the fire out of the engine. They shut the water off first in the tank valve, and started to pull the fire out. He asked them to turn the water back first, and then pull the fire on the engine, which they did. He asked them to do

that to keep from burning the engine. The effect of letting the water out of the engine with the fire in it, he thinks, would be apt to burn the bricks considerable.

WEST OAKLAND.

The following testimony relates to what occurred at West Oakland:

C. F. Hall, general foreman of the railroad shops at West Oakland testified that a number of engines were killed in and about the shops in the latter part of June and early part of July last. He could not give the numbers. There were 8 or 10 engines with fire in them, and the fire was let out of them, and all the engines were emptied that were full; that is, all the engines that were about the place were emptied of water,—water let out of them. This was done by the strikers.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (6) "by throwing switches, in order to prevent the passage of such trains through depots and stations."

RED BLUFF.

The following testimony relates to occurrences at Red Bluff with reference to delayed train No. 15 on July 3d last:

William Jones testified as to the throwing and spiking of switches as follows: That, after the Portland express which arived at Red Bluff on July 1st stood there a while, the engineer said he wanted coal, and Mr. Day, the foreman at the roundhouse, and the witness, took the engine and the mail car, as it was coupled on,—two mail cars,—there was a freight car which they said contained mail. [750] It was with the mail car. It had United States mail locks on it. He did not see the inside of it. Mr. Monteith: "We will admit that car had mail." The witness, continuing, stated that they took it to the coal pile to give the engine coal. They passed over one of the switches in the yard, and while they were gone the switch was thrown and spiked to the side track, so that when the train backed down it could not back to the balance of the train. It was forced to go to the siding. The switch was opened. It was thrown off the

main track to the siding, and spikes driven to hold it there, and the switch blocked. They could not have passed over it if it had been spiked. It was a switch in which the car could not go off the track. They could not have gone over it. It was not the case. The target was in its proper place and position. No orders were given by the railroad company for either the spiking of the switch or locking the switch. Such orders would come through him.

Charles F. Cadwalader, called for the United States, testifies that he saw Hehorn, Shade, Ray, and others spiking a switch on July 1, 1894.

W. H. Winter, also a witness for the government, testified that he saw the switch spiked, but the only person whom he can identify as having participated in the spiking is Hehorn.

Milton D. Clark, called for the United States, testified that he saw the spiking of the switch. He identifies Hehorn as the person who held spikes in his hand; Shade is the man who drove in the spikes; and that Ray was in the crowd with them.

John Kelly, a witness called for the United States, also testifies as to the spiking of the switch. He states that he was a member of the American Railway Union; that he was a fireman for the Southern Pacific Company; that he went out on strike at Red Bluff; that he did so because he was a member of the American Railway Union. He identifies John Shade as just in the act, when he saw him, of leaving with a spike-hammer and a couple of spikes in his hands. This switch, he states, connected with the main line. There were 30 or 40 men around there at that time. He gives the names of others, besides Shade, who were in the neighborhood of this switch, as Peter Ives, S. P. Roller, Jack Shepler, and Clodtfelder. He states that Roller locked the switch after it was spiked. As to the relation these persons bore to the strike, the witness testified that Roller was a brakeman, and that he was on strike at that time. He was an A. R. U. man. Ives was a car foreman up there. He was also on strike and an A. R. U. member. Clodtfelder and Shepler were on strike at that time. They are members of the A. R. U. Knows a man named Demmick. Knows a man named Harper. He (Harper) was there that morning.

Charge to the Jury.

He is a brakeman, and a member of the A. R. U., and out on strike. Knows a man named Heaney. He did not see him there.

The persons referred to by the witnesses for the prosecution as having participated in the spiking of the switch, which prevented the engine and mail car of the Portland express from getting back to the passenger and Pullman coaches, or, more strictly speaking, those [751] who have testified, deny that they have been guilty of the acts charged, or did anything in any way which contributed to the spiking of the switch.

SOUTH VALLEJO.

The following testimony relates to what occurred at South Vallejo:

Michael Keefe, yard engineer of the Southern Pacific Company at South Vallejo, called for the government, testified that on July 12th last he was making up a passenger train for Calistoga and the vicinity; that it was a mail train, and that it did not carry any Pullmans. He took the engine and made up the train with it, to get ready to go out again. He was going to the roundhouse with the engine. He saw a gang of men. He thought that he would get to the shops before they took the engine away from him. The switch was set for the side track. He would have got to the shop, he thinks, but this man closed the switch on him, so he stopped. Had he gone on he would have run off the track. It was an open switch. The crowd remained there. The engine was killed after that, and was there a day or two.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (7) "by opening drawbridges over navigable and other streams, upon which drawbridges the tracks of said railways were situated."

SACRAMENTO.

The following testimony relates to what occurred at Sacramento:

T. W. Heintzelman, a master mechanic in the employ of the Southern Pacific Company at Sacramento, called for the

Charge to the Jury.

United States, testified that he experienced some difficulty, on June 29th, in attempting to get train No. 4, which is a mail train, and came from Ogden, out of Sacramento,—in attempting to get her through. He testifies that he was requested by his superintendent, Mr. Wright, to back up the engine and mail car and express car,—he thinks it was coupled to the engine,—to couple on to the balance of the train that was left in the upper yard, and pull it down the depot. He did so. While pulling the train down in the depot, something was thrown at him while he was on the engine. After he saw what it was,—it proved to be a monkey wrench,—he got the train down to about its usual stopping place, and stopped there. After considerable persuasion he got the engineer and a fireman on the engine, and got the train started. The train had not moved a great ways—about 50 yards—when the drawbridge was swung open, and the train had to stop. This is the drawbridge across the Sacramento river. There was no vessel in sight to occasion the opening of the bridge. It was opened only for the purpose of stopping the train at that time. There was quite a crowd running down by the drawbridge just prior to the time it was opened.

Mr. Knox gives the following version of what transpired respecting the opening of the drawbridge: He says that on the morning of the 29th No. 4 came in. He guesses she got in about 6 o'clock,—somewhere around there. She came in with an engine, mail, bag- [752] gage, and express car. He went to Mr. Saulpaugh,—he was the engineer that was going out on that train,—and asked him if he was going to do any switching there. He said no, he was not; they would have to get some one else to do their switching. Mr. Wright came down there when they were talking, and asked him if he would back up to Sixth or Seventh street, he believes he said, and get the balance of the train. Mr. Saulpaugh suggested that it would be a pretty good idea to get Mr. Clark or Mr. Heintzelman to do that. They sent for Mr. Clark. The witness here stated that before this strike was ordered it was an understood thing with Mr. Wright and the committee that they should do all in their power to prevent any damage being done. On his (Wright's) side he was to give them

permission to talk to the crews, engineers, conductors, firemen, and brakemen, and see if they could induce them to stay with them. When Mr. Clark came over they had the right to talk to him to see if they could induce him not to back up to get the cars. After they talked with him a while he turned around and said he did not want any of this in it. They simply asked him if he wanted to scab on his own son. His son was working there. He said he did not want to have anything to do with this, and turned around and went away. Heintzelman came, after some time, got up on the engine, and the first thing Knox saw was a monkey wrench coming out of the engine, which pretty nearly hit him. They backed up. While they were up there, he, with the balance of the committee, went through the shops, to notify the men that the strike had been decided on. While they were going through the shops a man was sent over after them to tell them that the drawbridge was open, and to ask them to come and see if they could not get it closed. He ran over there, and sent some men out in a boat to close the bridge,—Mr. Hatch and Mr. Jefford, and two or three more. They closed the bridge, and he went back and told Mr. Saulpaugh that the bridge was closed. After the bridge was closed, he told Mr. Hatch to go up to Mr. Wright's office and get a lock,—a Yale lock,—and put it on there, so that the bridge could not be opened. Mr. Hatch went and got the lock and locked it on the bridge, so that they couldn't open it.

Both Hatch and Jefford corroborated Knox with respect to the latter's statement that he sent them to close the bridge, and Hatch, further, as to the lock being procured at Knox's instance, and being placed by Hatch on the bridge.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (8) "by burning and destroying bridges, trestles, culverts, over which such trains necessarily and usually would pass."

TRESTLE NO. 2, NEAR SACRAMENTO.

The following testimony relates to the wreck of train No. 4 at trestle No. 2, near Sacramento:

Mr. Baldwin, who saw the wreck of the delayed train No. 4 at trestle No. 2 about two hours after it occurred, testified on direct examination that the baggage and mail cars were off the track. When he says "baggage," it might have been express cars with the baggage. [753] One mail car was badly damaged; also a baggage car badly damaged; also two mail cars slightly damaged. These cars were on the side, smashed over. Some of them had reached the water. He made an examination of the trestle. The engine apparently had gone probably three or four car lengths before it went off the trestle. The trestle is about 300 or 400 feet in lenght. He found that the east end of it, especially the north side, was badly smashed in, as though the bridge had been weakened and smashed down; the bents slivered up, the ties all broken very much more on that end of the bridge than further along, right at once where the engine struck the bridge. The trestle was very badly crushed in on the east side, towards Sacramento, immediately where it joins the track, the embankment, two or three car lengths from where the engine lay in the water. Then the train lay all along the trestle on to the embankment. The trestle, where it joined the embankment, was very badly slivered; there was only a piece of about six or eight inches where the ties were solid enough to walk on. The trestle was all crushed in below the ties at that corner.

The testimony of Mr. Baldwin tends to show that the trestle was blown up, and that delayed train No. 4 was wrecked. I will not take up your time in reading to you all the testimony introduced by the prosecution tending to show that the trestle was blown up by members of the American Railway Union, and was a part of the conspiracy to obstruct and retard the mails, and restrain interstate commerce, nor such testimony as has been put in by the defense contradictory of such design, or as to the participants engaged in such affair, or as to being or playing any part in the policy or plan of the members of the American Railway Union in carrying on the strike between themselves and the Pullman cars. The details of this unfortunate catastrophe, as told by the witnesses on the stand, are doubtless fresh in your minds. The testimony tends to show that a train was made up in Sacramento on July 11th last for Oak-

land, to be sent by the way of Davisville. It left Sacramento a few minutes past 12 o'clock, under charge of Conductor Reynolds, with Samuel Clark as the engineer and Danicamp for fireman. On the train was postal clerk J. A. Brown, in charge of the United States mail. Lieut. Skerrey and a number of United States soldiers were on the train for its protection, some of the troops being on the engine. The train consisted of four mail cars, baggage, passenger coaches, and a Pullman. About two miles west of Sacramento, in crossing trestle No. 2, the engine and four of the cars were thrown from the track into the slough. Clark, the engineer, and four soldiers were killed. The jurisdiction to try and punish the parties who were guilty of murder in this dastardly affair belongs to the state. It is only for you to ascertain who were the parties to the conspiracy that brought about this terrible result, that you may determine who were responsible for the minor offenses involved in the stoppage of the United States mails and interstate commerce. You will recall the testimony of the boy Sherburn, who drove the wagon carrying Worden and others out to a point near trestle No. 2 just prior to the time [754] the wreck occurred, and the testimony of Knoblauch, Reed, and Winney as to the declarations and conduct of the parties who, the testimony tends to show, were sent out by the American Railway Union along the line of the road, and for a purpose. What was that purpose? To guard the road, or to wreck that train? It is for you to determine.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (9) "by loosening, removing, and displacing the rails of the tracks of said railroad."

TRESTLE NO. 2, NEAR SACRAMENTO.

The following testimony relates to the track at trestle No. 2, near Sacramento:

Mr. Baldwin, who testified that he saw the wreck of delayed train No. 4 shortly after the catastrophe, testified that he made a little diagram of the position of the rails. The north rail was swung over across the south rail. It apparently had been forced over, lifted over. He found there, right at the joint a nut, three washers, and two spikes. They were loose.

RED BLUFF.

The following was testified to as having occurred at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern Pacific Company at Red Bluff, testified that the spikes and the bolts were pulled out of a rail on the main line. This was between 1 and 2 in the morning of July 1st last. He went to the coal bin, just a little ways from the turntable, to see if the coal bin was all right, and there were four men right across the other side of the fence, working at the rail. They had shovels there. He went to the turntable, and stood there talking to the fireman, when the four men came down with those tools in their hands. They came right from the direction where the rail was tampered with. He could hear them working with shovels, scratching away dirt and covering it up. He was not there more than a couple of minutes. He went back to the roundhouse. He saw John Shade, John Salstrum, Robert Lang, and George Werhing coming from this direction. Mr. Shade had a claw bar in his hand. Salstrum and Lang had a shovel apiece. He did not see anything in Werhing's hands. A claw bar is a long bar made in the shape of a claw, for drawing spikes. He examined that rail an hour afterwards, and found the spikes pulled from a rail and a half, the bolts taken from the fishplates and left lying on the ground. He put the bolts back himself.

J. F. Heaney, called for the defense, who was at Red Bluff on the occasion detailed by the preceding witness, with reference to the displacing of the rail states that he may know John Shade, Salstrum, Lang, and Werhing, but he does not know them by name; that he is pretty sure that they did not belong to the A. R. U. at that time; that they had no connection with him there.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (10) "by greasing the rails."

[755]

RED BLUFF.

The following testimony was given as to what transpired at Red Bluff with reference to greasing of rails:

John Kelly, a fireman employed by the Southern Pacific Company prior to the strike, but who went out with the A. R. U., testifies on direct examination, as to the part he took, with other members of the A. R. U., in greasing the rails north of Red Bluff, that on July 1st, at about 3 o'clock in the morning, he was about four miles north of Red Bluff; that he was greasing the track; that there were with him Bill Ray, Joe Hill, Clodtfelder, and Archie Montanya; that Montanya is a member of the A. R. U.; that he was on strike; that they went about four miles further than Red Bluff, and greased the track, coming towards Red Bluff, for about three miles. This was done with engine oil. Both rails were greased. They just rubbed it on. There is a down-hill grade from Red Bluff, going north, for about a mile, and then for about three miles it is up hill. It is a pretty steep grade. They got the oil with which they greased the rails from the roundhouse,—from the oil tanks. They had oil cans from the engines, and buckets with which to carry it. They got through greasing about 4 o'clock. There was not any oil left in one of the tanks.

The witnesses J. C. Shepler, William Sheehan, and J. B. Hill all deny that they participated in, or know anything about, the greasing of the rails as testified to by the witness Kelly.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (11) "by stopping trains upon railway crossings, and upon switches, and by forcibly refusing to allow such trains to be hauled from such crossings and switches."

SACRAMENTO.

The following testimony was given as to what took place at Sacramento with reference to obstructing one of the railway crossings:

C. A. Newton, night yardmaster for the Southern Pacific Company, called for the United States, testified on direct examination that the three main tracks leading into the Sacramento depot were blocked with trains and engines from the 1st to the 11th of July,—blocked east, west, and south. One of the tracks leads in off the Western Division, called "South;" one leads off the Sacramento Division, called "East;" one leads in from the California Pacific, "West,"—that is called the "California Pacific Division." These tracks lead both in and out. The roundhouse is situated north of the depot. There are several tracks leading from the roundhouse to the main track. There is one track direct to the roundhouse from the main track, that one can go to the roundhouse straight from, without doing any switching. There is another track that one can switch in off the main track, and there are several switches to throw to get to the roundhouse. All of these tracks were blocked between the 1st and 11th of July. By "blocked" he means trains and engines were on the tracks. The engines were dead; they had no steam in them. Some of the trains were made up, and some of them, that were coming into the yard, [756] that were stopped on the main track. On Sunday, the 1st of July, the yard was in such a condition that trains could not pass through the Sacramento depot east or west. He knows the exact condition of the tracks on the 1st of July last. The main track from the west had, on the crossing leading to the roundhouse, No. 4 engine, just about to enter the crossing to go to the roundhouse. Then there was an engine that came in on No. 69, on the 29th of June. Both pilots came together right on the crossing. That blocked the main track to the roundhouse and another track, that we used to let freight trains up and down on, called the "old main track." Crossing Washington, which is on the other side of the river, in Yolo county, the coaches, the smoker, and the mail car and the baggage car stood there in Washington. One of the coaches was shoved part of the way in on a siding, and the other coaches run down against it. That blocked that track. On the Western Division there were some three or four freight and passenger trains down on the main track, mixed up, part on a siding and part on the main track. On the Sacramento Division the cars were sandwiched in every way,—off the track and on the track, coaches among sleepers,

and fruit cars, and everything else. That made the blockade complete. As night master he has control of the movement of all trains and engines in the Sacramento yard.

The testimony of Greenlaw, Compton, Knox, and others is to the effect that they had nothing to do with this obstruction, and that the American Railway Union did not countenance, nor was in any way responsible for, it.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (12), "by compelling the employés of said railroad company to leave their trains, shops, and the work of said company while in the performance of their duties."

OAKLAND.

The following testimony relates to what occurred at Oakland:

C. F. Hall, general foreman of the railroad shops at West Oakland, called for the United States, testified on direct examination that men in his shops were prevented from doing any work. He cannot name any of the parties who prevented his men from working, but they had a machinist working in there, with a helper, and they were taken out by a crowd that came in there. He could not now recognize any of the faces of the crowd. The same witness further testified that the crowds that came in took out the men that they had to work there,—pushed them out of the shops,—they took hold of them with their hands and shoved them out. Cannot name or designate or identify any men who were forced out of the shops, who were forcibly prevented from working. Cannot identify the men by their employment in the shops. This was on the 4th of July. He saw four men pushed out. He saw the stationary engineer taken out. He was surrounded by a gang that were forcing him out,—telling him to get out. They put their hands on him. Referring to the persons who thus prevented the men in the shops from working, the witness stated that one would not see the same parties there [757] every time. In the forenoon there were probably 150 or 200 men. In the afternoon, about 4 o'clock, he should judge about 300 came in, and so it was. There were

small bodies coming in frequently. These crowds were composed partly of strikers,—he would not say largely.

RED BLUFF.

The following testimony relates to what occurred at Red Bluff:

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, called for the United States, testified that on the 4th of July he did not remain in the continued occupancy of the telegraph office at Red Bluff. The telegraph office is his office. It is under his charge. It is the railroad office, the railroad wires doing the business of the railroad company. Mr. Clodtfelder and Mr. Demmick took possession of the office, and ordered him and his operator out. This was at 9:30 of the morning of the 4th of July. He asked them what for. He was told, "We have decided to close this office, and we want you to get out," and they locked it up. He immediately had the operator cut out the instruments, and locked the office and left. Both Demmick and Clodtfelder are operators, and have run both stations. They were on the strike at the time. Before the strike they were brakemen. He regained possession of the telegraph office at 6 o'clock in the evening. They, Clodtfelder and Demmick, opened it for their own use at about 1 o'clock. He was notified that he could come back to the office. Mr. Harper, another brakeman,—a striker,—also a leader, notified him that they had opened the office for their own benefit, or their own use, and he could come there and see nothing was disturbed. He did so. He went down after about half an hour. Mr. Demmick and Mr. Clodtfelder, Mr. Shepler, Mr. Heaney, came in at one time. Those that remained there all the time were Clodtfelder and Demmick. They used the office. His operator was telegraphing for them. The lines were working, and they were using the keys. Clodtfelder and Heaney both told him he could have possession of the office. Then he took possession. The night operator comes on at 6 and they took possession of the office until probably half past 9 or 10 of the evening, when another gang came in and said they had decided to close the office, and out they

went. The other gang were Frierson and Roller. Both were brakemen. They were on strike. He thinks there were others there with Frierson and Roller at that time. There were about 17 there after the station train had left for Sacramento,—about 15 or 17. He does not recollect who was there particularly, but those two men came to the office. They said: "We have decided to close your office." He asked, "For what reason?" They could not give any reason at first. They went out and consulted together, several of them, outside on the platform. They held a meeting. They came back, and he said, "Have you decided why you are going to close me up?" or "that you are going to close me up?" They said, "Yes, we are going to close you up for the same reason that you were closed this morning." That is all the reason they gave.

[758] J. C. Shepler, called for the defense, admits that the telegraph office was taken possession of by the men who were out on strike that day, and that he may have been there while it was in the exclusive control of those men, but he denies that he, with others, put Jones out, or told him he had to get out.

Finally, the indictment charges that it was sought to promote, carry out, effect, and execute the conspiracy "by using all such other forcible means as to them should seem expedient to prevent for an indefinite period the use of the said railway for the transportation of the mails of the United States and interstate commerce."

RED BLUFF.

The following testimony relates to Red Bluff:

MILLER HOOKS.

John Kelly, previously referred to as one who went out on the strike at Red Bluff, and who had been previously employed by the Southern Pacific Company as a fireman, called as a witness for the government, testified on direct examination that he recollects train No. 15 coming into Red Bluff about half past 4 (of July 1st last). The train was prevented from going on. The bolts were taken out of

the Miller hooks. He only noticed Will Ray, Richard Roe (Joe Hill) engaged in doing this, and he was there himself. He noticed what they were doing. These men whom he has mentioned were members of the A. R. U. They were among the strikers. They took the bolts out of the Miller hooks, so that they could not pull the train, and marked them all, and put them in a sack.

Joseph B. Hill, the person referred to in the testimony of the witness Kelly, just quoted, was called for the defense, and stated that he was present when the Portland express came in; that he did not see any safety chains or brake chains taken off, nor did he see any one at work taking off bolts or nuts from that train. He states, however, that all this could have been done without his knowing it; that there was quite a crowd around the station at the time the train came in. He states that he did not see Ray there, nor Richard Roe.

DUNSMUIR.

The following testimony relates to Dunsmuir:

EJECTED FROM TELEGRAPH OFFICE.

James Agler, superintendent of the Shasta Division, from Red Bluff to Ashland, Or., called for the United States, testified as to his being dispossessed from the telegraph office at the station as follows: That he has a telegraph office at the station at Dunsmuir; that on the 4th of July, from 10:30 until 12:15 p. m., he was dispossessed. After detailing how a crowd of 30 or 40 strikers rushed into the office, the witness states that Conductor Seyler was the man who did the talking. He said: "We are in here, and we have got to have this office." He (witness) said: "I don't see how you can [759] do this." Seyler replied: "We have got to have it." That it looked a little shaky. Agler told the dispatcher: "You had better go home. It seems they want the office, and I guess they are going to have it." He went out. Agler passed out, and went upstairs to the resident engineer's office, and was upstairs there 25 or 30 minutes. The witness then goes on to state who was there, and whether those persons had been in the employ of the railroad company. To

the question, "Q. Were these men who came into your office at that time then in the employ of the Southern Pacific Company?" he answers, "A. No, sir; they were not. Q. Of what class was the crowd made up? A. Employés; train men, car men, machinists of all the different departments. There was a large crowd of them. A Juror: Q. Men who had been in the employ of the company? A. Yes, sir. Q. They were not at that time? A. No, sir." The witness further states that after going upstairs he saw these people get the engine No. 1762 out of the roundhouse, which pulled the irregular train out of Dunsmuir. At 12:15 he was notified by them that they were ready to turn the office back to him. He thereupon went to the office. At 12:20 they pulled out.

DUNSMUIR.

The following testimony also relates what took place at Dunsmuir:

IRREGULAR TRAIN FROM DUNSMUIR TO SACRAMENTO.

The same witness (Agler) testifies as to this irregular train substantially as follows: That on the 4th of July a train went from Dunsmuir to Sacramento. Did not know who ordered it out. Saw the engine getting out. Saw the train made up. It was not a regular train. Had an engine and two cars. The instructions from the railroad officials concerning the movement of trains came to no other person than himself. He states that he received no instructions from his superiors in the Southern Pacific Company concerning the movement of this train. The train went without his authority. Witness knew a good many men that went on that train. Some 45 left Dunsmuir on it. He saw one Seyler, Littlefield, Walthers, Roberts, Price, Parrish. These men had been employés of the railroad company up to the 28th of June. H. L. Walthers was running the engine. Conductor Seyler seemed to be in charge of her. He noticed guns in the car. He had a conversation with Seyler just before the train pulled out. He explained to him that the coach and engine that was carrying Mrs. Stanford from Red Bluff to Dunsmuir had the right of way, and that he did not want

him to leave there with a train that he had no right to. Seyler replied, "We have received a message from Sacramento and must go there, and are going." Then they pulled out.

In this connection it might be well to refer to the following telegram, Exhibit No. 687, which reads:

"July 4, 1894. To H. L. Walthers, Dunsmuir, Cal.: One thousand cavalrymen and militiamen here. Come with whole outfit by train, without orders, at once. H. A. Knox."

[760] It will be noticed that this telegram is dated on the same day that this irregular train in charge of Walthers left Dunsmuir.

Walthers, who was called for the defense, admits that on the morning of July 4th a message arrived in Dunsmuir, purporting to have come from Mr. Knox at Sacramento, asking the men to come down,—asking their assistance,—to come to Sacramento. Walthers testified as follows:

"The message was read to all those present, members and outsiders, men and employés in general, and they all signified their intention of going. They all said they would go, and they left in a body, went down there, prepared an engine and coach, met the mail agent, and told him we were going to Sacramento. I could not state positively whether we asked him to go with us, or whether he put the question."

He states that they had a number of guns on the train,—perhaps 35. He states that the train was running without any orders at all. There were no orders from the company to run the train. He further states that he does not think Mr. Agler could have stopped his train.

M. C. Roberts, who was the secretary of the American Railway Union at Dunsmuir, of which Walthers was president, testifies to substantially the same facts as Walthers.

You will also recall that there is testimony with reference to an irregular train from Truckee to Sacramento, which arrived at the latter place about July 4th; and another from Lathrop to Sacramento, on the night of July 10th. You will observe that, so far, I have not alluded to the testimony tending to show acts committed by the defendants at Palo Alto on the 6th of July, although the indictment brings that place within the range of such testimony as I have referred to tending to show the means to be employed in carrying out the conspiracy. I have, however, deferred reference to this tesitmony until we reach the consideration of the overt acts charged

to have been committed by the defendants, when such testimony may then be considered in the double aspect, namely, as tending to show, not only the overt acts required to be established by the statute, but also as tending to show the means whereby the conspiracy was to be carried out.

I have now directed your attention to the testimony which it is claimed by the prosecution tends to establish the means whereby the conspiracy was to be promoted, carried out, effected, and executed; that is to say, it is claimed that such means were, in fact, used, and were part and parcel of the conspiracy: that the acts concerning which testimony has been given were unlawful acts, which entered into and became part of the crime of conspiracy to prevent the use of the Southern Pacific Railways in this district for the transportation of the United States mails and interstate commerce. I have, however, not attempted to exhaust the testimony presented for the prosecution and defense, nor are you to conclude or assume that, in your deliberations upon these matters, you are confined to the testimony referred to by me. I have merely attempted to classify the general features in such a way that you may be able to apply the law, as I shall give it to you, to the facts as you may find them. It is for you to determine beyond a reasonable doubt, not alone from the testimony I [761] have alluded to, but from any and all parts of the evidence, whether any one or more of such acts as have been referred to was or were, in fact, committed; and, if you should so determine, whether any one or more of them was or were the means conspired to be used to promote, carry out, effect, and execute the object of the conspiracy, as charged in the indictment. For, after all, the real question is not whether these acts were, in fact, committed, but whether these acts, or some of them, was or were the means to be used to carry out the conspiracy. You will observe that it is not necessary, to establish this element of the conspiracy, that you should find that all the means charged were to be used in carrying out its purpose. If you find beyond a reasonable doubt that there was a conspiracy to commit the offense charged, it will be sufficient if you also find beyond a reasonable doubt that one of the acts charged was to be the means for carrying out and executing

that conspiracy. We have now arrived at a stage of the case where we may properly refer to the law applicable to the conditions which it is claimed prevailed during the occurrences now under consideration. With the merits of the controversy between the railroad company and its employés you have nothing to do, except in so far as the facts relating thereto may furnish evidence as to the actual parties engaged in violating the laws of the United States. Moreover, it is no defense in this case to say that the railroad company obstructed and retarded the passage of the mails, or entered into a conspiracy in restraint of trade and commerce. If the railroad company violated the law, it should be punished, but we are here now charged with the sole and only duty of determining whether these defendants at the bar have been engaged in a conspiracy as charged in the indictment; and the testimony to which I have referred, bearing upon this question, suggests certain questions of law, to which I will now direct your attention.

The testimony tends to show, as you will remember, that the boycott of the Pullman cars was declared by Debs at Chicago on June 26th, to take effect at noon on that day. It did not, however, take effect at Sacramento until about midnight or early on the morning of the 27th, and its first operation in this district appears to have been to stop train No. 84 at Sacramento, due to leave there at 10:25 in the morning, for Oakland by the way of Tracy. This train, when regularly made up, carries a Pullman car which comes from Chicago to Sacramento on train No. 2. The Pullman car is destined for Los Angeles, and is carried from Sacramento to Lathrop, where it is attached to the train for Los Angeles. The members of the American Railway Union at Sacramento refused to handle this car, by reason of the boycott declared by Debs at Chicago the day before. This train carried the mails. Knox, speaking of this train, says:

"They [meaning the railroad officials] refused to allow the engine to go without the Pullman car on. We tried to induce Mr. Wright to let her go, because it was a mail train, and we did not want to be parties to holding the mail. He refused."

He says further:

"That train stood there until leaving time, when it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of [762] the office and turned the plug on the hind end of

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the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks."

A mail train is a train as usually and regularly made up, including, not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such a train, as a mail train, would include the Pullman car as a part of its regular make-up. The obligation which the railway company is under, as a common carrier, to employ such resources as it can command in the transportation of passengers, mails, express, and freight, without unnecessary delay, is one thing. The claim that the employés of a railroad company have the right to say what cars shall constitute a train is quite another thing. It is not for the employés of the railroad company to say whether a Pullman car shall constitute part of a mail train or not.

In the case of *U. S.* v. *Clark*, in the district court of the United States for the Eastern district of Pennsylvania (23 Int. Rev. Rec. 306, Fed. Cas. No. 14805), the defendant was one of a number of persons who assembled at the depot of the Lehigh Valley Railroad at South Easton, Pa. On the arrival of the mail train at the depot, the defendant, who had no connection with the train, said to persons having charge of it that the mail car could go on, but not the rest of the train. The defendant afterwards got on the train, and, with others, placed it on a siding, where it remained for several days. Judge Cadwallader, in charging the jury upon these facts, said:

"The defendant is charged with retarding the transportation of the mail. * * * The mail, in point of fact, was retarded, as the postmaster testifies, two or three days. The occurrence which retarded it, according to the tendency of the proofs, was that several persons were assembled at the depot at Easton for no lawful purpose, and that one or more of them declared that the mail might go, but the passenger train should not. They uncoupled the mail, and afterwards coupled it, for the purpose of carrying it, as they did, to a siding. If that was the fact, and their purpose was to retard the train which transported the mail, it matters not, in point of law, whether they were or were not willing that the mail car or baggage car or the particular vehicle carrying the mail should go."

The learned judge then quotes with approval the opinion of Judge Drummond of Chicago upon the subject, as follows:

"In relation to the transportation of the mails by means of railroads, it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must

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be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail where there are other cars to accompany it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss; so that, while nominally they permit the mail car to go, they really, by preventing the transit of other passenger cars, interfere with the transportation of the mails."

The law as thus declared by two learned judges many years ago is the law to-day. Apply that law to this case as you find the facts to be in relation to train No. 84 at Sacramento on June 27th; and also to train No. 2 at Sacramento on June 29th; and train No. 4 at Sacramento on June 28th, 29th, and July 3d, 4th, and 11th; train No. 69, from Red Bluff to Sacramento, on June 29th, stopped at Broderick; train No. 16, from Portland to San Francisco, stopped [763] at Dunsmuir, June 28th; train No. 15, from San Francisco to Portland, stopped at Red Bluff, July 1st; train No. 42, Santa Rosa to South Vallejo, stopped at South Vallejo, July 12th; train No. 19, from San Francisco to San Jose, July 5th; train No. 13, stopped at Palo Alto, July 6th; train No. 33, known as the "San Ramon Train," stopped at Sixteenth street station, Oakland, July 3d; and train No. 1, known as the "Santa Cruz Narrow-Gauge Train," at Alameda pier, July 4th. I do not understand that the testimony tends to show that there was any mail or express on the three local trains stopped in the vicinity of tower No. 2, West Oakland, on July 4th.

It is contended on behalf of the defense in this case that the boycott declared by the American Railway Union on June 26th, and the strike declared on June 29th, were in themselves lawful. The logical effect of this contention would be that, if any unlawful acts were committed during the pendency of the boycott and strike, they should be separated from these general and admitted acts of the American Railway Union. This feature of the case calls for the most careful consideration of the law as declared by the courts.

In *Thomas* v. *Railway Co.*, 62 Fed. 803, Judge Taft, in the United States circuit court for the Southern district of Ohio, determined that the boycott of the Pullman cars, as it was enforced in Ohio, was unlawful. The facts in that case were substantially the same as in this case. He said:

"The employés of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render

their services any more burdensome. They came into no actual relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury upon the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employés had the right to quit their employment, but they had no right to combine to quit their employment, in order thereby to compel their employer to withdraw from the mutually profitable relations with a third person, for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever upon the character or reward of their services. It is the motive for quitting and the end sought thereby that makes the injury involved unlawful, and the combination by which it is effected an unlawful combination. The distinction between an ordinary, lawful, and peaceable strike, entered upon to obtain concessions in the terms of the strikers' employment, and a boycott, is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott. Boycotts, though unaccompanied by violations or intimidations, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be Minnesota. They are held to be unlawful in England. * * * But the illegal character of this combination with Debs at its head and Phelan as an associate does not depend alone on the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to life and health and comfort of the people of this country as are arteries in the human body, and yet Debs and Phelan and their associates proposed, by inciting all the employés of all the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slight- [764] est degree responsible, and over whose acts they can lawfully exercise no control, to pay more wages to his employés. The merits of the controversy between Pullman and his employés have no bearing whatever on the legality of the combination effected through the American Railway Union. The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise. More than this, the combination is in the teeth of the act of July 2, 1890, which makes it an offense to restrain interstate commerce." 62 Fed. 821.

In *U. S.* v. *Elliott*, Id. 801, Judge Thayer, in the United States circuit court for the Eastern district of Missouri, states the law in the following language:

"A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining states until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states. Under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose by unlawful means. *Pettibone* v. *U. S.*, 148 U. S. 197, 13 Sup. Ct. 542; *Com.* v. *Hunt*, 4 Metc. (Mass.) 111."

In *Arthur* v. *Oakes*, 11 C. C. A. 209, 63 Fed. 324, Mr. Justice Harlan of the supreme court of the United States, sitting in the circuit court of appeals for the Seventh circuit, states the law in the following terms:

"It seems entirely clear, upon authority, that any combination or conspiracy upon the part of its employés would be unlawful which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, and thereby disabling or rendering unfit for use engines, cars, and other property in their hands, or by interfering with their possession, or by actually obstructing their control and management, or by using force, intimidation, threats, or other unlawful methods against the receivers or their agents, or against employés remaining in their service, or by using like methods to cause the employés to quit, or prevent or deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and personal liberty of individuals who, in the exercise of their inalienable privilege of choosing the terms upon which they shall labor, enter and attempt to enter the service of those against whom such combinations are specially aimed."

The right of labor to organize for its own benefit and protection, as I have before explained to you, is a substantial right, which the laboring class is entitled to enjoy to the greatest extent consistent with the rights of others. The limitation is that in the exercise of this right the property and rights of others must be respected. It remains for you to apply this law to the facts in the case at bar.

I will now direct your attention to the overt acts charged against these defendants.

OVERT ACTS OF DEFENDANTS.

George Cornwall, an engineer on train No. 13, going down towards San Jose, and No. 6, coming up, on the 6th of July, testified to what occurred at Palo Alto as follows: That he was the engineer on [765] train No. 13 on the 6th day of July last; that they took No. 6's time in coming back. It was express train No. 13, from San Francisco. It went down as far as this side of Santa Cruz crossing. They carried the mail and had a mail car. He saw some mail on

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the train. * * * They stopped at all the main points going along. Left San Francisco at 3:15, he thinks. He returned towards San Francisco. He backed up a train to Lawrence's Station. He ran around it, got on the other end, and pulled it back. Going down, the mail car was on behind; when he was coming back it was in front, next to the engine. He backed up from Lawrence's Station towards Palo Alto station, at the switch there. Reached Palo Alto somewhere about 5 o'clock. It was after 5, pretty near 6, when he got back there. He don't recollect exactly. The mail had not been taken off the train before it reached Palo Alto. At Palo Alto they stopped, uncoupled, and went in on the turntable track. He knows Clark, Rice, Mayne, and Cassidy. * * * He first saw some of them on his engine. This was at Palo Alto. He went in to turn around on the turntable. He got about half way turned around, and was saying something to the brakeman,—he forgets what it was,—when Mayne said: "Never mind those fellows. We will take charge of this engine." Then Mayne began to shake the grates, and was going to open the blow-off cock. He could not get it open until he loosened the nut underneath. He was trying to loosen it with a coal pick. Cornwall told him: "Don't break it off. Take the monkey wrench and unscrew it." Rice gave him the wrench, and told Mayne to go under it, as he knew more about it than he did. Mayne then went under. These men let the water out of the tank; shook the fire down. Mayne tried it, but thinks Rice did most of the shaking. Mayne was on the engine. He said he would take charge of her, and commenced shaking the grates. Cornwall was saying something to the brakeman, and he said: "Never mind them. We will take charge of this engine." Cornwall looked around,—that was the first time he saw them,—and he saw three or four of them there, and seven or eight on the ground; seven or eight all together. He saw Rice, Cassidy, and Mayne. He knows a man named Clark, but is not acquainted with him much. Believes he knows him by sight. Could not swear whether Clark was there with those men or not. The hose was uncoupled. One side was uncoupled by Cassidy; the other side, he could not say. The hose was uncoupled between the tank and the engine. The effect of uncoupling that hose was to let the water all out of the tank if the valve was open on top. * * * It is necessary to go under this engine to unscrew the nut. He handed Mayne the wrench, and saw him go under. The turntable was then turned half around. Cornwall wanted them to turn it around, that he might clean the fire out of the ash pan, so that it would not burn the grates. Some one did turn it around, and he ran her over the pit where they put out the ashes. Then the boys went up to the other engine, and, as everything was all quiet down there, he put his coat on, and went up too. He had a talk with Mayne about the mail. He called him to one side and spoke to him. He said: "Mr. Mayne, aren't you [766] afraid you will get into trouble by stopping the mail?" Mayne said: "Damn the mail. You ain't got no mail." Cornwall said: "You have fired on this train long enough to know we do carry the mail all the time." And then Mayne went away, and that is the last Cornwall saw of him to speak to him. * * * There is very seldom a Pullman car on that train. His engine was killed at that time. After these men left his engine, they went up to Mr. Minatt's engine and killed that one. He saw what was going on there. He saw her blowing off, and some one backed her on a split switch in front of the ticket office, and blew the steam right into the ticket office. The back drivers were partly off. It would take five minutes to get her on, if they had another engine there to do it. Could not see who was on the Minatt engine from the time it was moved from its position. There was too much steam. He could not say that these same men were there. Supposes they were. He believes he heard some of them say: "Come on. Let us go up to the other engine." * * * On cross-examination the witness stated that he did not tell those men that they were interfering with the United States mail train when he was on the turntable there, for the reason that there were so many around there he did not think of it. * * * Nothing said, to his knowledge, at the time that engine was killed, with reference to its being a mail train, by either party. It had a mail car on, though, and mail in it going north and south. * * * This conversation that he had

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with Mayne was close by the depot, on the other side of the track. He called him to one side, close by where Minatt's engine was. No one else heard it. Is sure that no one else heard it. That is the only conversation he had with him. Did not have a conversation with him to this effect, in which he said: "Aren't you afraid you will get into trouble about stopping the mail?" Mayne said: "No. I did not know there was any mail on the train, and, if there was, it is pretty late in the day to tell me." * * * Thinks there were more than four there. About seven or eight. Somewhere in that neighborhood. He had one brakeman and a fireman. He thinks he was helping turn around. He did not offer any resistance to them. They came on him so quickly that he did not think about much of anything.

W. R. Sowers testified that he was a brakeman in the employ of the Southern Pacific Company. That he was such on the 6th of July last. That he was on Conductor Gould's train as brakeman. Saw what happened to the engine of that train run by Cornwall. When they came into Palo Alto, coming back as No. 6, he cut the engine off from the train and took it over to the turntable, and started to turn it. He had the engine half or a third turned around, when there were five or six different parties came from over the field,—five or six different men. They were all together, as close as they could be, coming towards the engine. They came over and proceeded to kill the engine. One of the gentlemen in the crowd spoke to him and said: "You don't need to turn it any further. You remain in Palo Alto over to-night. You have run far enough to-day." Does not know who that man was. He was a tall gentleman, with a black mustache. He would know any of the gentlemen that were [767] with them at that time by sight, but not by name. (The defendants Mayne and Cassidy being directed to stand up, the witness identified them both.) After one of these men told him that he need not turn the engine further, but that he could remain in Palo Alto, the light-headed gentleman (Mr. Cassidy), who was on the left-hand side of the engine, and had something in the way of a hammer or monkey wrench, assisted to uncouple the hose between the tender and engine. He could not see who was on the other side. Did not notice who was

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in the cab. Mr. Mayne was in the cab, but what he was doing the witness does not know. He could not see unless he got into the cab. There were a couple of others in the cab at that time. Nothing else occurred, that he knows of, outside of uncoupling the hose between the tender and the engine, letting the water out, and blowing the steam off. Saw the steam escaping. Water escaped from the boiler. That engine was killed at that time. The fire was shook down. He supposes it was all out. * * * Mr. Mulder was in the cab before these men reached the cab. Mulder was helping to turn the engine. Mulder was on the opposite side from where he was. After they killed the engine, these men went from his engine over to Palo Alto station. * * * They were going at a moderate little trot. They were not running very fast, or anything like that. * * * Is acquainted with the signals that are used on passenger trains. This was a regular train.

Peter Mulder was fireman on the engine of which Cornwall was engineer. He was present when Cornwall's engine was killed, but he is unable to identify the defendants as being the persons who assisted in killing the engine. The material parts of his testimony are as follows: Having returned as far as Palo Alto, they stopped the train, uncoupled, backed it on the turntable, to turn the engine around, because she was headed the other way, and they were going to San Francisco. As soon as the engine stopped on the turntable, he got off the engine, to help push the engine around. * * * He was alone on the back end. He don't know whether any more were on the forward end with Long, or not. The engine was between them. Just as he put his shoulder to the lever to push it around, he saw some men coming from the back end of the engine towards the engine. They were walking pretty fast. Some were running a few steps. Some of them went up on the engineer's side of the engine; some of them stayed behind the engine. One of them turned open the air pipe under the engine while he was pushing around. He looked round and saw the air was blowing out of the hose. He stepped up and shut it off. Some one says, "God damn, leave that alone." With that this person opened it again, and Mulder went up on the engine. They pushed the engine

partly around a little ways. Mulder got up on his seat, and sat down to see what was going on. Cornwall, the engineer, at the time he (Mulder) got up, was sitting on the seat box. * * * The engine was killed. Saw the squirt hose used. One of the men said to him, "Turn that squirt hose on." Mulder said, "No, I will have nothing to do with this," and with that he reached by him and turned it on himself. They opened the door of the fire box, and squirted the water over [768] the fire, and killed it. They had already shaken the grates a little, although the fire was not altogether shaken down. This person was trying with a pick to open the blow-off cock, and the engineer told him it could not be opened that way; he would have to take a wrench and go underneath and loosen the nut before he could turn it. The engineer handed him a monkey wrench. One of the men went underneath and loosened the nut, and they blew the water out of the boiler and out of the tank. There were engaged in that work at least six, if not seven. He thinks there were seven,—three behind the tank when he left there, and four in the cab when he got up there.

T. J. Long was also a brakeman on the train pulled by Cornwall's engine. He accompanied the engine to the turntable, to assist in turning it around. He saw the killing of the engine, but is unable, like Fireman Mulder, to identify the defendants, or to distinguish the part they took in the disabling of the engine. He noticed some of the men coming down in the train with him. He recognizes Cassidy as being a member of that party. Cannot say as to Mayne, nor as to Rice and Clark.

C. B. Gould was the conductor of the train whose engine, of which Cornwall was engineer, was killed. He states that he left San Francisco on July 6, 1894, at 3:05, on train No. 13. The time was 2:20, but they waited for troops to take to San Jose. It was a mail train, having a mail car. He had baggage and express and mail, smoker, and, he thinks, two or three coaches. He had no Pullman cars,—no Pullman sleepers. He went as far as Santa Clara crossing, left the troops there, and returned immediately as No. 6; that is, on train No. 6's time. Those were his orders. It was a mail train returning. Left Santa Clara crossing at 5:15 p. m.

Reached Palo Alto at 5:55. The engine had been backed all the way from Santa Clara crossing, there being no turntable between that place and Palo Alto. Arrived at Palo Alto, he left the train on the south switch. The engine was sent on to the turntable, to turn her, so that the pilot and engine would come first. He told his men to go up with the engineer and fireman and turn the engine, while he went to the depot to get orders, if there were any to obtain. It was his intention to take that train right through to the city. Did not intend to stay at Palo Alto more than about 10 minutes. It would have taken them only a couple of minutes had they not turned the engine. He had just arrived at the ticket office when some one sang out to him, "I saw some one running towards your engine." He ran to the engine from the ticket office. When he reached her she was virtually dead. Saw Rice, Clark, Cassidy, and Mayne around the engine when he reached it. Rice was shaking the grate. The hose of the engine was cut; that is, it was uncoupled. That is the hose between the tender and the engine. Did not see who cut it. While examining the engine, he noticed Cassidy, Mayne, and others make a run for the other engine, of which Engineer Minatt was in charge. She had just arrived with a train from San Francisco. He followed them up. When he arrived, it also had been killed. With the exception of seeing Rice [769] shaking the grate, he did not see any of the acts connected with the killing of the two engines. In answer to the question, "Did you have any conversation with Mr. Rice and Mr. Clark in respect to this act?" the witness stated:

"After this was over I went to the telegraph office and notified the superintendent what had been done. Shortly after, I passed down track to go to my train, which was on the main track below, to protect it, and I met Mr. Rice and Mr. Clark coming towards the ticket office. I said to Mr. Rice and Mr. Clark: 'Well, you have tied us up.' He said: 'Yes. Well?' I said: 'This is a very wrong, unlawful act, and you have no grievances whatever against the Southern Pacific company, or any other company;' that is, speaking of them as the A. R. U.'s. I says: 'It was only to make the railroad companies whip Pullman, or, in other words, bring him to their terms.' He stated: 'We had orders to do this, and we have done it.'"

Rice, Clark, Mayne, and Cassidy remained around Palo

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Alto about 20 or 30 minutes. Possibly it might have been more. There were no other engines at Palo Alto save those two. They laid there until the next morning, until they got another engine to pull these engines to Menlo Park, and filled them with water and got up steam, so that they were able to make the trip out. Got back to San Francisco about half past 10 or 11 o'clock the next morning. Were due in San Francisco the night before.

Edward J. Kincaid, assistant agent at Palo Alto, called for the United States, testified that his attention was attracted to Cornwall's engine by hearing some one holler, "They have got it." He was then in the ticket office, and ran out, and saw four or five men coming from the field between the county road and the railroad track. He saw the men climb over the fence and climb up on the engine. The engine was half turned around on the turntable, and he did not see what they were doing to her, but he states that steam soon began to issue from the boiler, and the engine was turned clear around and run onto a side track, and there the steam was blown off. This crowd remained around the engine probably about six or seven minutes. They then went to Minatt's engine, and climbed up on the engine and told them to get out,—told the fireman to get out. They then let the steam and water out of the engine. Knows Rice, Clark, and Cassidy by sight. Does not know the others. He saw them there at the time these two engines were killed. Saw them mingling with the crowd. The only one he saw on the engine, to recognize, was Rice. Did not see either Clark or Cassidy on the engine. But they could have been on the engine, and still he might not have seen them. Could not see what they were doing. On redirect examination he states that he could see that the hose between the engine and tender was uncoupled, hanging down, and he could see under this hose where the water had run out.

Robert Dannenburg, station agent at Palo Alto, also agent for Wells, Fargo & Co., and Western Union operator, called for the prosecution, testified that he saw some five or six men coming from the county road towards the railroad track east, at a sort of dog trot; that they went to Cornwall's engine; that he saw them stop the turntable when

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about half way around, but he could not dis- [770] tinguish who it was that stopped the turntable. He saw steam escaping from the engine, and shortly after they (the crowd) turned the engine clean around, and ran over the ash pit. Ran her off the turntable, right onto the track. He could not see any particular thing that was done on the engine from where he was. The crowd then went over to Minatt's engine. He saw Rice board that engine, and also another man. All that he saw with reference to Minatt's engine was two or three men climbing the engine. He did not see the rest of it. But, probably two or three minutes after these men boarded the engine, he saw steam blowing off from the engine. Saw Cassidy, Mayne, Clark, and Rice in the neighborhood of those engines at these times. Distinguished them near Minatt's engine, but could not see what they were doing.

E. F. Minatt, called for the United States, testified that he was an engineer on the Southern Pacific system, running on the Coast Division; that he was an engineer on or about the 6th of July last. He went off on No. 17 according to the time card, which leaves San Francisco at 4:25 in the afternoon, but he thinks they were 10 minutes late on that day. Pulled a local train between San Francisco and Palo Alto. He reached Palo Alto that day. He was to return from Palo Alto the next morning at 6:40. Four of the boys,—two of them fired for him before, and he pulled the other two as brakemen (Cassidy and Mayne, they both fired for him, and a fellow named Rice, a brakeman, and Clark),—they came to his engine. He was down on the ground and they got up. He thinks Rice—he is not sure—commenced to shake the fire out of the grates down into the ash pan. Cassidy and Mayne commenced to uncouple the hose. They wanted to blow the water out of the boiler, and let it out of the tender. At this time Rice came around, and the witness said to him, "Boys, don't damage the engine." They said they would not; only let the water out of the boiler and tender; and they did that. There was such a crowd around there that he could not tell how many there were. Cassidy, Mayne, Rice, and Clark were actively taking part and killing the engine. Mr. Cassidy, he thinks, and Mr. Mayne, both had a hand in loosening the blow-off cock. The witness gave them a

wrench to do it,—to unloosen the blow-off cock,—and they did it. After they had blown the water partly out of the boiler,—the water was about out of the tender,—the young man Clark got up and backed her out through an open switch. Witness hollered to him, and told him the switch was wrong. He got the tender out and the back drivers out over this switch, then he undertook to run her ahead on the main track, and derailed her. She stood there like that until they sent a man from San Francisco to pull her on. * * * There were some exclamations made of "Hip, hip, hurrah for the A. R. U." There was such a crowd around there—such a jam—that he could not get to the engine from the crowd. Who it was did it he don't know. The only man that he saw at the time of the hurrahing was Clark. The latter was on the engine after he derailed her. He did not see Mayne or Cassidy or Rice at the time the hip, hip, hurrahing was going on. After the excitement [771] was over, he saw the parties going towards Menlo Park. He saw Mayne, Cassidy, Rice, and Clark going towards Menlo Park.

Edward C. Murray, a witness for the United States, testified that he was the railway postal clerk who accompanied train No. 13, coming back on the same train,—it coming back as No. 6; that is, on No. 6's time. He testifies as to its being a mail train. He did not see the engine killed. He testifies as follows:

"Q. State what mail, if you recollect, you took up or delivered on the way down, or coming back. A. I received mail from all stations between San Francisco and Lawrence, inclusive. Coming back, I received mail from Lawrence, Mountain View, and Mayfield. Q. Did you have a mail car, or not, on that train? A. Yes, sir. Q. Did you reach Palo Alto? A. Yes, sir. Q. Did you go beyond Palo Alto that day. A. Not that night; no, sir. * * * Q. What time were you due at San Francisco with that mail? A. 6:26."

AS TO CONVERSATIONS HAD WITH CLARK.

R. M. Donne states that he was a conductor on the Coast Division, and that he was at San Mateo on the evening of the 6th of July, and the morning of the 7th. He saw Cassidy, Rice, and Clark there that night (the 6th). Also saw a gentleman with them who weighed about 180 pounds; had a smooth face; was heavy set. He had a talk with Clark that night. He spoke to him outside of the ticket

office, and asked him if he would come inside of the office with him (Donne), and that he would introduce him to their assistant general passenger agent, and several others. He acceded, and came in. F. S. Douty, the secretary of the Pacific Improvement Company; H. R. Judah, the assistant general passenger agent; L. H. Fuller, an employé in the ticket auditor's department; the station agent, Mr. Peckham; and his assistant, Mr. Elmes,—were present. He testifies as to the conversation as follows:

"I introduced Mr. Clark to these men, and he was asked by Mr. Douty why they wanted to tie up the Coast Division. Well, he said that the boys on the other side were complaining that they were not taking any part in this affair; that they had the other side tied up, also the Narrow Gauge, and they had to do something on this side. Q. Do you recollect anything further that was said at that time? A. Nothing more, except that he was asked whether they had any grievances against the Coast Division. He replied by saying, 'No; not particularly.'"

F. S. Douty, a witness on the part of the government, narrates the conversation that passed between himself and Clark as follows:

"I think the conversation with Mr. Clark, after the introductions were over, by asking his reasons for this strike,—to get some information. He said that the Pullman Company had not treated the boys right, so that they had to strike on any road where Pullmans were used. I suggested that no Pullmans were used on this division. He said, in effect: 'No; but the boys on the other side' (referring to the Oakland side) 'are kicking, thinking that we are not doing enough here; so we have to keep our end up.' I said, 'Why do you have to keep your end up?' 'Well, we belong to an organization where we have taken an oath to stand together.' And he added, 'If we don't win this fight, I will go to China.' I said, 'Have you got any complaint to make against this Coast Division?' He said, 'No; there is no kick coming.' I asked him if it was what he called a 'sympathetic strike'; if he was striking in sympathy. He said, 'Yes,' he thought that was substantially it, so far as the Coast Division was concerned. I am giving the essence of my recollections, without trying to repeat the language."

[772] Upon being asked if he could give the names of any other person with Clark, he says one was called Cassidy; another, Rice.

H. R. Judah, who was present at the conversation carried on between Mr. Douty and Mr. Clark, thus gives his version of it:

"Mr. Douty took the leading part in opening the conversation, and in a general, pleasant way, asked Mr. Clark what was the object of their tying up the Coast Division. * * * I cannot give the exact language, but, according to my recollection, Mr. Clark replied that the

men on the other side (having reference to the Oakland side) had complained that nothing had been done on the Coast Division in the way of tying up trains, and that they felt it necessary to do something (or words to that effect). Then Mr. Douty asked him—I think that was the next question that was asked—why the Coast Division should be singled out, you might say, entirely disconnected with the balance of the system, in so far as Pullman cars were concerned. Mr. Clark replied, in substance, that that did not cut any figure in the matter at that time; that they were into this fight, and that they were going to stay with it; and, furthermore, said that if they lost their cause he was going to China,—he would not live in this country. The conversation was carried on by all of us. Questions would be asked, but I cannot recall every single question that was asked, or every answer that was given. In substance, it is the same as Mr. Douty has given, and Mr. Peckham. My memory might be refreshed if some questions were asked of me, but, in the main, what I have said covers the ground. Of course, a good deal was said to Mr. Clark, to try and persuade him to have the men cease on the Coast Division; to allow that to be an exception, as there did not exist, in fact, any cause for complaint on the part of those employed on the division, and if they continued in blocking the traffic it must be on the ground of sympathy, and nothing else. Then Mr. Clark reiterated—in fact, he reiterated on two or three occasions—the fact that they were in this fight, and they proposed to see it through."

The witnesses Peckham and Elmes testify substantially to the conversation between Clark and Douty as detailed above.

On page 644, vol. 8, of the testimony, appears the following admission:

"Mr. Monteith: We will admit that both of these defendants are members of lodge No. 345 of the American Railway Union, located in San Francisco. Mr. Knight: Q. In the latter part of June? Mr. Monteith: In all of June, and all of July last. Mr. Foote: Let that be taken down. Mr. Monteith: We will admit anything of that kind. We have nothing to conceal about it. Our side of the case is an open book."

TESTIMONY ON BEHALF OF DEFENDANTS.

The defendant John Mayne testified: That he was a locomotive fireman on the Coast Division last spring. That he was hostler at San Francisco at the time of the strike. He had charge of the engines after they came in off the road, put the necessary supplies on, put the engines in the house, and got other engines out to go out on the road. Had been employed on the railroad about six years. Understands all the duties of a fireman. Was familiar with the rules of the company at the time of the strike. Belonged to the Brotherhood of Locomotive Engineers and the American Railway Union. That he attended meetings of the A. R. U.

in the last part of June. He belonged to the San Francisco lodge. He attended a meeting on the night of the 29th of June. The lodge met on Mission street, between Fifth and Sixth. After the admission of members there was a message read stating that the members of the local union 310, in Oakland, had declared a strike on account of the discharge of [773] men. He identifies Exhibit No. 296 as the message, as near as he could remember. It reads as follows:

"June 2, 1894, Oakland, Calif. To J. E. Riordan, 118 Sixth St., Room 71, S. F.: American Railway Union three hundred ten has declared strike takes effect twelve thirty a. m. to-day. T. J. Roberts, President."

He further states that he thoroughly understood the cause of the strike. His union never participated in the boycott against the Pullman cars. With regard to the strike at Oakland, a motion was made, and a standing vote taken, that they indorse the action of the Oakland Union in striking, and that a strike be declared by their lodge for the reinstatement of the discharged employés. So far as this lodge was concerned, there was no other purpose in striking than the reinstatement of these men. After the strike was declared, the next action of the meeting was the appointment of an executive committee. Harry Bederman, George Elliott, Pete Farrel, and W. S. Runyon were appointed on that committee. They had full power to manage the strike, and all the business connected with it. The union did not reserve any authority to itself. After the appointment and authorization of this committee, the next business transacted was a discussion in regard to handling the mail. This was on the night the strike was ordered. The meeting of the 29th, some one made a motion (he thinks, Mr. Achorn) that the lodge take a vote as to whether they were willing to handle the mail or not. A standing vote was taken. Everybody in the hall stood up, in favor of handling the mails at all times. He did not hear any reference to interstate commerce. After that they held a meeting every day,—sometimes twice a day. He thinks he attended all meetings up to the afternoon of the 6th. Does not remember anything that was done, except routine business connected with the admission of new members, and so forth. He was in San

Francisco on the 5th of July. Saw Cassidy every day. Has known him about six years. For the last three years he has been almost a constant companion of Cassidy. They roomed together, boarded together, and were together evenings, and all the time. Saw him on the 5th. On the morning of July 5th, Cassidy and he, after breakfast, attended a meeting of the union. After the meeting they went around town,—he does not know just where, now; and in the afternoon they went to Valencia street, and took the train bound south,—bound for San José. He invited Cassidy to go down with him to San José, to see his folks, on the morning of the 6th. He had been with him all the morning from the time they got up. He asked the agent if there would be a train along in the afternoon. The latter informed him there would. He asked him for two tickets to San José. He notified him they were only carrying passengers as far as Mayfield. He bought two tickets for Mayfield, and handed one to Cassidy. He thinks it was about 3:30 o'clock when he got on the train. It was an ordinary train. There was a mail car on the hind end of it. Next to the mail car there was a car load of passengers. He tried to get into the car, and did not know what was in it, and the brakeman refused him admission. He then took the car immediately ahead of that. Cassidy did not get in at the same time he did. He saw Clark and Rice on that day. **[774]** When he got on at Valencia street, he was reading a newspaper. When he finished with the paper, he went into the smoking car. When he arrived there, there were quite a few people in the smoking car. There he saw Rice and Clark, and he believes Cassidy was in the smoker at the time. Rice and Clark and a number of passengers were talking to a captain of the militia,—he supposes it was a captain; he had stripes on his uniform. Just before they got to Redwood, the captain left the car, and went back through the train. Fred Clark came and sat down alongside of him. They chatted along the way. Mayne asked him where he was going. He said he intended to go to San José, but he only had a ticket for Mayfield. When they got to Mayfield he and Cassidy got off, and Rice and Clark also, and a great number of the other passengers. The first thing they did was to look for a conveyance. He

found nothing there; no wagons around the depot. They talked the matter over, and finally concluded to go back to Palo Alto. There are a couple of crews which run in there, and they thought they could get definite information of whether train 19 was coming out that afternoon or not. If there was no way of getting to San José they would have come back to the city. They walked up the county road very leisurely. Stopped just outside of Mayfield, and looked at the cavalry. There was a company of cavalry camping just outside of Mayfield. Walked up the county road to almost opposite Palo Alto. Cassidy complained that his shoes were hurting him, and wanted them to wait a moment. They jumped over the fence; sat down under a tree in University Park. They stayed there 10 or 15 minutes. While they were sitting there an engine came in on the turntable. They all got up and looked at it. He does not know whether he suggested that they go and kill it, or whether Rice did. He knows that Rice and he got over the fence, and went over and killed the engine. Rice and he were in advance of the rest. He did not know whether the rest were coming or not. He did not look around to see. They got to the engine first. He went up on the left-hand side, over the timber of the turntable, and thinks Rice went on the right-hand side. When he got on the engine, Engineer Cornwall was standing up with his head out of the window. There was a fireman, a man with overalls, and a man in citizen's clothes, turning the turntable. Cornwall was saying: "A little ahead. How is that, pard? A little ahead,"—repeating that remark two or three times. He (Mayne) said to him, "That is all right, George; she is all right where she is." Cornwall said, "What are you going to do?" Mayne replied, "Nothing in particular." Cornwall then stated, "Don't hurt my engine, boys." To which Mayne replied, "We have no intention of hurting your engine." That was all that was said. He caught hold of the grates, and started to shake the fire out. He tried to shake the fire out. It was in such a condition—it was all clinkered—that it would not go through the grates. He was about to give it up, when the idea struck him that he could put it out with a squirt on the left-hand injector. He put on the injector, turned the water into the

fire box, and drowned the fire out. * * * About the time he thought the fire was quenched, he asked the engineer if he thought [775] it would be safe to let the water out. The latter stooped down, looked into the fire box, and said he thought it was all right. Then Mayne took the coal pick, and tried the blow-off cock. He suggested to the engineer that they had better run the engine off the turntable, on account of the blow-off pipe coming against the timber of the turntable, and it would scald the paint on the engine. He approved of that, and the table was turned back for the straight track, and the engineer ran the engine off over the ash pit. Mayne tried the blow-off cock, and he could not open it. The engineer told him he would have to get down underneath with a monkey wrench, and loosen up the nut in the bottom of the car. Cornwall gave him the monkey wrench. Mayne jumped down on the ground. It was necessary for him to get under the engine, so he took off his hat and coat, and handed it to the engineer. The latter held his hat and coat while he opened it, and until he got back on the engine. * * * There was nothing said, further than what he has stated. The engineer requested them not to hurt his engine. He said: "Boys, don't hurt my engine. I like my engine." And he repeated that remark two or three times, and that was all that was said. * * * Just before he finished killing the engine, Rice came back from up towards the depot, and after he let about four inches of water out of her he went back into the cab, and opened the blow-off cock. Then he stood by the water glass, and watched it until the water went out of sight in the glass. Then he closed the blow-off cock. He did not know but what the fire might kindle up again, and he was not taking any chances on it. He shut the blow-off cock as soon as the water went out of sight. After they killed the engine, Rice and he walked up to the depot. There was a crowd of 20 people up there, he supposes. Just before they reached the depot, the other engine that Minatt was running was blowing out against the side of the station-house,—a little station, six by six. He said to him (Rice): "That won't do. You don't want to spoil the paper in there." He mentioned the paper and instruments. Rice went up on one side, and he

on the other. They moved the engine ahead a foot, so that she would clear the building. Rice was moving the engine, and he had hold of the brake wheel. About the time they moved a foot, some one hollered, "Whoop! you are off the track." They stopped immediately. The water was all, or nearly all, out. He kicked the blow-off cock shut, and got down off the engine. He had nothing whatever to do with the killing of Minatt's engine. He got up there. The fire was all out, and the water almost all out. He had a talk with Engineer Cornwall just before they left Palo Alto. Cornwall was up at the station. Cornwall called him over, and said to him: "Pard, don't you think you have done something pretty serious, in stopping the mail?" Mayne replied: "No, I don't think so. Even so, this is a hell of a time to tell us of it now, when it is all over." Mayne then turned round and walked off. He denies having made the statement testified to by Cornwall, as follows: "I says, 'Mr. Mayne, aren't you afraid you will get into trouble by stopping the mail?' He [Mayne] said, 'Damn the mail. You ain't got no mail.'" Cornwall replied, "You have fired on this train long enough to know [776] we do carry the mail all the time." He, on the contrary, affirms that statement was just exactly as he gave it, word for word. He further states that he had no knowledge of any mail train coming along at that time, and before he killed the engine; did not know that a mail train was due at that time on the schedule. Is familiar with the surroundings at Palo Alto. The train could not be seen from that turntable. He remained in Palo Alto about 40 minutes; then went over to Menlo Park. Cassidy told him he had heard that Haydock had telegraphed to the constable at Palo Alto to arrest them. The first thing they thought of was to move over to Menlo Park. They stayed in Menlo Park an hour, or may be an hour and a half. Ate supper over at the hotel. Then they tried to get a rig. The livery stable man wanted too much. He suggested to the boys that they walk over to Redwood; there was a friend of theirs over there who would drive them up. They walked to Redwood, got a rig there, and they were taken as far as San Mateo. Got to San Mateo between half past 10 and 11 o'clock. Did not do anything in particular,

only sat on the platform and talked with the boys around there. On cross-examination the defendant Mayne testified that he bought his ticket as far as he could go in the direction of going home,—to San José. The distance from Mayfield to San José is 16 miles. He was there when the train left. He made no effort to get on and buy a ticket from the conductor, and proceed on his journey, when he saw it going further on, although his destination was his home, at San José. He did not think they were carrying passengers any further than Mayfield. He supposed he would find the regular Palo Alto crews at Palo Alto. He knew that two trains laid over at Palo Alto at night. From where he was, he could not see the train coming back. He did not hear it coming. He was over 200 yards from the road. He admits that, although he neither heard nor saw the train come in, he suddenly started over to kill a live engine. He had fired on that train. He knew that Cornwall sometimes went on that engine. He knows all the engineers on the Coast Division. He states that he did not know what engine was on the train that he went up on, but he admits that he knew train 6 was due at San Francisco at 6:30. Being asked to repeat the circumstances under which he jumped up and ran for that engine, he states that when the engine came over the switch, just before she came on the turntable the cylinder cocks were opened, and made a lot of noise,—steam blowing off. They got up and looked at the engine. He don't know now whether he suggested to Rice, or the latter suggested to him, "Let's go and kill her." They did not debate the question at all. They went and killed her.

"Q. What was your purpose in killing a live engine there? A. I have not any good reason for killing the engine. We wanted to be doing something, I suppose. We wanted a frolic. Q. Did you not know that a live engine could pull a train? A. I did. Q. And a dead one could not? A. And a dead one could not. Q. Did you not kill that engine because you did not want it to pull a train? A. I did not know one was there at the time. Q. Did you not know that a live engine usually pulls a train? A. Yes, sir. Q. Did you not know that to kill that live engine was to disable it from pulling a train. A. I did. Q. Yet you killed it, and for no purpose? A. I did not know there was a train there, attached to it. I thought it was a light en- [777] gine. It is customary— Q. I do not want anything about customary. I want you to answer my question. Now, Mr. Mayne, did you not know that to kill that live engine would render it impossible to take a train that might be there back to San Francisco? A. I did not think anything about it. Q. You just went up there out of pure deviltry? A. Yes, sir. Q. You did not know whether there was a train or not, or whether or not there was any mail, or not any mail, and you killed it out of pure deviltry? A. I did not debate it. I thought it was a light engine, and went over there and killed her for no reason whatever. Q. Did you not do it for that reason? A. For deviltry? Q. Yes; from a pure spirit of mischief and deviltry. A. I guess you might as well put it that way. Q. Without caring what the result was? A. That is as good an answer as any."

Referring to the conversation he had with Cornwall about the mail, he states that, if he had stopped the mail, it was too late to start it then. The engine was killed. He made no effort whatever to repair that which he was told was a violation of the law. He left because he did not know just exactly what the consequences would be. He went off towards San Francisco. He went in company with these men,—Clark, Cassidy, and Rice.

John Cassidy, the other defendant on trial, testifies, substantially, that he was a fireman employed by the Southern Pacific Company last spring; that he had been such for about eight years; that he belongs to the Brotherhood of Locomotive Firemen, and San Francisco Lodge, No. 345, of the American Railway Union; that he attended the meeting of that union on June 29th; that "every one was there, and there was a telegram read about the Oakland strike, or about the Oakland boys going out on a strike, and we indorsed their action. * * * We all decided to strike." He states that most of the members of his union were employed on the Coast Division; that at that meeting, besides ordering a strike, they took in a number of new members, and appointed a crew to go down, and go out with the mail the next morning. They also appointed a mediation committee. The witness' statement as to the invitation tendered him by Mayne to go down to San José on July 6th, to visit Mayne's folks, agrees substantially with the latter's testimony. The witness further states that he first saw Rice and Clark on July 6th, somewhere between San Mateo and Redwood City, on the train. He got off the train at Mayfield. He states that, after an ineffectual attempt to secure a conveyance to San José—

"We concluded to go back to Palo Alto. We went back to Palo Alto to see if train 19 was coming through. When we got up about opposite Palo Alto, on the way up, there was some cavalry marching

back from Santa Cruz; some regular troops. They were in the field. We stopped and talked with them for quite a while. We walked on until we got opposite Palo Alto. I had a new pair of shoes on. I told the fellows they could go on the rest of the way, if they wanted, but I was going to take my shoes off. I climbed over a fence in the park, took off my shoes, and laid down in the grass. They all got over the fence, too. We were sitting there, or laying there, telling stories and yarns, for about ten or fifteen minutes, when we heard the cylinder cock of an engine blowing off. Some of the boys got up, and looked over the fence, and saw an engine. Some one says, 'There is an engine on the turntable,' and they started for it. I had to put my shoes on, and, I believe, my coat. Somebody else had their coat off. They were on the engine before I got there. I got there just as quick as I could, after I got my shoes and coat on. There were two or three in the cab of the engine. I went around to the left, and started to take off or uncouple the tank hose. [778] I turned around, and happened to see Minatt's engine up the track, and I quit my job, and went up to Minatt's engine. Q. What did you do with Minatt's engine? A. Between Minatt and myself, we loosened the blow-off cock, and blew the water out. The fire was already out of it. I had to crawl under the engine to do it. The tank valve was open, and the water was running out of the tank. Q. Did Minatt offer any resistance? A. No; he stood off, and seemed tickled. He gave me a wrench to do it; told me where I could get one. I had to lay down flat. There is an air drum under the deck, and I had to lay down flat, and crawl under it. Q. Was Mayne there when you were killing that engine? A. No, sir. Q. Who was there besides Minatt and yourself? A. I think Clark and I did that job. I am pretty sure Clark was there."

Upon being asked by his counsel if he knew what the indictment charged, he states that he does, but that he never did anything except to let water out of that engine. Respecting the cause of his leaving Palo Alto that night, he states that somebody in the crowd told him that the division superintendent, Haydock, had ordered the constable at Palo Alto to arrest them; that they thereupon went over the county line to Menlo Park, and subsequently to San Mateo. On cross-examination, being interrogated as to his motive in running towards Cornwall's engine to assist in killing her, he states that he went because the others did; that he helped kill the engine because the rest of them were killing it; that he simply wanted to be with the crowd, or, to use his own language, "I suppose I wanted to be in the swim." Respecting the killing of Minatt's engine, he states that he thinks he was the first man to reach it; that when he did he got up and looked into the fire box; the fire was out of her; he started in to open the blow-off cock; that the effect of this was to let the water out; that he let nearly all of the water out; that the effect of this was to kill the engine. He also states that, while engaged in killing Minatt's engine, he heard some one

holler, "Three cheers for the A. R. U." Being asked to give his reason for killing Minatt's engine, he states that it was "to have a good time." He states that he would done what he could towards killing Cornwall's engine if the other engine (Minatt's) had not been there. Further, that he did not think of any consequences that might ensue, from the killing of those engines, to him; that the only reason that prompted him to kill those engines was "to keep my hand in."

F. W. Clark, one of the defendants in the indictment, but not on trial, was called for the defendants, and testified, briefly, that he was a brakeman on the Coast Division of the Southern Pacific Company, and had been such for about two years; that he was braking between San Francisco and Monterey, on the freight trains; that he knows Rice; that he met him on the morning of the 6th of July at the A. R. U. meeting; that, after the meeting adjourned, Rice asked him to go down to San José with him; that they could not get tickets for San José, and they went as far as Mayfield. On cross-examination he states that he met Cassidy and Mayne on the train between San Mateo and Redwood City; that he stayed with them all the while until they got back to San Mateo; and that he finally came to San Francisco with them. He states that, when they got opposite University Park, Cassidy complained that his shoes were hurting him. They thereupon climbed over the fence [779] of the park, and sat down under the shade of a tree. After they had been sitting there about 10 minutes, he heard a noise of steam blowing out of a cylinder cock of an engine. He rose up, and looked over, and saw an engine going on to the turntable. Either Mayne or Rice said: "There is an engine. Let's kill her." They jumped over the fence. He followed them over to the engine. When he reached there, Mayne got up on the engine,—on the left side,—and Rice on the right side. He got up behind Rice. Cornwall was standing by his lever. He had his head inside the cab when he (Clark) first got up. Then he stuck his head out, and said to some one in front of the engine: "What do you want? A little more ahead. Is she all right, pard?" He believes it was Mayne who replied, "She is all right where she is, George." Cassidy was some distance behind. The witness stayed on Cornwall's engine

about a couple of minutes, and then went over to Minatt's engine. Cassidy also went over. Rice got on the engine, and Cassidy did also. The witness got up behind Cassidy. There was no fire in the fire box; the witness took out a hammer from the tool box on the tank, and disconnected the hose, and took the packing off, and pulled the strainer out, and put the hook and hammer and strainer back in the box. Respecting the conversation he had with Douty, Judah, Donne, and others in the station at San Mateo, he testifies that he was called by Conductor Donne, who said to him: "There is some people in here who want to have a talk with you." He asked: "Who are they?" Donne said: "Douty and Judah. They want to talk with you about the strike. This is no put-up job to put you in a hole, or anything like that." He states that he went in, and was introduced to Douty and Judah. He believes it was Douty who asked them what they had struck for. He told them members of the Oakland Union had been discharged for refusing to handle Pullman cars, and that the union over there had ordered a strike, and Union 345, in San Francisco,—the union he was a member of,—indorsed the action of Union 310, and they struck. Douty said: "What do you want to strike on the Coast Division for? They are not hauling any Pullman cars here." And he wanted him (Clark) to go back to San Francisco, and declare the strike off. Clark told him (Douty) that he could not declare the strike off. Respecting his motive in participating in the killing of the engines, the testimony is as follows:

"Q. (on cross-examination). What was your idea in killing these engines, where there were no Pullmans running on that end of the line, unless it was to help out those that were striking against the Pullmans? A. I do not know. I was with the others, and helped them. Q. You were with the others, and helping them? A. Yes, sir. Q. And you had no idea in the world as to what the object was? A. No, sir."

This concludes the review of the testimony relating to the overt acts charged as having been committed by the defendants at Palo Alto. It is for you to say whether it establishes, to your satisfaction and beyond a reasonable doubt, that the defendants committed any of the following acts charged in the indictment, to wit:

"(1) Forcibly taking possession and control of the * * * engines * * * of the Southern Pacific Company, by (1) * * *

(2) threats, intimidations, [780] personal assaults, or other acts of force and violence, in, upon, and towards the engineers, firemen, conductors, brakemen, switchmen, agents, and other employés of said company having charge of said * * * engines, etc.

"(2) By forcibly and violently preventing the movement of all trains of the Southern Pacific Company to, from, or through the town of Palo Alto, by (1) gathering in crowds, etc.; (2) by placing physical obstructions upon said track; (3) by displacing the switches; (4) by forcibly and violently assaulting, threatening, and intimidating said engineers, firemen, conductors, brakemen, switchmen, agents, and other employés while engaged as aforesaid; (5) by uncoupling the cars of said trains, and disconnecting the same; (6) by removing said cars from said tracks; (7) by withdrawing the water from the boilers and tanks of said engines, and putting out and removing the fires therein [I call your particular attention to this charge, and the evidence relating to the overt acts under this head]; (8) by displacing and removing valves, pins, bolts, plates, and other appliances and portions of the machinery of said engines and cars, and of the rails of said railways, thereby loosening said rails; (9) by other violent, forcible, and unlawful acts and means, to the grand jurors unknown."

As I have before explained to you, it is not necessary that the government should prove that all the overt acts charged were committed by the defendants. If you are satisfied, beyond a reasonable doubt, that they committed any one of the acts charged, it will be sufficient, in determining this element of the offense involved in the crime of conspiracy.

Whether the Southern Pacific Company was in June and July last a railway corporation, duly organized and existing under the laws of the state of Kentucky, engaged in the business of a common carrier of the mails of the United States, and of passengers, freight, and express matter, in this district, and over the lines of the railways mentioned in the indictment, is a material fact in the case, which you will be required to find, as you would any other material fact; that is to say, beyond a reasonable doubt. You will recall the testimony of Mr. Lansing upon this point, and the circumstance that no testimony was offered to contradict him in any particular.

Whether train No. 6, at Palo Alto, on July 6th, was a regular or special train, is immaterial. The testimony tends to show that the train carried the mail, and that it was being carried over post route No. 176002. Whether some other train was annulled or not is also immaterial. The question is, was this train carrying the mail under the sanction of the postal authorities? If it was, it was a mail train, in the eye of the law.

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It is claimed by counsel for the defendants that an intent to obstruct and retard the passage of the mails cannot be inferred against these defendants unless they had knowledge that the mails were on board the train when they killed the engine on the turntable. In the language of Judge Grosscup in the case of *U. S.* v. *Debs* (in the United States district court of Illinois) 65 Fed. 211:

"I do not concur in this view. The defendants are properly chargeable with an intent to do all the acts that are the reasonable and natural consequence of the acts done. The laws make all the railways post routes of the United States, and it is within every one's knowledge that a large portion of the passenger trains on these roads carry the mail. There is no stretch, therefore, either of law or common sense, to presume the person obstructing one of those trains contemplates, among other intents, the obstruction of the mail."

[781] And in *U. S.* v. *Debs*, 64 Fed. 764, Judge Woods, of the circuit court, uses the following language:

"The rule is well settled, and I suppose well understood, that all who engage, either as principals, or as advisers, aiders, or abettors, in the commission of an unlawful or criminal act, are individually responsible for the criminal or injurious results which follow the commission or an attempt by any of their number to commit the intended crime or wrong. It is by the same rule that co-conspirators are responsible for the acts and declarations of each other in the furtherance of their unlawful purpose. * * * 'A man may be guilty of a wrong which he did not specifically intend (says Bishop), if it came naturally, or even accidentally, through some other specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding and growing out of the common plan, terminates in a criminal result, though not the particular result meant, all are liable.'"

But, aside from this responsibility which the law imposes upon those who commit unlawful acts, the testimony of the defendants Mayne and Cassidy may throw some light on the real motive that actuated the defendants in killing the engine at Palo Alto. When asked by Cornwall if he did not think he had done something serious in stopping the mail, he admits that he replied: "Even if I have, this is a hell of a time to come and tell us of it, after it is all over." And, hearing, soon after, that an officer was after them, the defendants fled from that place. Was the motive "deviltry," as Mayne says; and the consequences, whatever they might be? Was the motive "to be in the swim," as Cassidy says; and the consequences, whatever they might be? If so, how can they avoid responsibility for such consequences?

In considering the testimony relating to the whole case, it

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will be for you to determine whether there was such a general conspiracy as claimed by the government, involving the members of the American Railway Union in a combination and concert of action to obstruct and retard the passage of the mails of the United States, and in restraint of trade and commerce, and whether these defendants were members of that conspiracy; but you may also consider the case, under this indictment, within much narrower limits. A conspiracy may have been formed between these defendants, at Palo Alto, while Mayne, Cassidy, Clark, and Rice were sitting under the tree at University Park, to commit an offense against the United States, in obstructing and retarding the passage of the United States mails, and in restraint of trade and commerce, and in pursuance of such conspiracy they committed the overt act of killing the engine on the turntable; and if you believe from the testimony, beyond a reasonable doubt, that they did at that time form a conspiracy to commit such an offense and committed the act they did in pursuance of that conspiracy, it will be your duty to find the defendants guilty on the facts involved in that occurrence alone, without regard to the testimony relating to occurrences elsewhere.

REASONABLE DOUBT.

This is a criminal case. The presumption of innocence is in favor of the defendants. A mere preponderance of testimony, in a criminal case, is not sufficient to justify a verdict of guilty. The burden **[782]** of proof is upon the prosecution, and it must prove every material fact, and establish the guilt of the defendants to your satisfaction, beyond a reasonable doubt. The degree of satisfaction and certainty required is not absolute conviction or certainty, but the evidence must produce that effect on the minds of the individual jurors, so that, after its consideration, he can, in view of his oath, have no reasonable doubt of the guilt of the accused. By 'reasonable doubt,' I mean a reasonable doubt arising out of the evidence, and not an imaginary doubt, a fanciful conjecture, or strained inference, but such a doubt as a reasonable man would act upon, or decline to act upon,

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when his own concerns are involved,—a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence. When such a doubt exists, the accused is entitled to its benefit, and should be acquitted. But where the evidence is satisfactory to the impartial mind that the crime was committed; that the defendant committed it as charged,—when the mind comes naturally and reasonably to this conclusion, from a fair consideration of the evidence, properly, there can be no reasonable doubt, and the prisoner should be convicted.

JURY SOLE JUDGES OF CREDIBILITY OF THE WITNESSES.

Now, in relation to all the testimony in this case, you, gentlemen of the jury, are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives; by contrary evidence. And you are the exclusive judges of his credibility. In judging the credibility of the witnesses in this case (and their testimony is, to some extent, conflicting), you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in doing so consider all the circumstances under which any witness has testified, his demeanor, his manner while on the stand, the relations which he bears to the government or the defendants, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and any construction that tends to shed light upon his credibility, and to determine the amount of credence to which each statement is entitled at your hands, as reasonable and intelligent men; but, in this respect, you must remember that your power and duty to judge the effect of evidence is not arbitrary. It must be exercised with legal discretion, and in subordination to the rules of evidence. This is a government of law,

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and you are charged with its administration in this case without fear, favor, or partiality. An honest, fair, and impartial trial of persons accused of crime is the highest obligation we owe to society. The law, properly administered, affords protection alike to the high and the low, to the rich and the poor. Popular clamor should not direct [783] it, nor the insinuating influence of prejudice turn it aside. Courts never appeal to the passions, prejudices, or sympathies of a jury, in favor of a prosecution, or against the accused. They seek only equal and exact justice, and appeal only to reason. In this light only is the case presented to you by the court, and it is with the utmost confidence in your reason and intelligence, and in the fullest belief that you highly appreciate the important duty imposed upon you, that I commit this case to your careful and patient consideration.

NOTE.—The jury, after deliberating four days and nights, failed to agree, and were discharged. On the final ballot, 10 jurymen voted for conviction, and 2 for acquittal, upon the count for conspiracy to retard the mails, and 8 for conviction, and 4 for acquittal, on the count for conspiring to obstruct and interfere with interstate commerce.

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[564] # IN RE DEBS, Petitioner.[a]

ORIGINAL.

No. 11. Original. Argued March 25, 26, 1895.—Decided May 27, 1895.

[158 U. S., 564.]

The order of the Circuit Court finding the petitioners guilty of contempt, and sentencing them to imprisonment, was not a final judgment or decree.[b]

The government of the United States has jurisdiction over every foot of soil within its territory, and acts directly upon each citizen.

While it is a government of enumerated powers, it has full attributes of sovereignty within the limits of those powers, among which are the [565] power over interstate commerce and the power over the transmission of the mails.

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[a] Debs found guilty of contempt of court and sentenced to imprisonment for six months (64 Fed., 724). See p. 322. Petition for writ of habeas corpus denied by Supreme Court (158 U. S., 564). Debs was also indicted, with others, for conspiracy to obstruct the mails (65 Fed., 210). This latter decision not reprinted. Anti-trust law not considered.

[b] Syllabus and abstract of argument copyrighted, 1895, by Banks & Bros.

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The powers thus conferred are not dormant, but have been assumed and put into practical exercise by Congressional legislation.

In the exercise of those powers the United States may remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails.

While it may be competent for the government, through the executive branch and in the use of the entire executive power of the Nation, to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and the character of any of them, and if such are found to exist or threaten to occur, to invoke the powers of those courts to remove or restrain them, the jurisdiction of courts to interfere in such matters by injunction being recognized from ancient times and by indubitable authority.

Such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law, or by the fact that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; as the penalty for a violation of such injunction is no substitute for, and no defence to, a prosecution for criminal offences committed in the course of such violation.

The complaint filed in this case clearly shows an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mails, not only temporarily existing, but threatening to continue, and under it the Circuit Court had power to issue its process of injunction.

Such an injunction having been issued and served upon the defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been disobeyed, to proceed under Rev. Stat. § 725, and to enter the order of punishment complained of.

The Circuit Court having full jurisdiction in the premises, its findings as to the act of disobedience are not open to review on *habeas corpus* in this or any other court.

The court enters into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209, on which the Circuit Court mainly relied to sustain its jurisdiction; but it must not be understood that it dissents from the conclusions of that court in reference to the scope of that act, but simply that it prefers to rest its judgment on the broader ground discussed in its opinion, believing it important that the principles underlying it should be fully stated and fully affirmed.

On July 2, 1894, the United States, by Thomas E. Milchrist, district attorney for the Northern District of Illinois, under the direction of Richard Olney, Attorney General, filed their [566] bill of complaint in the Circuit Court of the United States for the Northern District of Illinois

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against these petitioners and others. This bill set forth, among other things, the following facts: It named twenty-two railroad companies, and it alleged that they were engaged in the business of interstate commerce and subject to the provisions of the act of Congress of February 4, 1887, known as "the Interstate Commerce Act," and all other laws of the United States relating to interstate transportation of passengers and freight; that the number of passengers annually carried by them into the city of Chicago from other States than Illinois, and out of Chicago into other States than Illinois, was more than twelve millions, and in like manner that the freight so carried into and out of the city of Chicago, from and into other States than Illinois, amounted to many millions of tons; that each of the roads was under contract to carry, and in fact carrying, the mails of the United States; that all were by statute declared post roads of the government; that many were by special acts of Congress required at any and all times to carry the troops and military forces of the United States, and provisions, munitions, and general supplies therefor; and that two of them were in the hands of receivers appointed by the courts of the United States. It stated at some length the necessity of the continued and uninterrupted running of such interstate railroads for the bringing into the city of Chicago supplies for its citizens and for the carrying on of the varied industries of that city.

The bill further averred that four of the defendants, naming them, were officers of an association known as the American Railway Union; that in the month of May, 1894, there arose a difference or dispute between the Pullman Palace Car Company and its employés, as the result of which a considerable portion of the latter left the service of the car company; that thereafter the four officers of the railway union combined together, and with others, to compel an adjustment of such dispute, by creating a boycott against the cars of the car company; that, to make such boycott effective, they had already prevented certain of the railroads running out of Chicago from operating their trains, and were combining to extend [567] such boycott against Pullman sleeping cars by causing strikes among employés of all railroads attempting

to haul the same. It charged knowledge on the part of the defendants of the necessity of the use of sleeping cars in the operation of the business of the railroads as common carriers, of the contracts for such use between the railroad companies and the car company, of the contracts, laws, and regulations binding the railway companies and the receivers to the carrying of the mails; also of the fact that sleeping cars were and of necessity must be carried upon the trains of said carriers with cars containing the mails; that with this knowledge they entered into a combination and conspiracy to prevent the railroad companies and the receivers, and each of them, from performing their duties as common carriers of interstate commerce, and in carrying into execution that conspiracy did induce various employés of the railway companies to leave the service of the companies, and prevent such companies and the receivers from securing other persons to take their places; that they issued orders, notifications, etc., to the members of the railway union to leave the service of the companies and receivers, and to prevent the companies and receivers from operating their trains; that they had asserted that they could and would tie up, paralyze, and break down any and every of said railway companies and receivers which did not accede to their demands; that in pursuance of the instructions, commands, and requests of said officers large numbers of the employés of the railway companies and receivers left their service.

Then followed these allegations:

"And your orator further charges that said defendants aimed and intended and do now aim and intend in and by the said conspiracy and combination, to secure unto themselves the entire control of the interstate, industrial and commercial business in which the population of the city of Chicago and of the other communities along the lines of road of said railways are engaged with each other, and to restrain any and all other persons from any independent control or management of such interstate, industrial or commercial enterprises save according to the will and with the consent of the defendants.

[568] "Your orator further avers that in pursuance of said combination and conspiracy and to accomplish the purpose thereof as hereinbefore set forth, the said defendants Debs, Howard, Rogers, Keliher and others, officers of said American Railway Union, issued or caused to be issued the orders and directions as above set forth, and that in obedience of such orders and in pursuance of said conspiracy and combination, numerous employés of said railroad companies and receivers unitedly refused to obey the orders of said employers or to perform the usual duties of such service, and many others of such employés quit

such service with the common purpose, and with the result of preventing said railroad companies and receivers from operating their said railroads and from transporting the United States mails, and from carrying on or conducting their duties as common carriers of interstate traffic.

"Your orator further avers that, pursuant to said combination and conspiracy, and under the direction as aforesaid of said officers and directors of said American Railway Union, said other defendants and other persons whose names are to your orator unknown, proceeded by collecting together in large numbers, by threats, intimidation, force and violence at the station grounds, yards and right of way of said railroad companies, respectively, in the State of Illinois, to prevent said railroad companies from employing other persons to fill the vacancies aforesaid; to compel others still employés of said railroad companies to quit such employment and to refuse to perform the duties of their service, and to prevent the persons remaining in such service and ready and willing to perform the duties of the same, from doing so.

"Your orator further avers that said defendants, in pursuance of said combination and conspiracy, acting under the direction of said officers and directors of said American Railway Union, did with force and violence at divers times and places within said State of Illinois and elsewhere, stop, obstruct and derail and wreck the engines and trains of said railroad companies, both passenger and freight, then and there engaged in interstate commerce and in transporting United States mails, by locking the switches of the railroad of said [569] railroad companies, by removing the spikes and rails from the track thereof, by turning switches and displacing and destroying signals, by assaulting and interfering with and disabling the switchmen and other employés of said railroad companies having charge of the signals, switches and tracks of said companies, and the movement of trains thereon, and in other manners by force and violence, depriving the employés of said railroad companies in charge of such trains of the control and management of the same, and by these and other unlawful means attempted to obtain and exercise absolute control and domination over the entire operations of said railroads."

The bill further set forth that there had become established in the city of Chicago a business conducted under the name of the Union Stock Yards, at which for many years immense numbers of live stock from States and Territories beyond the State of Illinois had been received, slaughtered, and converted into food products, and distributed to all quarters of the globe, and that all the large centres of population in the United States were in a great degree dependent upon those stock yards for their food supply of that character; that for the purpose of handling such live stock and the product thereof the company conducting such business operated certain railroad tracks, and that in pursuance of the combination and conspiracy aforesaid the four defendants, officers of the railway union, issued orders directing all the employés handling such railroad tracks to abandon such service.

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To this was added the following:

"And your orator further alleges that in pursuance of a like combination and unlawful conspiracy, the said defendants and others combining and conspiring with them for the purpose of still further restraining and preventing the conduct of such business, have by menaces, threats and intimidation prevented the employment of other persons to take the place of the employés quitting the service of said company so operating said Union Stock Yards.

"And your orator further charges that by reason of said unlawful combination and conspiracy and the acts and doings aforesaid thereunder, the supply of coal and fuel for consump- [570] tion throughout the different States of the Union and of grain, breadstuffs, vegetables, fruits, meats and other necessaries of life, has been cut off, interrupted and interfered with, and the market therefor made largely unavailable, and dealers in all of said various products and the consumers thereof have been greatly injured, and trade and commerce therein among the States has been restrained, obstructed and largely destroyed."

The bill alleged that the defendants threatened and declared that they would continue to restrain, obstruct, and interfere with interstate commerce, as above set forth, and that they "will if necessary to carry out the said unlawful combination and conspiracy above set forth tie up and paralyze the operations of every railway in the United States, and the business and industries dependent thereon." Following these allegations was a prayer for an injunction. The bill was verified.

On presentation of it to the court an injunction was ordered commanding the defendants "and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing or stopping any of the business of any of the following named railroads," (specifically naming the various roads named in the bill,) "as common carriers of passengers and freight between or among any States of the United States, and from in any way or manner interfering with, hindering, obstructing or stopping any mail trains, express trains or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the States; and from in any manner interfering with, hindering or stopping any trains carrying the mail; and from in any manner interfering with, hindering, obstructing or stopping any engines, cars or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the States; and from in any manner interfering with, injuring or destroying any of the property of any of said railroads engaged in or for the purpose of, or in connection with, interstate commerce or the carriage of [571] the mails of the United States or the transportation of passengers or freight between or among the States; and from entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the States, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce or the transportation of passengers or property between or among the States; and from injuring or destroying any part of the tracks, roadbed, or road, or permanent structures of said railroads; and from injuring, destroying, or in any way interfering with any of the signals or switches of any of said railroads; and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, locking, or in any manner fastening any of the switches of any of said railroads, and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said raliroads engaged in interstate commerce or in the transportation of passengers or freight between or among the States, or engaged in carrying any of the mails of the United States; and from compelling or inducing or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employés of any of said railroads to refuse or fail to perform any of their duties as employés of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among the States; and from compelling or inducing or attempting to compel or induce by threats, intimidation, force, or violence any of the employés of any said railroads who are employed by such railroads, and engaged in its service in the

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conduct of interstate business or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the States, [572] to leave the service of such railroads; and from preventing any person whatever, by threats, intimidation, force, or violence from entering the service of any of said railroads and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the States; and from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation of persons and freight between and among the States; and from ordering, directing, aiding, assisting, or abetting in any manner whatever, any person or persons to commit any or either of the acts aforesaid.

"And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill from and after the service upon them severally of said writ by delivering to them severally a copy of said writ or by reading the same to them and the service upon them respectively of the writ of subpœna herein, and shall be binding upon said defendants, whose names are alleged to be unknown, from and after the service of such writ upon them respectively by the reading of the same to them or by the publication thereof by posting or printing, and after service of subpœna upon any of said defendants named herein shall be binding upon said defendants and upon all other persons whatsoever who are not named herein from and after the time when they shall severally have knowledge of the entry of such order and the existence of said injunction."

This injunction was served upon the defendants—at least upon those who are here as petitioners. On July 17 the district attorney filed in the office of the clerk of said court an information for an attachment against the four defendants, officers of the railway union, and on August 1 a similar information against the other petitioners. A hearing was had before the Circuit Court, and on December 14 these petitioners were found guilty of contempt, and sentenced to [573] imprisonment in the county jail for terms varying from three to six months. 64 Fed. Rep. 724. Having been committed to jail in pursuance of this order they, on January 14, 1895, applied to this court for a writ of error and also

one of *habeas corpus*. The former was, on January 17, denied, on the ground that the order of the Circuit Court was not a final judgment or decree. The latter is now to be considered.

Mr. Lyman Trumbull for petitioners.

I. The extraordinary proceeding under which the prisoners were deprived of liberty, was commenced by the filing of a bill in equity in the name of the United States, by a district attorney, under the direction of the Attorney General. The bill is unsigned by any one, and has attached to it a naffidavit of George Q. Allen, an unknown person, having no connection, so far as the record shows, with the case, stating that he has read the bill, and "believes the statements therein contained are true." The bill was filed July 2. The same day an injunction was issued, without notice to anybody, against the prisoners and unknown persons, and the next day was served on some of the prisoners. The bill states that twenty-two railroads and railroad companies, and among them the Union Stock Yard and Transit Company, were chartered and organized for the purpose of continuously doing the business of common carriers of passengers and freight generally, and were doing such business among the different States. So far from having such power as alleged, the Union Stock Yard and Transit Company, one of the roads named, was organized for the purpose of locating and conducting stock yards and connecting them by rail with railroads entering Chicago on the south side, and transporting between said cattle yards, "cattle and live stock and persons accompanying the same," and by the 11th section of its charter it is declared: "Nothing in this act contained shall be taken or construed as conferring upon the company hereby created any power or authority to maintain or operate a railroad for the conveyance of passengers or freight within the city of Chicago."

[574] A large part of the bill is devoted to a statement of the amount of business done at the Union Stock Yards, the quitting of work by the employés of the company, the handling of live stock and its conversion into food, etc.

The bill states that the prisoners are officers and members

of an organization known as the American Railway Union; that in May, 1894, a dispute arose between the Pullman Palace Car Company and its employés which resulted in the employés leaving the service of the company; that the prisoners, officers of the American Railway Union combining together, and with others unknown, with the purpose to compel an adjustment of the said difference and dispute between said Pullman Co. and its employés, caused it to be given out through the newspapers of Chicago, generally, that the American Railway Union would at once create a boycott against the cars manufactured by said Pullman Palace Co., and that in order to make said boycott effective, the members of the American Railway Union who were some of them employed as trainmen or switchmen, or otherwise, in the service of the railroads mentioned, which railroads or some of them are accustomed to haul the sleeping cars manufactured by the Pullman Palace Car Co., would be directed to refuse to perform their usual duties for said railroad companies and receivers in case said railroad companies thereafter attempted to haul Pullman sleeping cars.

Such is the gist of the bill. All that is subsequently alleged as to what was done by the prisoners, was for the purpose of compelling an adjustment of the difference between the Pullman Company and its employés. To accomplish this, the American Railway Union called upon its members to quit work for the companies which had persisted in hauling the Pullman cars. Was there anything unlawful in this? If not, then the prisoners and the members of the American Railway Union were engaged in no unlawful combination or conspiracy. The allegation that the prisoners, officers and directors of the American Railway Union did issue and promulgate certain orders and requests to the members of the union in the service of certain railway companies in pursuance of said [575] unlawful purpose or conspiracy, did not make the purpose unlawful, when the facts stated in the bill show that the purpose was not unlawful. All that the prisoners are charged with threatening to do, or having done, was for the purpose, primarily, of bringing about an adjustment of the differences between the Pullman Company and its employés. It is only incidentally in pursuit of this lawful

purpose that prisoners are charged with obstructing commerce.

The boycott of the Pullman sleepers was, as the bill shows, not to obstruct commerce, but for an entirely different purpose.

It was not unlawful for the American Railway Union to call off the members of the organization, although it might incidentally affect the operation of the railroads. Refusing to work for a railroad company is no crime, and though such action may incidentally delay the mails or interfere with interstate commerce, it being a lawful act, and not done for that purpose, is no offence.

II. In the proceeding now before the court the main question is whether the bill states a case over which a court of equity has jurisdiction; if not, then the injunction was void and the prisoners are entitled to their discharge.

This court has often said that equity jurisdiction of the Federal courts is such as was exercised by the high court of chancery of England at the time of the adoption of the Constitution, or has been conferred upon them by Congress. *Mills* v. *Cohn*, 150 U. S. 202.

This is not a bill by the owner of property to prevent an irreparable injury. The government does not own the railroads. It is a bill by the government to prevent interference with the private property of the citizen, lest such interference restrain commerce among the States.

It was said by this court, (*License Tax Cases*, 5 Wall. 470,) alluding to the internal commerce or domestic trade of the States: "Over this commerce Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of [576] powers clearly granted to the legislature." *Genesee Chief*, 12 How. 443, 452; *Veazie* v. *Moor*, 14 How. 568.

The chancery court of England entertained no such jurisdiction when the Constitution was adopted.

If the prisoners were guilty of an offence against the United States by any acts which interfered with the trans-

portation of the mails, the laws provide for their punishment; but equity has no jurisdiction to grant an injunction to stay proceedings in a criminal matter. "If they did," said Chief Justice Holt, "the court of Queen's Bench would break it, and protect any that would proceed in contempt of it." Accordingly, in the case of *Lord Montague* v. *Dudman*, Lord Hardwicke allowed a demurrer to a bill for an injunction to stay proceedings on a mandamus issued to compel the lord of a manor to hold a court. "The court," he said, "has no jurisdiction to grant an injunction to stay proceedings on a mandamus, or on an indictment, or an information, or a writ of prohibition." 3 Perkins' ed. Daniell's Ch. Pr. 1721.

III. It is not in the power of Congress to confer upon a court of equity jurisdiction unless of an equitable nature, which jurisdiction over crimes is not. The Constitution recognizes and confers upon the judicial department jurisdiction in certain cases in law and equity, and provides that trial of all crimes, except in cases of impeachment, shall be by jury, and in common law cases preserves the right of trial by jury. It is not competent for Congress to break down this distinction between law and equity by conferring upon courts of equity, jurisdiction of criminal and common law cases and thereby deny parties the right to a jury trial.

The act to protect trade and commerce against unlawful restraints and monopolies does not apply to the case stated in the bill. If it does, then it is unconstitutional. If a court of equity is authorized to restrain and prevent persons from the commission of crimes or misdemeanors prohibited by law, it must have the power to enforce its restraining order. In this case some of the parties are sentenced to imprisonment for six months, and for what? For doing some of the things forbidden by a criminal statute. If they have done none of the [577] things forbidden, they have not violated the injunction, for it could only restrain them from doing what the law forbade. It follows that by indirection a court of equity under its assumed jurisdiction to issue injunctions and punish for contempts, is made to execute a criminal statute and deprive persons of their liberty without a jury trial. This a court of equity has no power

to do, nor is it competent for Congress to confer such a power on a court of equity.

Mr. Assistant Attorney General Whitney for the United States.

Mr. S. S. Gregory for the petitioners.

Mr. Edwin Walker for the United States.

Mr. Attorney General for the United States.

Mr. C. S. Darrow for the petitioners.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty.

[578] First. What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State.

"The government of the Union, then, is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

"No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution." Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, 424.

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States." Chief Justice Chase in *Lane County* v. *Oregon*, 7 Wall. 71, 76.

"We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to [579] it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.'" Mr. Justice Bradley in *Ex parte Seibold*, 100 U. S. 371, 395. See also, *Schooner Exchange* v. *McFaddon*, 7 Cranch, 116, 136; *Cohens* v. *Virginia*, 6 Wheat. 264, 413; *Legal Tender Cases*, 12 Wall. 457, 555; *Tennessee* v. *Davis*, 100 U. S. 257; *The Chinese Exclusion Case*, 130 U. S. 581; *In re Neagle*, 135 U. S. 1; *Logan* v. *United States*, 144 U. S. 263; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *In re Quarles*, *ante*, 532.

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a post office system for the nation. Article I, section 8, of the Constitution provides that "the Congress shall have power. . . . Third, to regulate commerce with foreign nations and among the several States, and with the Indian tribes. . . . Seventh, to establish post offices and post roads."

Congress has exercised the power granted in respect to interstate commerce in a variety of legislative acts. Passing by for the present all that legislation in respect to commerce

by water, and considering only that which bears upon railroad interstate transportation, (for this is the specific matter involved in this case,) these acts may be noticed: First, that of June 15, 1866, c. 124, 14 Stat. 66, carried into the Revised Statutes as section 5258, which provides:

"Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore, Be it enacted by the [580] *Senate and House of Representatives of the United States of America in Congress assembled*, That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

Second. That of March 3, 1873, c. 252, 17 Stat. 584, (Rev. Stat. §§ 4386 to 4389,) which regulates the transportation of live stock over interstate railroads. Third. That of May 29, 1884, c. 60, § 6, 23 Stat. 31, 32, prohibiting interstate transportation by railroads of live stock affected with any contagious or infectious disease. Fourth. That of February 4, 1887, c. 104, 24 Stat. 379, with its amendments of March 2, 1889, c. 382, 25 Stat. 855, and February 10, 1891, c. 128, 26 Stat. 743, known as the "interstate commerce act," by which a commission was created with large powers of regulation and control of interstate commerce by railroads, and the sixteenth section of which act gives to the courts of the United States power to enforce the orders of the commission. Fifth. That of October 1, 1888, c. 1063, 25 Stat. 501, providing for arbitration between railroad interstate companies and their employés; and, sixth, the act of March 2, 1893, c. 196, 27 Stat. 531, requiring the use of automatic couplers on interstate trains, and empowering the Interstate Commerce Commission to enforce its provisions.

Under the power vested in Congress to establish post offices and post roads, Congress has, by a mass of legislation, established the great post office system of the country, with all its detail of organization, its machinery for the transaction of business, defining what shall be carried and what not, and the

prices of carriage, and also prescribing penalties for all offences against it.

Obviously these powers given to the national government over interstate commerce and in respect to the transportation [581] of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offences against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided: "The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the

said crime shall have been committed." If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation [582] of the mails, prosecutions for such offences had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. In *Stamford* v. *Stamford Horse Railroad Co.*, 56 Connecticut, 381, an injunction was asked by the borough to restrain the company from laying down its track in a street of the borough. The right of the borough to forcibly remove the track was insisted upon as a ground for question-

ing the jurisdiction of a court of equity, but the court sustained the injunction, adding: "And none the less so because of its right to remove [583] the track by force. As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter. In some cases of nuisance and in some cases of trespass the law permits an individual to abate the one and prevent the other by force, because such permission is necessary to the complete protection of property and person. When the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual will consent to waive his right to the use of force and await its action. Therefore, as between force and the extraordinary writ of injunction, the rule will permit the latter."

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and the troubles which threatened so much disaster terminated.

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. *Searight* v. *Stokes*, 3 How. 151, 169, arose upon a compact between the United States and the State of Pennsylvania in respect to the Cumberland Road, which provided, among other things, "that no toll shall be [584] received or collected for the passage of any wagon or carriage laden with the property of the United States;" the question being whether a carriage employed in transporting the mails of the United States was one "laden with the property of the United States," and it was held that it was, the court, by Chief Justice Taney, saying: "The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the session of Congress, consists of communications to or from the officers of the executive departments, or members of the legislature, on public service, or in relation to matters of public concern. . . . We think that a carriage, whenever it is carrying the mail, is laden with the property of the United States within the true meaning of the compact."

We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. This proposition in some of its relations has heretofore received the sanction of this court. In *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 285, was presented an application of the United States to cancel and annul a patent for land on the ground that it was obtained by fraud or mistake. The right of the United States to maintain such a suit was affirmed, though it was held that if the controversy was really one only between individuals in respect to their claims to property the government ought not to be permitted to interfere, the court saying: "If it be a question of property

a case must be made in which the court can afford a remedy in [585] regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

This language was relied upon in the subsequent case of *United States* v. *Bell Telephone Company*, 128 U. S. 315, 367, which was a suit brought by the United States to set aside a patent for an invention on the ground that it had been obtained by fraud or mistake, and it was claimed that the United States, having no pecuniary interest in the subject-matter of the suit, could not be heard to question the validity of the patent. But this contention was overruled, the court saying, in response to this argument, after quoting the foregoing language from the *San Jacinto case:* "This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which

are not excluded [586] from the jurisdiction of the court by want of interest in the government of the United States."

It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control.

As said in *Gilman* v. *Philadelphia*, 3 Wall. 713, 724: "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England."

See also the following authorities in which at the instance

of [587] the State, or of some municipality thereof within whose limits the obstructed highway existed, a like power was asserted: *Stamford* v. *Stamford Horse Railroad Co.*, 56 Connecticut, 381; *People* v. *Vanderbilt*, 28 N. Y. 396; *State* v. *Dayton & Southeastern Railroad*, 36 Ohio St. 434; *Springfield* v. *Connecticut River Railroad*, 4 Cush. 63; *Attorney General* v. *Woods*, 108 Mass. 436; *Easton and Amboy Railroad Co.* v. *Greenwich*, 25 N. J. Eq. 565; *Stearns County* v. *St. Cloud, Mankato and Austin Railroad*, 36 Minnesota, 425; *Rio Grande Railroad Co.* v. *Brownsville*, 45 Texas, 88; *Philadelphia* v. *13th & 15th Street Passenger Railway Co.*, 8 Phil. 648. Indeed, the obstruction of a highway is a public nuisance, 4 Bl. Com. 167,* and a public nuisance has always been held subject to abatement at the instance of the government. *Attorney General* v. *Tudor Ice Co.*, 104 Mass. 239, 244; *Attorney General* v. *Jamaica Pond Aqueduct Corporation*, 133 Mass. 361; *Village of Pine City* v. *Munch*, 42 Minnesota, 342; *State* v. *Goodnight*, 70 Texas, 682.

It may not be amiss to notice a few of the leading cases. *City of Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91, 98, was a bill filed by the plaintiff to restrain the construction of an aqueduct across the Potomac River. While under the facts of that case the relief prayed for was denied, yet, the jurisdiction of the court was sustained. After referring to the right to maintain an action at law for damages, it was said:

"Besides this remedy at law, it is now settled, that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the Attorney General. This jurisdiction seems to have been acted on with great caution and hesitancy. . . . Yet the jurisdiction has been finally sustained, upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all that it is confessedly one of delicacy, and accordingly the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief before the tardiness of the law could reach it."

[588] *State of Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, was a bill filed by the State of Pennsylvania to enjoin the erection of a bridge over the Ohio River within the limits of the State of Virginia. As the alleged obstruction was not within the State of Pennsylvania, its right to relief

was only that of an individual in case of a private nuisance, and it was said, on page 564:

"The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out, the same as in a public prosecution. If the obstruction be unlawful, and the injury irreparable by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

"Such a proceeding is as common and as free from difficulty as an ordinary injunction bill, against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named. And, in regard to the exercise of these powers, it is of no importance whether the eastern channel, over which the bridge is thrown, is wholly within the limits of the State of Virginia. The Ohio being a navigable stream, subject to the commercial power of Congress, and over which that power has been exerted, if the river be within the State of Virginia, the commerce upon it, which extends to other States, is not within its jurisdiction; consequently, if the act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it could afford no justification to the bridge company."

Coosaw Mining Co. v. *South Carolina*, 144 U. S. 550, was a bill filed by the State in one of its own courts to enjoin the digging, mining, and removing phosphate rock and deposits in the bed of a navigable river within its territories. The case was removed by the defendant to the Federal court, and in that court the relief prayed for was granted. The decree of the Circuit Court was sustained by this court, and in the opinion by Mr. Justice Harlan, the matter of equity jurisdiction is discussed at some length, and several cases cited, among them *Attorney General* v. *Richards*, 2 Anstr. 603; *Attorney* [589] *General* v. *Forbes*, 2 My. & Cr. 123; *Gibson* v. *Smith*, 2 Atk. 182; *Attorney General* v. *Jamaica Pond Aqueduct Corporation*, 133 Mass. 361. From *Attorney General* v. *Forbes* was quoted this declaration of the Lord Chancellor: "Many cases might have been produced in which the court has interfered to prevent nuisances to public rivers and to public harbors; and the Court of Exchequer, as well as this court, acting as a court of equity, has a well established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbors and public roads; and, in short, generally to prevent public nuisances." And from *Attorney General* v. *Jamaica Pond Aqueduct* these words of the Supreme Court of the State of Massachusetts: "There is another ground upon which, in our opinion, this information

can be maintained, though perhaps it belongs to the same general head of equity jurisdiction of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. . . . If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the Attorney General to restrain and prevent the mischief." An additional case, not noticed in that opinion, may also be referred to, *Attorney General* v. *Terry*, L. R. 9 Ch. 423, in which an injunction was granted against extending a wharf a few feet out into the navigable part of a river, Mellish, L. J., saying: "If this is an indictable nuisance there must be a remedy in the Court of Chancery, and that remedy is by injunction," and James, L. J., adding: "I entirely concur. Where a public body is entrusted with the duty of being conservators of a river, it is their duty to take proceedings for the protection of those who use the river."

It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to **[590]** waterways—the natural highways of the country—and not over artificial highways such as railroads; but the occasion for the exercise by Congress of its jurisdiction over the latter is of recent date. Perhaps the first act in the course of such legislation is that heretofore referred to, of June 14, 1866, but the basis upon which rests its jurisdiction over artificial highways is the same as that which supports it over the natural highways. Both spring from the power to regulate commerce. The national government has no separate dominion over a river within the limits of a State; its jurisdiction there is like that over land within the same State. Its control over the river is simply by virtue of the fact that it is one of the highways of interstate and international commerce. The great case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 197, in which the control of Congress over inland waters was

asserted, rested that control on the grant of the power to regulate commerce. The argument of the Chief Justice was that commerce includes navigation, "and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'" In order to fully regulate commerce with foreign nations it is essential that the power of Congress does not stop at the borders of the nation, and equally so as to commerce among the States:

> "The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies."

See also *Gilman* v. *Philadelphia*, 3 Wall. 713, 725, in which it was said: "Wherever 'commerce among the States' goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights."

Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent **[591]** years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will oper-

ate with equal force upon any new modes of such commerce which the future may develop.

It is said that seldom have the courts assumed jurisdiction to restrain by injunction in suits brought by the government, either state or national, obstructions to highways, either artificial or natural. This is undoubtedly true, but the reason is that the necessity for such interference has only been occasional. Ordinarily the local authorities have taken full control over the matter, and by indictment for misdemeanor, or in some kindred way, have secured the removal of the obstruction and the cessation of the nuisance. As said in *Attorney General* v. *Brown*, 24 N. J. Eq. (9 C. E. Green) 89, 91: "The jurisdiction of courts of equity to redress the grievance of public nuisances by injunction is undoubted and clearly established; but it is well settled that, as a general rule, equity will not interfere, where the object sought can be as well attained in the ordinary tribunals. *Attorney General* v. *New Jersey Railroad*, 2 C. E. Green, (17 N. J. Eq.,) 136; *Jersey City* v. *City of Hudson*, 2 Beasley, (13 N. J. Eq.,) 420, 426; *Attorney* [592] *General* v. *Heishon*, 3 C. E. Green, (18 N. J. Eq.,) 410; *Morris & Essex Railroad* v. *Prudden*, 5 C. E. Green, (20 N. J. Eq.,) 530, 532; High on Injunctions, § 521. And because the remedy by indictment is so efficacious, courts of equity entertain jurisdiction in such cases with great reluctance, whether their intervention is invoked at the instance of the attorney general, or of a private individual who suffers some injury therefrom distinct from that of the public, and they will only do so where there appears to be a necessity for their interference. *Rowe* v. *The Granite Bridge Corporation*, 21 Pick. 340, 347; *Morris & Essex Railroad* v. *Prudden*, *supra*. The jurisdiction of the court of chancery with regard to public nuisances is founded on the irreparable damage to individuals, or the great public injury which is likely to ensue. 3 Daniell's Ch. Pr. 3d ed. Perkins's, 1740." Indeed, it may be affirmed that in no well-considered case has the power of a court of equity to interfere by injunction in cases of public nuisance been denied, the only denial ever being that of a necessity for the exercise of that jurisdiction under the circumstances of the particular case. Story's Eq. Jur. §§ 921, 923, 924; Pomeroy's Eq. Jur. § 1349; High on Injunctions, §§ 745 and 1554; 2 Daniell's Ch. Pl. and Pr. 4th ed. p. 1636.

That the bill filed in this case alleged special facts calling for the exercise of all the powers of the court is not open to question. The picture drawn in it of the vast interests involved, not merely of the city of Chicago and the State of Illinois, but of all the States, and the general confusion into which the interstate commerce of the country was thrown; the forcible interference with that commerce; the attempted exercise by individuals of powers belonging only to government, and the threatened continuance of such invasions of public right, presented a condition of affairs which called for the fullest exercise of all the powers of the courts. If ever there was a special exigency, one which demanded that the court should do all that courts can do, it was disclosed by this bill, and we need not turn to the public history of the day, which only reaffirms with clearest emphasis all its allegations.

The difference between a public nuisance and a private nui- [593] sance is that the one affects the people at large and the other simply the individual. The quality of the wrong is the same, and the jurisdiction of the courts over them rests upon the same principles and goes to the same extent. Of course, circumstances may exist in one case, which do not in another, to induce the court to interfere or to refuse to interfere by injunction, but the jurisdiction, the power to interfere, exists in all cases of nuisance. True, many more suits are brought by individuals than by the public to enjoin nuisances, but there are two reasons for this. First, the instances are more numerous of private than of public nuisances; and, second, often that which is in fact a public nuisance is restrained at the suit of a private individual, whose right to relief arises because of a special injury resulting therefrom.

Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offence against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when

such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law. Thus, in *Cranford* v. *Tyrrell*, 128 N. Y. 341, an injunction to restrain the defendant from keeping a house of ill-fame was sustained, the court saying, on page 344: "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner." And in *Mobile* v. *Louisville & Nashville Railroad*, 84 Alabama, 115, 126, is a similar declaration in these words: "The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable [594] injury which will result from the failure or inability of a court of law to redress such rights."

The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages, and the same is true of all other offences which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered, and it is no defence to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction. So here, the acts of the defendants may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings. The complaint made against them in this is of disobedience to an order of a civil court, made for the protection of property and the security of rights. If any criminal prosecution be brought against them for the criminal offences alleged in the bill of complaint, of derailing and wrecking engines and trains, assaulting and disabling employés of the railroad companies, it will be no defence to such prosecution

that they disobeyed the orders of injunction served upon them and have been punished for such disobedience.

Nor is there in this any invasion of the constitutional right of trial by jury. We fully agree with counsel that "it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts," and we reaffirm the declaration made for the court by Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635, that "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And [595] this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency. In the *Case of Yates*, 4 Johns. 314, 369, Chancellor Kent, then Chief Justice of the Supreme Court of the State of New York, said: "In the *Case of The Earl of Shaftesbury*, 2 St. Trials, 615; *S. C.* 1 Mod. 144, who was imprisoned by the House of Lords for 'high contempts committed against it,' and brought into the King's Bench, the court held that they had no authority to judge of the contempt, and remanded the prisoner. The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle that every court, at least of the superior kind, in which great confidence is placed, must be *the sole judge*, in the last resort, of contempts arising therein, is more explicitly defined and more emphatically enforced in the two subsequent cases of the *Queen* v. *Paty and others*, and of the *King* v. *Crosby*." And again, on page 371, "Mr. Justice Blackstone pursued the same train of observation, and declared that all courts, by which he meant to include the two houses of Parliament, and the

courts of Westminster Hall, could have no control in matters of contempt. That the sole adjudication of contempts, and the punishments thereof belonged exclusively, and without interfering, to each respective court." In *Watson* v. *Williams*, 36 Mississippi, 331, 341, it was said: "The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it." In *Cart-*
[596] *wright's Case*, 114 Mass. 230, 238, we find this language: "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights." See also *United States* v. *Hudson*, 7 Cranch, 32; *Anderson* v. *Dunn*, 6 Wheat. 204; *Ex parte Robinson*, 19 Wall. 505; *Mugler* v. *Kansas*, 123 U. S. 623, 672; *Ex parte Terry*, 128 U. S. 289; *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36, in which Mr. Justice Miller observed: "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it;" *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 488. In this last case it was said "surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury."

In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.

Further, it is said by counsel in their brief:

"No case can be cited where such a bill in behalf of the sovereign has been entertained against riot and mob violence, though occuring on the highway. It is not such fitful and temporary obstruction that constitutes a nuisance. The strong hand of executive power is required to deal with such lawless demonstrations.

"The courts should stand aloof from them and not invade executive prerogative, nor even at the behest or request of the executive travel out of the beaten path of well-settled judicial authority. A mob cannot be suppressed by injunction; nor can its leaders be tried, convicted, and sentenced in equity.

"It is too great a strain upon the judicial branch of the [597] government to impose this essentially executive and military power upon courts of chancery."

We do not perceive that this argument questions the jurisdiction of the court, but only the expediency of the action of the government in applying for its process. It surely cannot be seriously contended that the court has jurisdiction to enjoin the obstruction of a highway by one person, but that its jurisdiction ceases when the obstruction is by a hundred persons. It may be true, as suggested, that in the excitement of passion a mob will pay little heed to processes issued from the courts, and it may be, as said by counsel in argument, that it would savor somewhat of the puerile and ridiculous to have read a writ of injunction to Lee's army during the late civil war. It is doubtless true that *inter arma leges silent*, and in the throes of rebellion or revolution the processes of civil courts are of little avail, for the power of the courts rests on the general support of the people and their recognition of the fact that peaceful remedies are the true resort for the correction of wrongs. But does not counsel's argument imply too much? Is it to be assumed that these defendants were conducting a rebellion or inaugurating a revolution, and that they and their associates were thus placing themselves beyond the reach of the civil process of the courts? We find in the opinion of the Circuit Court a quotation from the testimony given by one of the defendants before the United States Strike Commission, which is sufficient answer to this suggestion:

"As soon as the employés found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances, if we had

been permitted to remain upon the field among them. Once we were taken from the scene of action, and restrained from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work. [598] . . . Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up. . . . not by the army, and not by any other power, but simply and solely by the action of the United States courts in restraining us from discharging our duties as officers and representatives of our employés."

Whatever any single individual may have thought or planned, the great body of those who were engaged in these transactions contemplated neither rebellion nor revolution, and when in the due order of legal proceedings the question of right and wrong was submitted to the courts, and by them decided, they unhesitatingly yielded to their decisions. The outcome, by the very testimony of the defendants, attests the wisdom of the course pursued by the government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom by the Constitution and in accordance with the settled conviction of all citizens is committed the determination of questions of right and wrong between individuals, masses, and States.

It must be borne in mind that this bill was not simply to enjoin a mob and mob violence. It was not a bill to command a keeping of the peace; much less was its purport to restrain the defendants from abandoning whatever employment they were engaged in. The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried. And the facts set forth at length are only those facts which tend to show that the defendants were engaged in such obstructions.

A most earnest and eloquent appeal was made to us in eulogy of the heroic spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defence of their own rights, but in sympathy for and to assist others whom they believed to be wronged. We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson [599] which cannot be learned too soon or too thoroughly that under this government of and by the people the means of

redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the coöperation of a mob, with its accompanying acts of violence.

We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of [600] injunction is no substitute for and no defence to a prosecution for any criminal offences committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the

Syllabus.

passage of interstate commerce and the transmission of the mail—an obstruction not only temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; that it having been issued and served on these defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under section 725, Revised Statutes, which grants power "to punish, by fine or imprisonment, . . . disobedience, . . . by any party . . . or other person, to any lawful writ, process, order, rule, decree or command," and enter the order of punishment complained of; and, finally, that, the Circuit Court, having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on *habeas corpus* in this or any other court. *Ex parte Watkins*, 3 Pet. 193; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Terry*, 128 U. S. 289, 305; *In re Swan*, 150 U. S. 637; *United States* v. *Pridgeon*, 153 U. S. 48.

We enter into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209, upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed.

The petition for a writ of *habeas corpus* is

Denied.

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[908] LOWENSTEIN *v.* EVANS ET AL.

(Circuit Court, D. South Carolina. October 9, 1895.)

[69 Fed., 908.]

MONOPOLIES AND TRUSTS—MONOPOLY BY STATE.—The act of July 2, 1890 (26 Stat. 209, c. 647), to protect trade and commerce against unlawful restraints and monopolies, is not applicable to the case of a state which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors (Act S. C. Jan. 2, 1895). A state is neither a "person" nor a "corporation," within the meaning of the act of congress.[a]

[a] Syllabus copyrighted, 1895, by West Publishing Co.

Complaint.

SAME—NECESSARY PARTIES—JURISDICTION OF FEDERAL COURTS.—Where a person brings an action under section 7 of the anti-trust law of July 2, 1890, against the officials of a state, to recover damages for acts done under authority of a state statute, which gives the state an entire monopoly of the traffic in intoxicating liquors (Act S. C. Jan. 2, 1895), the state itself is a necessary party thereto, and consequently the federal courts would have no jurisdiction of the action.

This was an action brought under the seventh section of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

The complaint was as follows:

The complaint of the above-named plaintiff respectfully shows to this court: (1) That the plaintiff, Julius Lowenstein, is a citizen of the state of North Carolina, and is engaged in business in Statesville in said state, under the name and style of Lowenstein & Co. (2) That the defendants are each and all of them citizens of the state of South Carolina. (3) That the defendants John Gary Evans, D. H. Tompkins, and James Norton, styling themselves a "State Board of Control," and the defendant Frank M. Mixson, styling himself "State Commissioner," together with divers other persons, to the plaintiff unknown, prior to the time hereinafter mentioned, under the pretended authority of a certain act of the legislature of the state of South Carolina, entitled "An act to further declare the law in reference to, and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the state of South Carolina, and to police the same," approved January 2, 1895, combined to monopolize a certain part of the trade and commerce among the states and foreign nations, to wit, the trade in alcoholic liquids and liquors, including whiskys, brandies, wines, ales, and beer, to prevent the purchase of such whiskys, brandies, wines, ales, and beer from citizens of other states and foreign nations, and to prevent the importation thereof into this state in restraint of the trade and commerce between the states and foreign nations, and to discriminate against the products of other states and the citizens of other states, in favor of the products of the state of South Carolina and the citizens of said state, which said legislative enactment the plaintiff is advised and therefore alleges is null and void, in this: that the same is in contravention of an act of congress entitled "An act to protect trade and commerce against unlawful restraint and monopoly," approved July 2, A. D. 1800, in that the said legislative enactment undertakes to and does create a monopoly in the traffic in alcoholic liquors, and operates as a restraint upon the trade among the states and foreign nations in such traffic. (4) That the plaintiff now is, and was at the time hereinafter mentioned, engaged in the business of a manufacturer and wholesale dealer in spirituous liquors at Statesville, in the state of North Carolina, and in the prosecution and conduct of his said business, and, in the exercise of the right to engage in interstate commerce, he had from time to time sold, shipped, and delivered whiskys and other liquors to persons residing in states, other than the state of North Carolina; that in pursuance of his said business, and in exercise of the rights conferred by and reserved in the constitu-

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tion and laws of the United States, on the 27th day of May, A. D. 1895, he delivered one barrel of whisky, of the value of fifty-seven and [909] $^{58}/_{100}$ dollars, to the Southern Railway Company, at Statesville, in the state of North Carolina, to be transported by said company and connecting lines to Charleston, in the state of South Carolina, marked and consigned to Thomas Hartigan, but the title to said property still remained in the plaintiff. (5) That on the 29th day of May, A. D. 1895, while the said barrel of whisky was in transit, at Columbia, in the state of South Carolina, and within this district, certain persons, to the plaintiff unknown, without warrant of law, entered the cars of the common carrier so engaged in the transporation of said whisky and of interstate commerce, and then and there took the said whisky and carried the same away, and thereafter delivered and caused said whisky to be delivered unto the defendant Frank M. Mixson, who thereupon, and in furtherance of said combination and monopoly, and in restraint of the trade and of interstate commerce, received the same, and has retained and detained the same from the plaintiff. (6) That the wrongful and unlawful acts of the said persons unknown, and of the said Frank M. Mixson, as aforesaid, in the seizure and detention of said whisky, was done in pursuance of the combination and in furtherance of the monopoly aforesaid, and by and under the directions of the other defendants, intending thereby to deter and prevent the plaintiff from engaging in trade with the citizens and residents of the state of South Carolina, and to that extent to prevent the plaintiff from engaging in interstate commerce, and for the purpose of monopolizing the trade in spirituous liquors, in contravention of the act of congress aforesaid. (7) That, by reason of the unlawful seizure and detention of said whisky, the plaintiff has been greatly injured, to his damage fifty-seven and $^{58}/_{100}$ dollars. Wherefore the plaintiff demands judgment against the defendants for three times the amount of his said damage, to wit, one hundred and seventy-one and $^{54}/_{100}$ dollars, for a reasonable attorney's fee, and for his costs, as provided in the act of congress aforesaid.

Murphy, Farrow & Legare, for plaintiff.

Wm. A. Barber, Attorney-General of South Carolina, and *C. P. Townsend*, Assistant Attorney-General, for defendants.

SIMONTON, Circuit Judge.

This is an action brought under the seventh section of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, c. 647). The section is in these words:

"Any person who shall be injured in his property or business by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained and the costs of the suit, including a reasonable counsel fee."

Opinion of the Court.

The act declares:

"Every contract, combination in the form of trust or otherwise, or conspiracy in retraint of trade or commerce among the several states or with foreign nations is hereby declared illegal."

The cause of action set out in the complaint is on this statute of 1890, and seeks the special remedy provided in the statute. The relief is sought, not because the rights of the plaintiff were violated, but because they were violated in order to enforce and perpetuate a monopoly declared illegal by this statute. The defendants interpose a demurrer on two grounds: First, that on the face of the complaint this court has no jurisdiction of the matters and things forming the subject of this action; second, that from the face of the complaint it does not state facts sufficient to constitute a cause of action cognizable in this court.

[910]

THE JURISDICTION.

The first ground of demurrer was sustained in argument, because this is an action against the state, and the state is a necessary party thereto. The act of 1890 strikes at contracts, combinations, and conspiracies in restraint of or to monopolize trade and commerce among the several states or with foreign nations. *U. S.* v. *E. C. Knight Co.*, 156 U. S. 17, 15 Sup. Ct. 249. The complaint charges that the defendants Evans, Tompkins, and Norton, styling themselves a "State Board of Control," and Mixson, styling himself "State Commissioner," together with divers other persons to the plaintiff unknown, under the pretended authority of an act of the legislature of South Carolina, "giving the title of the act," combined to monopolize a certain part of the trade and commerce among the states and foreign nations, to wit, the trade in alcoholic liquids and liquors with citizens of other states and foreign nations, to prevent their importation into this state, and to discriminate against the products and citizens of other states in favor of the products and citizens of the state of South Carolina. This act of the legislature of South Carolina, the complaint avers, is void as in contravention of the act of 1890.

Does this act of the legislature of South Carolina authorize

contracts or combinations in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations? Does it create a monopoly, and in whom? The answer to this question must be found in the act. It is entitled "An act to further declare the law in reference to and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the state of South Carolina and to police the same," approved January 2, 1895. It is impossible after examining this act to avoid the conclusion that it declares in the state the monopoly in the purchase and sale of alcoholic liquors. Not only so, but it protects this monopoly in the state in every way possible and by the most drastic methods. Every attempt to interfere with this monopoly by the receiving, keeping, vending, giving away, or mercantile use of alcoholic liquors, is made an offense against the state, punishable by criminal proceedings in her name in her courts. The governor, secretary of state, and comptroller general are officially charged with the direction and enforcement of this monopoly. The monopoly is not given to them. They have no pecuniary interest whatever in it. All the profits of the monopoly go to the state, to be used and applied for public purposes,—increase of her revenue. The close analysis made of the act by the counsel for the plaintiff shows that this was their conviction. They find that its manifest object is to raise revenue, and not to prevent the consumption of liquor, except that owned and furnished by the state; that $50,000 was appropriated from the public treasury for the purpose of purchasing liquors and to enable the state to go into the business of buying and selling intoxicating liquors; that liquors are not contraband, except when not purchased from a dispenser,—that is, one who holds and sells for the state: that the act creates a monopoly. So, also, Chief Justice McIver, speaking for the majority of the supreme court [911] of South Carolina, in *McCullough* v. *Brown*, 41 S. C. 220, 19 S. E. 458, dissecting the dispensary law, says:

"The manifest object of the act is that the state shall monopolize the entire traffic in intoxicating liquors, to the entire exclusion of all persons whomsoever, and this, too, for the purpose of profit to the state and its governmental agency. * * * We think it safe to say that it is an act forbidding the manufacture or sale of intoxicating liquors as a beverage within the limits of this state by any private individual, and vesting the right to manufacture and sell such liquors in the state exclusively, through certain designated officers and agents."

This act of the legislature of South Carolina evidently does not create in nor give to any individuals the monopoly. It gives it wholly and entirely to the state.

Now, the question to be decided is not as to the constitutionality of this act, nor whether it be in the lawful exercise of the police power, but whether, in declaring and asserting this monopoly in herself, and in assuming and controlling its enforcement, the state comes within the provisions of the act of congress of 1890. That act, as has been seen, declares illegal every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations. But by this act the state makes no contract, enters into no combination or conspiracy. She declares and asserts in herself the monopoly in the purchase and sale of liquors. The section of the act of 1890, sued upon, gives a right of action for any injury by any other person or corporation. The state is not a corporation. A corporation is a creature of the sovereign power, deriving its life from its creator. The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. The state gets none of its powers from the general government. It has bound itself by compact with the other sovereign states not to exercise certain of its sovereign rights, and has conceded these to the Union, but in every other respect it retains all its sovereignty which existed anterior to and independent of the Union. Nor can it be said that the state is a person in the sense of this act. Even were this the case, as the monopoly now complained of is that of the state, no relief can be had without making the state a party, and this destroys the jurisdiction of this court. No opinion whatever is expressed as to the right of the plaintiff for violation of his common-law rights. In this proceeding and under the act of 1890, he must seek his remedy against the holder of the monopoly; and, as in the present case the monopoly is in the state, this court has no jurisdic-

Statement of the Case.

tion. The demurrer is sustained, and the complaint is dismissed.

As this case has gone off on the demurrer, a copy of the complaint is filed as an exhibit to the opinion.

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[438] PRESCOTT & A. C. R. CO. *v.* ATCHISON, T. & S. F. R. CO. ET AL.[a]

(Circuit Court, S. D. New York. January 8, 1896.

[73 Fed., 438.]

PLEADING—INTERPRETATION OF COMPLAINT—DEMURRER.—A complaint is to be interpreted as a whole even on demurrer and on motion to dismiss.[b]

RAILROAD COMPANIES—ARRANGEMENTS FOR THROUGH BILLING.—There is no principle of common law which forbids a single railroad corporation, or two or more of such corporations, from selecting, from two or more other corporations, one which they will employ as the agency by which they will send freight beyond their own lines, on through bills of lading, or as their agent to receive freight, and transmit it on through bills to their own lines, and without breaking bulk; and the right to make such selection is not taken away by the interstate commerce law. *New York & N. Ry. Co.* v. *New York & N. E. R. Co.*, 50 Fed. 867, explained.

CONTRACTS IN RESTRAINT OF TRADE—ACT JULY 2, 1890.—A contract by which a railroad company arranges with another, to the exclusion of still others, for the interchange of passengers and freight by through tickets and bills of lading, is not a contract in unlawful restraint of trade, within the meaning of the act of July 2, 1890.

This was an action by the Prescott & Arizona Central Railroad Company against the Atchison, Topeka & Santa Fé Railroad Company and other railroad corporations and individuals for alleged unlawful discrimination in refusing to accept freight from the plaintiff company, on through bills of lading, while such freight was accepted and carried on through bills, under a contract with other railroad companies. The case was heard upon a motion, by all of the

[a] Appeal to Circuit Court of Appeals, Second Circuit, dismissed because not sued out within six months after entry of original judgment (84 Fed., 213). Not reprinted. Merely a matter of practice.

[b] Syllabus and statement copyrighted, 1896, by West Publishing Co.

Opinion of the Court.

defendants save one, to direct a verdict in their favor upon the pleadings and opening, the remaining defendant asking judgment in his favor on demurrer.

C. N. Sterry, for the motion.

Delos McCurdy, opposed.

LACOMBE, Circuit Judge (orally).

In this case I have examined the authorities submitted yesterday by the parties on both sides, and have reached the conclusion that the motions to dismiss must be granted. I am unable, however, in so brief a time to formulate any elaborate opinion; and it will be sufficient to indicate that the lines of thought which lead to this conclusion may be ascertained by reference to the cases of *U. S.* v. *Trans-Missouri Freight Ass'n*, 7 C. C. A. 15, 58 Fed. 58, *Little Rock & M. R. Co.* v. *St. Louis S. W. Ry. Co.*, 11 C. C. A. 417, 63 Fed. 775, and the *Dueber Watch-Case Co. Case*, 14 C. C. A. 14, 66 Fed. 637; all three being opinions of circuit courts of appeals.

All legislation interfering with the right of the individual, whether he be a natural person or a corporation, to enter into contracts or to exercise his preferences as to the persons with whom he shall do business, should be cautiously construed. It is legislation of a novel character, and should not be extended beyond the plain import of the language used by the lawmakers. Stripped of the adjectives and of the averments as to conclusions of law, the gist of this complaint is the making of the particular contract known as "Exhibit A," and [439] the carrying out of that contract according to its terms, coupled with the further set of facts that, in carrying out that contract according to its terms, the parties thereto necessarily ceased to continue with the plaintiff corporation the relations which had existed before. That contract contemplates, and the acts of the parties defendant set forth in the complaint show, that what was done was to institute a system of interchange of freight and interchange of passengers by the new corporation to and with the other four defendant corporations, and to cease, from and after the execution of that contract or some subsequent date, the further

interchange of freight and passengers on through bills, and by through tickets, with the plaintiff corporation. Now, it is true that the complaint contains a single clause, at the close of the sixty-ninth paragraph, which uses the words "by utterly refusing to receive or deliver freight or passengers to or from it." That language, taken in its full scope, imports a refusal to receive freight, that had its origin on the line of the Prescott & Arizona Central Railroad Company, wherever and under whatever circumstances it was tendered. But it is a fair rule of pleading that the complaint is to be interpreted, even upon demurrer and upon motion to dismiss, as a whole; and examining it a second time, after the arguments yesterday, with great care, I am constrained to the conclusion that the case which it makes out is the case stated in general terms in the sixty-ninth paragraph, but set forth specifically and distinctly in the seventy-eighth paragraph, namely, "that the defendants have refused to accept or deliver local and interstate freight at said Seligman [or Prescott Junction] upon through billing from or to the line of the plaintiff, in conjunction with the lines of said defendants, although the said defendants now accept and deliver freight upon through billing from or to the said defendant the Santa Fé, Prescott & Phœnix." And the illustrative cases which are given under another of the paragraphs, the seventy-first, indicate quite clearly that the ground of complaint and the case made by the bill is the refusal to deliver freight on through bills, and without breaking bulk, to the plaintiff corporation, or to receive freight from the plaintiff corporation without breaking bulk, and without rebilling, and the same with regard to passengers,—the refusal to send passengers on through tickets, or to accept through tickets with passengers.

Now, I know of no principle of common law which forbids an individual railroad corporation, or two or three or more corporations, from selecting as to which one or two or more corporations they will employ, as auxiliary to their own lines, as the agency by which they will send freight beyond their own lines, or as their agent to receive freight on the auxiliary line to be transmitted to their own line upon through bills, and without breaking bulk. And I do not find

in the interstate commerce law sufficient to warrant the conclusion that the law has been changed in that particular. This court, sitting in May, 1892, at a term where the present judge sat, reached a somewhat different conclusion in *New York & N. Ry. Co.* v. *New York & N. E. R. Co.*, 50 Fed. 867. Of that case it is to be said that the decision was to some extent induced by the way [440] in which the case came to the court, after action by the interstate commerce commission, already partially accepted by both sides; and, moreover, there had not been at that time so exhaustive a judicial examination and exposition of the terms of the interstate commerce law as we now find in the authorities, notably in the decisions of circuit courts of appeals. The conclusion is reached, therefore, that this was not a contract in unlawful restraint of trade, within the meaning of the act of July 2, 1890, for the reason that it was not so at common law, was not made so by the interstate commerce statute, and that the act of 1890, as indicated in the Dueber Watch-Case Co. Case and in the Trans-Missouri Case (which have been already cited), is directed solely against contracts which would have been unlawful before the passage of the act.

The further question as to whether the averments of the complaint are sufficient, assuming that the court be in error on this branch of the case, to make out a cause of action against the individual directors, need not be considered. The authorities cited by the defendants are very strongly in support of their motion; but the court prefers to put the decision in this case upon the broader ground.

The motions, therefore, to dismiss as to John J. McCook individually, as to the same as receiver of the Atchison, Topeka & Santa Fé, as to the same as receiver of the Atlantic & Pacific, as to the same as trustee of the Prescott & Arizona Central Railroad Company, as to Russell Sage, as to Cecil Baring, both individually, as to McCook and Crane, as executors of George C. Magoun, and as to John J. McCook, as director of one or more of the railroads named, are granted; and the demurrer of George J. Gould to the bill, on the ground that it does not set forth facts sufficient to constitute a cause of action, is sustained. Judgment is therefore directed in favor of the moving parties for dismissal of the

Syllabus.

complaint, and the ordinary form of order on demurrer will be signed when presented. An exception is granted as to the whole disposition of the case, and exceptions separately as to each one of the separate motions will be recorded. Stay of 30 days to plaintiff.

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[236] NATIONAL HARROW CO. *v.* QUICK ET AL.

(Circuit Court of Appeals, seventh circuit. May 4, 1896.)

[74 Fed., 236.]

[Decree of the Circuit Court (67 Fed., 130) dismissing the bill for want of equity affirmed, but not upon any ground having a bearing upon the anitrust law. Patent in question held to be void.]

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[802] THE CHARLES E. WISEWALL.[a]

(District Court, N. D. New York. June 12, 1896.)

[74 Fed., 802.]

MONOPOLIES—ACT JULY 2, 1890—TOWAGE SERVICES.—One who requests and accepts the services of a tug for towage purposes cannot escape paying the reasonable value of the services rendered, on the ground that the tug owners are members of an association which is illegal under the act of July 2, 1890, relating to trusts and monopolies.[b]

This was a libel in rem by certain tug owners against the steam dredge Charles E. Wisewall to recover the value of certain services rendered by their tugs in towing the dredge. On final hearing.

Joseph A. Lawson and *Isaac N. Lawson*, for libelants.

W. Frothingham, for claimant.

[a] Decree affirmed by Circuit Court of Appeals, Second Circuit. March 2, 1898 (86 Fed., 671). See p. 850, where the case is entitled "The Charles E. Wiswall."

[b] Syllabus copyrighted, 1896, by West Publishing Co.

Opinion of the Court.

COXE, District Judge (orally).

The proof shows conclusively that during the summer of 1895, the tugs mentioned in the libel, rendered services to the claimant's dredge in sums aggregating several hundred dollars. The claimant seeks to avoid payment for the services thus requested and accepted by him, upon the ground that the tug owners were members of an association which was illegal and void under the act of July 2, 1890. The courts have found it very difficult to apply the indefinite generalities of this act to the facts of any given case. *Prescott & A. C. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 73 Fed. 438, and cases cited. Assuming, however, in order to avoid argument, that the agreement by which the tugs undertook to act in unison was prohibited by the act, as being in restraint of trade, my present impression is that this assumption will not aid the claimant. He should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services, and having accepted the benefit thereof, he should pay. Counsel for the claimant asked for additional time in which to present authorities to establish the proposition that the towage contracts were void and in restraint of trade because the agreement by which the tugs were associated was void for that reason. The au- [803] thorities furnished fail, in my judgment, to meet the point in question. It is a mistake to confound the two contracts. An agreement by the tug Mayflower to tow the dredge Wisewall, for a reasonable sum, from Albany to Troy, is not void because the Mayflower is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop he would find it difficult to avoid paying their actual market value because the vendor and other tailors of that city had combined to keep up prices. So when he employs the Albany tugs during an entire season and receives services worth, upon the present proof, over $900, he should not be permitted to disavow his just obligations upon a pretext so illogical. The tugs do not ask that the dredge shall pay any more than their services are actually

worth. If they are worth less than $924 demanded in the libel, it is still open for the claimant to show it. But it is unnecessary to pursue the subject further. Above and beyond every other consideration stands the indisputable fact that the tugs rendered valuable services to the dredge at her request. These debts she should pay. To permit her to escape would be aiding a scheme of repudiation. The tugs are entitled to a decree. Unless there is a reasonable prospect that the claimant can produce testimony reducing the amount proved to be due, a reference would seem unnecessary. However, if the claimant desires it a reference will be ordered. The libelants may amend the libel in the respects heretofore suggested if on reflection they desire to do so.

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[667] NATIONAL HARROW CO. *v.* HENCH ET AL.[a]

(Circuit Court, E. D. Pennsylvania. August 25, 1896.)

[76 Fed., 667.]

MONOPOLIES—COMBINATION OF PATENT OWNERS.—A combination among manufacturers of spring-tooth harrows, by which each manufacturer assigns to a corporation organized for the purpose the patents under which he is operating, and takes back an exclusive license to make and sell the same style of harrows previously made by him, and no other, all the parties being bound to sell at uniform prices, *held* to be an unlawful combination for the enhancement of prices, and in restraint of trade.[b]

Risley, Robinson & Love, for complainant.

Strawbridge & Taylor and *John G. Johnson*, for defendants.

ACHESON, Circuit Judge.

The plaintiff, the National Harrow Company, seeks an injunction restraining the defendants, Hench & Dromgold, from selling float spring-tooth harrows, harrow frames, and attachments applicable thereto, upon more favorable terms

[a] Affirmed by Circuit Court of Appeals, Third Circuit (83 Fed., 36). See p. 742. A similarly entitled case (84 Fed., 226), p. 746, is another suit, brought in the Circuit Court, N. D. of New York.

[b] Syllabus copyrighted, 1896, by West Publishing Co.

as to price to purchasers thereof than the prices stipulated in two license contracts annexed to the bill, and a decree for the specific enforcement of said contracts, and for an accounting at the rate of five dollars for each harrow, etc., sold in violation of the terms of said license contracts.

Several defenses are insisted on, but in the view I take of the case it will be necessary to discuss only one of them, namely, that these license contracts are in unreasonable restraint of trade, and are part of an unlawful combination to control the manufacture of an important article of commerce, to destroy competition in the [668] sale thereof, and maintain high prices. The National Harrow Company, a corporation of the state of New York,—to whose contract rights and general purposes the plaintiff, a subsequently created New Jersey corporation, has succeeded,—originated in a written agreement between a number of leading and distinct manufacturers, under various United States letters patent of float spring-tooth harrows, whereby it was agreed that they should organize a corporation under the laws of New York, and would assign to the corporation all United States letters patent which they respectively then owned or should thereafter acquire relating to float spring-tooth harrows, and the good will of their business in such harrows, and that they would not thereafter be interested in the manufacture or sale of such harrows, except as agents or licensees of the corporation; that the corporation should issue to the persons, firms, and corporations, respectively, so assigning to it their said patents and the good will of their business, exclusive licenses to manufacture and sell upon their own account, subject to uniform terms and conditions, the same style of harrows which they were making and selling just prior to the agreement, and that the corporation itself would not manufacture and sell any style of harrows covered by its licenses; that each licensee should pay to the corporation one dollar on every float spring-tooth harrow manufactured and sold by such licensee, and that each person, firm, or corporation transferring to the corporation the good will of their float spring-tooth harrow business, and their patents relating thereto, should receive in payment therefor the value thereof as agreed upon or as fixed by arbitration in paid-up stock of

the corporation. The agreement in the first instance was signed by six different manufacturers, but the contract contemplated and provided that others should come into the arrangement and become parties thereto. Accordingly, other manufacturers of float spring-tooth harrows soon joined the combination, which then embraced 22 different persons, firms, or corporations. Thus, almost the entire output of float spring-tooth harrows made in the United States was brought under the regulation and control of this organization, its licensees manufacturing and selling at least 90 per cent. thereof.

The defendants were the owners of two United States letters patent relating to float spring-tooth harrows, under which they had been manufacturing and selling harrows. They joined the combination, and, agreeably to the provisions of the above-recited agreement, they assigned to the New York corporation their patents, and that corporation then issued to the defendants a license to manufacture and sell their old style of harrows. The New Jersey corporation, which was formed in furtherance of the general scheme, issued to the defendants a second license on terms and conditions substantially like the former license. These are the two license contracts here sued on. The following stated provisions are common to both licenses: The defendants agree not to sell float spring-tooth harrows, float spring-tooth harrow frames without teeth, or attachments applicable thereto, at less prices or on more favorable terms of payment and delivery to the purchasers [669] than as is set forth in the schedule annexed to the license, unless the licensor should reduce the selling prices and make more favorable terms for purchasers, and that the defendants will not directly or indirectly manufacture or sell any other float spring-tooth harrows, etc., than those which they are thus licensed to sell and market, except for another licensee, and then only of such style as he is licensed to manufacture and sell. They agree to pay to the corporation one dollar upon each float spring-tooth harrow, etc., manufactured and sold by them agreeably to the terms of the license, and the sum of five dollars as liquidated damages for every harrow, etc., manufactured or sold by them contrary to the terms and provisions of the license,

and the corporation agrees to defend all suits for alleged infringement brought against the licensees. All the licenses issued by the corporation are upon the like terms and conditions.

It will be perceived that the corporation through whose instrumentality the purposes of the combination are effected is simply clothed with the legal title to the assigned patents, while the several assignors are invested with the exclusive right to manufacture and sell their old style of harrows under their own patents; but all of them must sell at uniform prices and upon the same terms, without respect to cost or the merits of their respective styles of harrows, and all the members of the combination are strictly forbidden to manufacture or sell any other style or kind of float spring-tooth harrow than they are thus licensed to make and sell. Now, it is quite evident to me, as well by the papers themselves as from the testimony of witnesses, that this scheme was devised for the purpose of regulating and enhancing prices for float spring-tooth harrows, and controlling the manufacture thereof throughout the whole country, and that the combination, especially by force of the numbers engaged therein, tends to stifle all competition in an important branch of business. I am not aware that such a far-reaching combination as is here disclosed has ever been judicially sustained. On the contrary, the courts have repeatedly adjudged combinations between a number of persons engaged in the same general business to prevent competition among themselves, and maintain prices, to be against sound public policy, and therefore illegal. *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *Pittsburg Carbon Co.* v. *McMillin*, 119 N. Y. 46, 23 N. E. 530; *Merz Capsule Co.* v. *United States Capsule Co.*, 67 Fed. 414; *Nester* v. *Brewing Co.*, 161 Pa. St. 473, 29 Atl. 102.

I am not able to concur in the view that the principle of these cases is inapplicable here, because the agreement in question involves patents. It is true that a patentee has the exclusive control of his invention during the life of the patent. He may practice the invention or not, as he sees fit, and he may grant to others licenses upon his own terms. But where, as was the case here, a large number of inde-

pendent manufacturing concerns are engaged in making and selling, under different patents and in various forms, an extensively used article, competition between them is the natural and inevitable result, and thereby the public interest is pro- [670] moted. Therefore, a combination between such manufacturers, which imposes a widespread restraint upon the trade, and destroys competition, is as injurious to the community, and as obnoxious to sound public policy, as if the confederates were dealing in unpatented articles. To the present case may well be applied the remarks of the supreme court of Pennsylvania in *Morris Run Coal Co.* v. *Barclay Coal Co.*, *supra:* "This combination has a power in its confederated form which no individual action can confer." By the united action of more than a score of different manufacturers, natural and salutary competition is destroyed. To sanction such a result, because accomplished by a combination of patentees, would be, I think, to pervert the patent laws. Moreover, it is to be noted that under these license contracts the licensees can only make or sell their own specific form of harrow. All other forms, whether patented or unpatented, are prohibited to them. For this interdiction there is no justification. In the case of *Harrow Co.* v. *Quick*, 76 O. G. 1574, 67 Fed. 130, Judge Baker expressed the opinion that this combination was unlawful, and against sound public policy. I am constrained to regard the license contracts sued on as part of an illegal combination, and in unwarrantable restraint of trade. I must, therefore, deny the plaintiff the relief sought. The other defenses I need not consider.

The matter of the cross bill was not much noticed by counsel, if discussed at all. My conclusion is that the plaintiffs therein have not shown themselves to be entitled to affirmative relief. They entered into this combination voluntarily. The preliminary agreement does not remain executory in any particular. These cross plaintiffs do not owe any duty or service to the public, the performance of which is hindered by an improvident and unlawful contract. No special ground for equitable relief is disclosed by the cross bill, and the plaintiffs therein do not require a decree of cancellation in order to defend against suits based upon the license contracts. The cross bill will be dismissed, without prejudice to the right of the plaintiffs therein to defend against suits, or their right to maintain a bill should circumstances or exigencies arise to justify equitable interposition.

Let a decree be drawn in conformity with the views expressed in the foregoing opinion.

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[895]. UNITED STATES *v.* JOINT TRAFFIC ASS'N.[a]

(Circuit Court, S. D. New York. May 28, 1896.)

[76 Fed., 895.]

RAILROADS—JOINT TRAFFIC ASSOCIATIONS—INTERSTATE COMMERCE LAW.—A combination of railroad companies into joint traffic associations, under articles of agreement by which each road carries the freight it may get, over its own line, at its own rates, and has the earnings to itself, though providing proportional rates, or proportional division of traffic, is not a pooling of traffic on freights, or division of net proceeds of earnings, within the prohibitions of the interstate commerce law, nor of the act of 1890 (26 Stat. 209) against unlawful restraints and monopolies.[b]

SAME—JURISDICTION OF FEDERAL COURTS.—The United States cannot maintain a bill in equity to restrain an association of railroads from carrying into effect an agreement alleged to be illegal under the interstate commerce law, when it appears that it did not grant the charter of, and has no proprietary interest in, any of the roads. Its right is to prosecute for breaches of the law, not to provide remedies.

This was a bill in equity, filed by the United States against the Joint Traffic Association to enjoin alleged violations of the interstate commerce law.

Wallace Macfarlane, United States Attorney.

James C. Carter and *Edward J. Phelps* (*George F. Edmunds*, on brief), for defendants.

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[a] Affirmed by Circuit Court of Appeals, Second Circuit (89 Fed., 1020). Memorandum decision. See p. 869. Reversed by Supreme Court United States (171 U. S., 505). See p. 869.

[b] Syllabus copyrighted, 1896, by West Publishing Co.

Opinion of the Court.

WHEELER, District Judge.

The interstate commerce law (24 Stat. 379) provides:

"Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any [896] case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offence."

The act of 1890 against unlawful restraints and monopolies (26 Stat. 209) provides:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations is hereby declared illegal."

The 32 railroad companies defendants, immensely engaged in competitive interstate commerce, have made an arrangement forming this Joint Traffic Association, with a board of nine managers, consisting of one each from the Baltimore & Ohio, Chesapeake & Ohio, Erie, Grand Trunk, Lackawanna, Lehigh Valley, Pennsylvania, Vanderbilt, and Wabash systems; and with jurisdiction over competitive traffic which passes to, from, or through the western termini of the trunk lines, viz. Toronto, Can., Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk and Salamanca, N. Y.; Erie, Pittsburgh, and Allegheny, Pa.; Bellaire, O.; Wheeling, Parkersburg, Charleston, and Kenova, W. Va.; and Ashland, Ky.; and such other points as may hereafter be designated by the managers as such termini. The arrangement provides as to rates, fares, charges, and rules (article 7):

"Section 1. The duly-published schedules of rates, fares, and charges, and the rules applicable thereto, now in force, and authorized by the companies parties hereto, upon the traffic covered by this agreement (and filed with the interstate commerce commission as to such of said traffic as is interstate), are hereby reaffirmed by the companies composing the association; and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares, and charges, and the rules applicable thereto.

"Sec. 2. The managers shall, from time to time, recommend such changes in said rates, fares, charges, and rules as may be reasonable and just, and necessary for governing the traffic covered by this agreement, and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto as and when made shall be deemed a violation of this agreement.

Opinion of the Court.

No company party hereto shall, through any of its officers or agents, deviate from or change the rates, fares, charges, or rules herein reaffirmed or so recommended by the managers, except by a resolution of its board. The action of such board shall not affect the rates, fares, charges, or rules disapproved, except to the extent of its interest therein over its own road. A copy of the resolution of the board of any company party hereto authorizing any such change shall be immediately forwarded by the company making the same to the managers, and such change shall not become effective until thirty days after the receipt of such resolution by the managers. The managers, upon receiving such notice, shall act promptly upon the same for the protection of the parties hereto.

"Sec. 3. The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the interstate commerce act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto; and the managers shall co-operate with the interstate commerce commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

It also provides, as to competitive traffic (article 8):

"The managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement so far as can be legally done; and the control of all persons acting as contracting and soliciting freight and passenger agents in relation to [897] the traffic covered with due regard to the relative interests involved, and the number of such persons to be employed, is given to the managers."

This bill is brought at the request of the interstate commerce commission, under the direction of the attorney general, by the district attorney of the United States for this district, against this agreement, as made, without counting upon any statutes, or alleging anything actually done under it to be of itself unlawful otherwise than because so done. The answer denies, as a conclusion, any illegality within or under the agreement; and, as a matter of fact, anything unlawful outside of or beyond it. The case has been heard upon the bill and answer, and so is made to turn upon the question of the legality or illegality of the contract, and upon the right of the United States, as plaintiff, to maintain this suit, if it is illegal. The provisions of the contract stated are understood to be the ones challenged as being contrary to the statutes quoted.

The restraint and monopoly act expressly authorizes such a proceeding in equity as this to prevent its violation, and this suit is well maintained if this contract is within it. Railroads are not expressly named in this act, and are said in argument not to be within its terms. No one is so named;

but it applies to all contracts and combinations in restraint of trade or commerce among the states. Railroads do not trade among the states, but they carry for those who do; and what would restrain their so carrying would seem to be a restraint of such commerce.

These provisions of the contract do not provide for lessening the number of carriers; nor their facilities; nor for raising their rates, except expressly by its terms not contrary to law, and therefore not beyond what are reasonable. The interstate commerce law (section 1) requires all rates to be reasonable, and the making of reasonable and lawful rates upon carriage in any traffic cannot be any restraint in law upon such traffic. *U. S.* v. *Trans-Missouri Freight Ass'n*, 53 Fed. 440; *Id.*, 7 C. C. A. 15, 58 Fed. 58. The soliciting of custom is no part of the duty of common carriers, and dispensing with soliciting agents, or with the control of them, cannot be illegal, nor an agreement to do so be an illegal contract. As this case rests wholly upon the contract as made, and not upon anything actually done under color of or beyond it, and each road is left by it to carry on its own business within lawful limits as before, no unlawful restraint of commerce seems to be provided for by it; and no ground for relief under that statute of 1890 is made out.

No provision is made by the interstate commerce law for enforcing its provisions in equity, except to carry out orders of the commission; and authority for this suit to restrain any violation of that law must appear otherwise, or fail. That governments and states exercising general municipal control over the people, their property, their rights and their convenience, may, by their law officers, maintain suits in equity to restrain actual nuisances to ways, parks, commons, and the like, which are injurious to the common rights of all to their enjoyment, is not to be questioned. The United States government is limited in such control to such particular subjects as are committed to it, which include, of course, interstate and foreign commerce, car- [898] rying the mails, and such. These railroads are not federal instruments, although they may be, and probably are, engaged in the business of, and are within control of the laws of, the government to some extent. As so engaged, no nuisance would be

federal till it should become actual by obstructing these functions. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900. This contract, if illegal, is intangible, and is not alleged or claimed to have obstructed the roads for government purposes in any manner whatever.

The United States may maintain a bill in equity to repeal a patent for land (*U. S.* v. *San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850), or a patent for an invention (*U. S.* v. *American Bell Tel. Co.*, 128 U. S. 315, 9 Sup. Ct. 90); and a state to protect its interest in components of the soil under its navigable waters (*Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 550, 12 Sup. Ct. 689), or to prevent abuse of charters granted by it (*Attorney General* v. *Railroad Companies*, 35 Wis. 524), because of the interest in the property as proprietor, or in the grant as a party to it. But here the United States are not alleged, or understood, to have granted the charters of, or to have any proprietary interest in, any of these railroads; or to have any other concern about them in any respect involved here, but to have its prohibitory statutes for regulating commerce between the states respected and obeyed, the same as those against counterfeiting, or tampering with the mails, should be. Breaches of such statutes are misdemeanors punishable by indictment or information, and that merely such are not preventable in equity is elementary. A plaintiff in equity for relief by injunction should have some right or interest in the subject of prevention, or be given express authority to proceed in that way by statute. Authority is given to the interstate commerce commission to have proceedings for the enforcement of that law taken and prosecuted, but that is understood to refer to the usual and appropriate proceedings in such cases, and seems not to authorize any that were unknown before. The right given here to that commission is to prosecute rights, but not to provide remedies. If this is erroneous, only such agreements are prohibited as are for the pooling of freights, or dividing aggregate or net proceeds of earnings. So far as this agreement goes, each road carries the freights it may get, over its own line, at its own rates, however fixed, and has the proceeds, net or other, of the earnings to itself. Very able judicial opinions and learned commentaries and

Syllabus.

disquisitions upon pooling, too numerous for separate notice herein, have been referred to, but none make it include what is left in wholly separate channels. Provision for reasonable, although equal or proportional, rates for each carrier, or for a just and proportional rate for each carrier, or for a just and proportional division of traffic among carriers, does not seem to be either a pooling of their traffic or freights, or a division of the net proceeds of their earnings, in any sense.

This statement of reasons seems quite inadequate to the very full and able argument upon which this case has on each side been presented, but these conclusions have been reached upon full consideration of all, so far as understood; and, as they appear to be sufficient for the disposition of the case, no more is attempted. Bill dismissed.

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[1] GREER, MILLS & CO. *v.* STOLLER ET AL.

(Circuit Court, W. D. Missouri, W. D. November 6, 1896.)

[77 Fed., 1.]

FEDERAL COURTS—JURISDICTION—NONRESIDENTS OF DISTRICT—MONOPOLIES.—A bill by members of a business exchange to enjoin the board of directors from enforcing against them certain by-laws of the association on the ground that the same are illegal, as being in restraint of trade and commerce, cannot be based upon the "Anti-Trust Law" of July 2, 1890 (26 Stat. 209); for the right given by section 4 thereof to bring suits for injunction is limited to suits instituted on behalf of the government. Therefore the authority given by section 5, to bring in nonresidents of the district, cannot be availed of in private suits, and the court can acquire no jurisdiction over them.[a]

PARTIES TO ACTIONS—DIRECTORS OF UNINCORPORATED ASSOCIATIONS.—All the directors of an unincorporated association are necessary parties to a suit against it arising out of contractual relations, even though a less number are authorized by the association to transact business.

VOLUNTARY ASSOCIATIONS—SUSPENSION OF MEMBERS.—Where a member of a voluntary association has been suspended by the directors for nonpayment of a fine for violation of the by-laws, his action to be restored to the privileges of membership is founded upon the contract between himself and the association, which he must either accept in its entirety or repudiate. He does not occupy the position of a stranger injured by the acts of co-trespassers.

[a] Syllabus copyrighted, 1896, by West Publishing Co.

Statement of the Case.

This is a bill in equity seeking to enjoin the defendants from doing certain specified acts. The complainant is a nonresident of the state. The respondents constitute the board of directors of the Kansas City Live-Stock Exchange, a voluntary business association of this district.

The general objects of this association, as declared in its articles of association, are "for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, nor for the transaction of business, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to promulgate and enforce amongst the members correct and high moral principles in the transaction of business." By subscribing thereto, the members agreed with each other to faithfully observe and be bound by the rules and by-laws of the association. The complainant became a member thereof, and participated in the proceedings and business of the association for a [2] long time prior to the institution of this suit. For an alleged violation of the by-laws of the association it was, in accordance with the provisions of such by-laws, tried by the governing board of the association, and, being by them found guilty, was sentenced to pay a fine of $1,000, and suspended until the said fine should be paid. Refusing to comply therewith, the board of directors, as authorized by the by-laws of the association, sought, by giving public notice thereof on the billboards of the association and otherwise, to induce the members of the association to cease to do business with the complainant as a member of the association, and to obstruct its business operation as a member of the association, by denying it the privilege of members in selling stock on commission through the exchange. Thereupon it brought this bill in equity, setting out in detail its grievances, alleging that the by-laws thus sought to be enforced against it are illegal, being in restraint of trade and commerece, and tending to create a monopoly by the said board in the live-stock business at said stock yards, and charging the defendants with attempting to enforce against it what is termed a "boycott." The bill alleges that the complainant gave notice to the board of the withdrawal of its assent hitherto given to the by-laws complained of; and it asks to have the respondents enjoined from further attempting to enforce said by-laws and said penalty and order of suspension against it, and from further interfering with the business as a member of the said association or otherwise, and from publishing such notices or otherwise of the fact of said suspension, and from requiring other members of the association to cease to do business as such with the complainant, and for general relief. The bill discloses that the association is composed of about 300 members, the price of membership at this time being $1,000; and that the defendants constitute the board of directors of the association; all of which board are resident citizens of this district, except the respondent Hanna, who is a citizen of the state of Kansas. Hanna has filed a motion to be discharged herefrom for want of jurisdiction over him, while the other defendants move to dissolve the temporary injunction granted heretofore herein, for the reason, inter alia, that because of the want of jurisdiction over said Hanna all the necessary parties are not before the court to authorize it to proceed to final decree. Other essential facts appear in the following opinion.

Mills, Smith & Hobbs, Lathrop, Morrow, Fox & Moore, and *Albert H. Horton*, for complainant.

Hutchings & Keplinger, *McGrew*, *Watson & Watson*, and *Karnes*, *Holmes & Krauthoff*, for defendants.

PHILIPS, District Judge (after stating the facts).

The defendant Hanna being a nonresident of the state, this court can acquire no jurisdiction over him against his consent, unless it can be maintained that this action is predicable of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." 26 Stat. 209. By the fifth section of this act, the court, whenever the ends of justice require it, may bring before it other parties by summons, "whether they reside in the district in which the court is held or not." Can a private citizen, for a redress of a private grievance, maintain a bill in equity for an injunction under this act? The things forbidden by the act are declared to be criminal offenses against the government of the United States. By the fourth section, the jurisdiction is conferred upon the circuit courts of the United States to prevent and restrain the violations of this act, "and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations; such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined [3] or otherwise prohibited." Section 7 gives to the private person "injured in his business or property by any other person or corporation by reason of anything forbidden, or declared to be unlawful by this act," a right to sue in a circuit court of the United States in the district in which the defendant resides or is found for threefold damages by him sustained. The statute, being highly penal in its character, must be strictly construed; and, having created a new offense, and imposed new liabilities, and having provided the modes of redress to the public and the private citizen, by established rules of construction, these remedies are exclusive of all others. Suth. St. Const. §§ 392–394, 399; *Riddick* v. *Governor*, 1 Mo. 147; *Stafford* v. *Ingersol*, 3 Hill, 38; *Chandler* v. *Hanna*, 73 Ala., 390. While there has been some contrariety of opinion among

judges as to whether or not the right of injunction to a private citizen is accorded by this statute, my conclusion is that the right is limited by the fourth section to injunction at the relation of the district attorney, and that the seventh section gives to the private citizen his only remedy. *Blindell* v. *Hagan*, 54 Fed. 40, 41; *Id.*, 6 C. C. A. 86, 56 Fed. 696; *Pidcock* v. *Harrington*, 64 Fed. 821. Therefore Hanna has a right to insist that he cannot be sued in this jurisdiction. *In re Keasbey & Mattison Co.*, 16 Sup. Ct. 273–275. The motion to dismiss on behalf of the defendant Hanna is therefore sustained on the ground of his nonresidence.

The question, then, occurs, can this suit proceed without his presence as a party? In other words, is he a necessary party? The Kansas City Live-Stock Exchange is an unincorporated voluntary association composed of about 300 members. Such associations of individuals, in respect of their rights and liabilities, are generally regarded as mere partnerships. Dicey, in his work on Parties, says:

"An unincorporated company is fundamentally a large partnership, from which it differs mainly in the following particulars, viz.: that it is not bound by the acts of the individual partners, but only by those of its directors or managers; that shares in it are transferable; and that it is not dissolved by the retirement, death, bankruptcy, etc., of its individual members." Page 149.

As said in *Phipps* v. *Jones*, 59 Am. Dec. 711:

"Suits by and against such associations cannot at common law be brought and maintained in the name of the association, or in the name of its agents or trustees. *Curd* v. *Wallace*, 32 Am. Dec. 85; *Schuetzen Bund* v. *Agitations Verein*, 44 Mich. 313, 6 N. W. 675. But actions must be brought and maintained in the names of all the members. * * * On the ground that they have a common interest, members of a voluntary unincorporated association are entitled to join in a suit in regard to matters pertaining to or affecting such interest. *Mears* v. *Moulton*, 30 Md. 142."

The individual members of such associations retain all their original autonomy, except in so far as they may, by consent to the articles of association, have surrendered such right. In the absence of such assent, not even a majority of the associates could bind the individual member. His judgment would remain independent. A proceeding, therefore, to control the action of and bind the associates, must be directed against the whole membership. But where, as

in this instance, the executive administra- [4] tion of the business affairs of the association is by articles of agreement committed to a designated board of less number than the whole, it may be conceded that a judicial proceeding against the association may be maintained by summons against such board.

Rule 1 of the association, referred to in the bill of complaint, vests the government of the exchange in a board of 11 directors, composed of the president and vice president of the association, 7 members of which shall constitute a quorum for the transaction of business. Unquestionably, but for the provision clothing the number 7 with the functions of government, it would require the presence and co-operation of the whole 11 to transact any business. But this 7 must not only be present, assembled as a board, to perform any official act (*Hay-Press Co.* v. *Devol*, 72 Fed. loc. cit. 721, 722), but they are clothed with the functions of acting for and representing the board only for the transaction of business of the association, and not for any other purpose. It does not authorize affirmative action against the association by notice to seven of the directors. As to third persons moving against the association to bind the constituent members, notice must be given to all. As said in *People* v. *Batchelor*, 22 N. Y. 134:

"It is not only a plain dictate of reason, but a general rule of law, that no power or function intrusted to a body consisting of a number of persons can be legal without notice to all the members composing such body."

See, also, 1 Mor. Priv. Corp. (2d Ed.) §§ 479–532.

In *McGreary* v. *Chandler*, 58 Me. 538, which was an action served on a portion of the directors of a voluntary asssociation, the court said:

"The Machias Mining Company is a voluntary association of individuals, and not a corporation under the laws of the state. The defendants are members, and assume to act as its directors, and as such to bind the association. If they have bound the association, as they purport to have done, all its members are bound by and liable upon their contracts. A suit in such case would be against all the members. In the present case it is against three of the associates only."

The question under consideration was passed upon in *Wall* v. *Thomas*, 41 Fed. 620. The suit was by a member of an unincorporated association, whose management was intrusted

to nine trustees. The bill charged the trustees with mismanagement of the affairs of the association, and asked for an injunction. Only four of the trustees were summoned, presumably because the others were nonresidents of the district. It is true, the defendants summoned were less than a majority of the trustees, but the logic of the ruling was that all of the trustees were necessary parties, and therefore the bill could not be entertained. The court said:

"If the defendants are enjoined, their co-trustees will to that extent be crippled, and may be wholly prevented from doing what they propose. What is proposed to be done may be lawful and authorized, and, indeed, essential to the protection of the great interests with the management of which the trustees are charged. It is not enough that, according to the averments of the bill, these things are unauthorized, and a breach of trust, because the absent trustees have the right to be heard before these averments are taken as true against them. And they cannot be assumed to be true as the basis for a decree until all those who have a right to challenge them have been given an opportunity to do so. A contrary rule would put it in the power of a minority of unfaithful trustees, by collusion [5] with a beneficiary whose interests might not lie with those of other beneficiaries, to defeat the performance of legitimate and exigent official duties by faithful trustees."

The logic of the opinion clearly shows that it is just as incompetent to undertake to bind the body of trustees by a proceeding against six as it would be against three, for the learned judge says:

"Succinctly stated, the court is called upon to adjudge not only that the defendants have abused their trust, but also that the absent trustees have done so, and to decree that what the absent trustees propose to do is unauthorized and unlawful. While the absent trustees would not be bound by such a decree, it could not be made without embarrassing, and perhaps defeating, their contemplated action, because it would deprive them of the co-operation of their co-trustees."

The court then proceeds to argue that, if the injunction would prevent the absent trustees from taking any action, it should not be granted without giving such absent party an opportunity to be heard; and that such a suit would be an attempt by indirection "to control the management of a trust fund without giving some of those who are charged with the duty of managing it a right to be heard."

This is a wholesome rule. As applied to business corporations whose management by charter is committed to a board of directors, the courts, with unyielding decision, have required that all acts of such trustees affecting the property

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of the corporation, and all acts of an administrative character should be performed by them when assembled as a board, so that their action should be a unit, and the result of deliberation with that mutual interdependence of judgment which comes from consultation one with another. *Cammeyer* v. *Lutheran Churches*, 2 Sandf. Ch. 208–229; *State* v. *Ancker*, 2 Rich. Law, 245; *Hay-Press Co.* v. *Devol*, 72 Fed. 717; *Hill* v. *Mining Co.*, 119 Mo. 9–24, 24 S. W. 223. If a suitor may proceed against less than the whole number of trustees to bind the association, against how many and which of the number? Shall he select them? He might omit those from the summons whose wise counsel and staid judgment would be most valuable and reliant to the body in defending in court. While section 739, Rev. St. U. S., declares that, where there are several defendants in any suit at law or in equity, and any number of them are not inhabitants of nor found in the district where suit is brought, and do not voluntarily appear, the court may proceed to adjudication, yet it is the recognized construction of this statute that it has reference only to instances of mere formal parties, or where the cause may be determined, and justice satisfied, "without essentially affecting the interests of absent parties"; as where the interests of the parties absent are separable from those before the court. But where persons have not only an interest in the controversy, but such an interest that a final decree would affect it, or leave the controversy to be fought over in subdivisions, in order to conclude the rights and measure out the equities of all, they are indispensable parties to the exercise of jurisdiction. *Shields v. Barrow*, 17 How. 130; *Wall* v. *Thomas*, supra. The defendant Hanna, both as trustee and member of the association, has a direct personal interest in and important official relation to the management and [6] property of this association. There is not only committed to his keeping, by the rules of the association, the responsible duty of assisting and managing its affairs, but in the custody and management of the $12,000 of assets which the bill alleges to be now in the treasury of the association, as also in the management and disposition of the $1,000 fine assessed against the complainant, the collection or enforcement of which the bill seeks to enjoin.

And as a member of the board of business managers he is entitled to a voice in deciding whether or not the board shall resist or accede to complainant's demand. To enable the complainant, therefore, to proceed to judgment against the segment of the managing board of trustees before the court, it must be held that the suit, in its legal effect, presents the instance of an action ex delicto by a party wrongfully injured in his property rights by the tortious acts of several persons, in which case the injured party may proceed jointly or severally against the tort feasors for satisfaction. *Boyd* v. *Gill*, 19 Fed. loc. cit. 145.

This brings us to a consideration of the character of the case presented on the face of the bill, around which is centered the real battle between the contending parties. What is the real gravamen of the bill? Do the facts alleged constitutive of the cause of action depend upon a contractual relation between the complainant and the association, or does it occupy the attitude of a stranger injured by the act of co-trespassers? If the cause of action is dependent upon a contract between the parties sustaining inter sese the relation of co-partners, the rule of equitable procedure seems to be well established that all the partners, or at least all the board of trustees, representing the association, must be made parties. The bill alleges the existence of a voluntary business association, and sets out or refers to in appropriate form the articles of association and its by-laws. It appears that the complainant became voluntarily a member thereof, and subscribed to the articles of agreement, and thereby became entitled to share in and enjoy the privileges, rights, and benefits of the business organization. Reduced to its actual essence, the complaint is that, although the complainant, in becoming a member of the association, agreed that its board of managers, for any infraction of the established rules of business ethics, might, in its discretion, visit upon the offending member a fine, to be enforced, if not paid, by suspension and expulsion, with a further disability of being refused by other members of the association recognition in their dealings as live-stock commission men, so that, so far as they are concerned, he would be proscribed in the dealings of the association,—it then complains that, by reason of the visitation

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upon it of the penalty of these regulations, it is barred the privileges and benefits accruing to a member of the association. It complains that it is practically prevented from collecting its commissions on live stock sold at the stock yards, which are secured to it by the articles of association. And among the grievances complained of it is alleged that a fine was imposed upon it by the board of directors for a violation of the rules and regulations of the association, and that an order of sus- [7] pension was made and published; and that among its regulations is one providing that no hogs can be sold on the exchange unless the same have been "docked,"—that is, an estimate made by the inspectors of the association designated therefor as to the average weight of the hogs,—and that by reason of the refusal of the managing board to have hogs consigned to it for sale "docked" it is unable to make sales thereof on the exchange; whereby, in connection with other efforts of the board to visit upon it the penalty of disbarment, a practical "boycott" is put in force against it. The bill then alleges that so much of the by-laws as authorizes the board to impose such fine, to suspend and expel the complainant, is contrary to sound public policy, and is in restraint of trade, and tends to give the other members of the association a monopoly of such business at the stock yards in question, and that this complainant, having notified the board of its withdrawal and its assent to such rules and regulations when it became a member, it is now entitled to have the same nullified, and its rights as a member recognized by the board. It thus is quite apparent that the whole predicate of the action has its root in the contract by which complainant became, and yet claims to be, entitled to the rights of a member of this association. In substantive effect it seeks to be restored to all the rights, privileges, and benefits of a membership in the live-stock exchange, the deprivation of which is the sole gravamen of the complaint. The right, for instance, to have the hogs consigned to it for sale on commission "docked," whereby it may be able to sell them on the exchange, is wholly dependent upon its contractual relation to the association. There is no claim in the bill that the "docking" regulation is vicious, as conflicting with any public policy of this state or at common law.

Opinion of the Court.

Neither does the complainant complain that the general articles of the joint association to which it subscribed is contrary to law, or that the limitations in the articles of agreement and by-laws fixing a minimum commission at which any member shall sell live stock shipped to this market, and prohibiting its members from conducting here such business "on the outside," are in restraint of trade, or tend to create a monopoly. So that the complainant occupies in this controversy the anomalous attitude of claiming the privileges and benefits attaching to and ensuing from the association, while denouncing as illegal and inoperative that portion of the articles designed to make the combination effective and obligatory on the associates. It may be conceded that in respect of a certain character of contracts they may be good in part and bad in part, so that the court may enforce that which is valid and reject that which is vicious; but that is not this case. The rights of the complainant being bottomed on its having become a member of the association by subscribing to its articles and its body of by-laws, can it, under such a compact, ask a court of equity to restore it to fellowship, while rejecting a part of the creed of the order? As said by Chief Justice Coleridge in *Steamship Co.* v. *McGregor*, 21 Q. B. Div. 544: "It is a bargain which persons in the position of the defendants here have a right to make, and those [8] who are parties to the bargain must take it or leave it as a whole."

So, waiving any question of whether or not certain provisions of the articles of agreement and by-laws are contrary to public policy, the fact remains that, had the complainant declined, when it applied for admission into the association, to subscribe to and accept the articles and by-laws as a whole, it would not have been admitted to membership. In such contingency, it would hardly need the citation of authorities to command the assent of the learned counsel representing this complainant to the proposition that no court would issue a mandatory injunction compelling the admission of such an applicant to membership, for the palpable reason that it is entirely a matter of contract, and it takes two parties to make a contract; and courts ought never to undertake to make a contract between two free, responsible persons. It does seem

to me that this complainant must choose to be either in or out of this association. It cannot be half in and half out. If a member, and the contract of membership be what is sometimes inaptly termed "illegal," but is simply one in contravention of a sound public policy, as said by Lord Justice Bowen in *Steamship Co.* v. *McGregor*, 23 Q. B. Div. 598, 619, it is one which the courts do "not prohibit the making of," but which they will simply "not enforce." And the converse of the proposition must hold good,—that, if he be outside of such an association, he cannot appeal to a court of equity to reinstate him after expulsion; nor can he base any right of action on the alleged illegal character of part of the articles of association of the exchange or its by-laws (*American Live-Stock Commission Co.* v. *Chicago Live-Stock Exchange*, 143 Ill. 210, 32 N. E. 274), so long as he insists upon the rights of a member. A member is entitled to the privileges and rights inhering in a membership so long only as he keeps his part of the contract, expressed in his subscribing to the articles and by-laws of the association. 1 Beach, Priv. Corp. §§ 19, 83, 84, 309; Boone, Corp. § 333; *Supreme Lodge* v. *Wilson*, 14 C. C. A. 264, 66 Fed. 788; *Hammerstein* v. *Parsons*, 38 Mo. App. 336, 337; *Warren* v. *Exchange*, 52 Mo. App. 157–167.

It is a general rule of law, applicable to such voluntary associations, that a member must either submit to its rules or surrender his membership. *White* v. *Brownell*, 2 Daly, 329, 337, 342, 350; *Id.*, 3 Abb. Prac. (N. S.) 318; *Hyde* v. *Woods*, 2 Sawy. 655–659, Fed. Cas. No. 6,975; *Lafond* v. *Deems*, 81 N. Y. 507–514; *Weston* v. *Ives*, 97 N. Y. 222–228; *Lewis* v. *Wilson*, 121 N. Y. 284–287, 24 N. E. 474; *Belton* v. *Hatch*, 109 N. Y. 593, 17 N. E. 225; 24 Am. Law Rev. 538. The member has his option to retain his membership by complying with the by-laws, or cease to be a member by refusing a compliance. *Manufacturing Co.* v. *Hollis* (Minn.) 55 N. W. 1119–1121; *Rorke* v. *Board* (Cal.) 33 Pac. 881–883.

But, without undertaking to enter upon any discussion as to the legality of this association, and its right to continue its organization and prosecute its business, and accepting the averments of the bill that the relation of the complainant to the association rests upon a mutual contract between the associates, my conclusion is [9] that this court cannot proceed

to judgment in this action for the want of jurisdiction over all the necessary parties to a full and final determination. Therefore the motion to dissolve the injunction must be sustained. Decree accordingly.

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[712] UNITED STATES *v.* ADDYSTON PIPE & STEEL CO. ET AL.[a]

(Circuit Court, E. D. Tennessee, S. D. February 5, 1897.)

[78 Fed., 712.]

ANTI-TRUST ACT—INTERSTATE COMMERCE.—The act of congress of July 2, 1890, commonly known as the "Anti-Trust Act," does not, and could not constitutionally, affect any monopoly or contract in restraint of trade, unless it interferes directly and substantially with interstate commerce, or commerce with foreign nations.[b]

SAME.—Where several corporations engaged in the manufacture of cast-iron pipe formed an association whereby they agreed not to compete with each other in regard to work done or pipe furnished in certain states and territories, and, to make effectual the objects of the association, agreed to charge a bonus upon all work done and pipe furnished within those states and territories, which bonus was to be added to the real market price of the pipe sold by those companies, this combination was not a violation of the anti-trust act, as it affected interstate commerce only incidentally.

SAME.—In the examination of such a contract, fraud and illegality are not to be presumed, but must be proved, as in all other cases.

SAME.—In a suit such as this, in the name of the United States, jurisdiction depends alone upon the act; and the court is concerned with no case between private persons or corporations, where jurisdiction depends on other conditions, and in which proceeding a common-law remedy might become available.

James H. Bible, for complainant.

Brown & Spurlock and *W. E. Spears*, for defendants.

[713] CLARK, District Judge.

This suit is brought on behalf of and in the name of the United States against six named corporations. The state of

[a] Reversed by Circuit Court of Appeals, Sixth Circuit (85 Fed., 271). See p. 772. Decree modified and affirmed by the Supreme Court (175 U. S., 211). See p. 1009.

[b] Syllabus copyrighted, 1897, by West Publishing Co.

creation and the chief place of business of the several defendants are as follows: Addyston Pipe & Steel Company, Cincinnati, Ohio. Dennis Long & Co., Louisville, Ky. Howard-Harrison Iron Company, Bessemer, Ala. Anniston Pipe & Foundry Company, Anniston, Ala. South Pittsburg Pipe Works, South Pittsburg, Tenn. Chattanooga Pipe & Foundry Works, Chattanooga, Tenn. The petition charges that the defendants are practically the only manufacturers of cast-iron pipe within the following states and territories: Alabama, Arizona, California, Colorado, North Dakota, South Dakota, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Indian Territory, North Carolina, South Carolina, New Mexico, Minnesota, Michigan, Tennessee, Texas, Illinois, Wyoming, Indiana, Ohio, Utah, Washington, Oregon, Iowa, West Virginia, Nevada, Oklahoma, and Wisconsin. It is further charged upon information that the defendants, in order to monopolize the trade in cast-iron pipe in the above-named states and territories, entered into a contract or association known as the Associated Pipe Works; that the purpose of the association was to destroy all competition within said territory, and to force the public to pay unreasonable prices for the cast iron pipe manufactured and sold by said companies; that for such purposes each company selected a representative; and that these representatives constituted an executive committee. It is charged that the defendants, by the terms of said association, agreed not to compete with each other in regard to work done or pipe furnished in the states and territories above named, and, to make effectual the objects of the association, a bonus was agreed to be charged upon all work done and pipe furnished within said territory, and the petitioner charges that this bonus was put upon the real market price of the pipe sold by these companies, and, to that extent, increased the price to the purchasing public; that the amount of this bonus ranged from $3 to $9 per ton; that the purpose of the association was thus to force up the price of cast-iron pipe to an exorbitant and unreasonable extent. It does appear from the bill, as well as the answer and the proof, that upon what may be called "stock goods," regularly sold, there is a fixed bonus, and that

upon goods supplied by special contract the bonus is determined as follows: When bids are advertised for by any municipal corporation, water company, or gas company, the executive committee determines the price at which the bid is to be put in by some company in the association, and the question to which company this bid shall go is settled by the highest bonus which any one of the companies, as among themselves, will agree to pay or bid for the order. When the amount is thus settled the company to whom the right to bid upon the work is assigned sends in its estimate or bid to the city or company desiring pipe, and the amount thus bid is "protected" by bids from such of the other members of the association as are invited to bid, and by the bidding in all instances being slightly above the one put in by the company to whom the contract is to go. There are within the 36 states and territories what are called "reserved cities," by which it is [714] agreed that particular members of the association shall have the work at particular cities, and on this they pay the regular bonus, just as on stock goods when sold otherwise than by special contract obtained by bidding. It appears, too, that by far the larger part of the work done with goods furnished by these companies is under special contract with municipal corporations and gas and water companies, as above stated. Practically, all the profitable business is thus done. The general public, so far as affected by the business at all, is affected mainly through municipal corporations. All of the states of the United States outside of the states and territories above named are called "free territory," and the states named are distinguished as "pay territory." Settlements are made at stated times of the bonus account debited against each company, where these largely offset each other, so that small sums are in fact paid by any company in balancing accounts.

The aggregate annual manufacturing capacity of the 6 companies belonging to the association is 220,000 tons, with a daily capacity or output of about 650 tons; there are 9 other companies or corporations engaged in the manufacture and sale of cast-iron pipe within the pay territory, with an aggregate daily capacity of about 835 tons, though most of these are small concerns; and there are 10 companies or corpora-

tions engaged in the same business located within the free territory, as above explained, with a daily capacity or output of, say, 1,550 tons. It appears, also, that members of the Associated Pipe Works, while they do not compete with each other, are subjected to competition by the other companies and corporations, both within and without the pay territory, though just to what extent and with what effect this competition is carried on does not clearly appear. It does appear, however, sufficiently, that the companies within the association have so far not been able to raise or maintain prices above what is reasonable, compared with the prices at which similar goods and similar work may be obtained from the companies outside of the association. It now appears that all corporations, with one or two unimportant exceptions, which have let contracts to the members of this association, are satisfied with the prices, and make affidavit to the fact that they are reasonable, and that the prices furnished are, in the main, considerably below the estimates made by the expert engineers of such companies prior to advertising for the bids. The proof shows, too, that the defendant companies have, at least in certain instances, made quotations on goods to be delivered in the free territory below corresponding prices within the pay territory. It is said by the defendants that this is explained by reason of the difference in the cost of goods manufactured under contracts obtained by bidding, and stock goods which are sold on general orders, and consisting of goods which have been rejected as not coming up to the specifications, and goods manufactured during the winter season in order to keep men and machinery from becoming idle, during which period there is practically no demand by companies which purchase goods on special orders, and contract by bids.

[715] I think it does sufficiently appear that the average prices obtained by this association since its formation are above what was obtained before, though, as above stated, the proof is not sufficient to show that the ruling prices are now above what is reasonable, as determined in the markets and by competition. The defendants, in their answer, deny the purpose attributed to the association by the plaintiff's petition. On the contrary, they say and set up that prior to the association they were engaged in reckless and ruinous competition among themselves, as a result of which their business was not prosperous, and under which condition of things it was certain that some or all of them would fail and leave the entire field to such as might be able to survive. It is set up that what is called the "bonus" does not affect the price to the purchaser at all, but that the association determines in the first place what the market price should be, having regard also to the competition to which it is likely to be subjected by other companies not in the association, and that the price is not at any time unreasonable, and that the bonus is merely a mode of determining as between themselves, to an extent, who shall secure the work, but chiefly to make it certain that each company does its fair share of the business, by making the bonus burdensome to such companies as might undertake to do more than their reasonable share of the business within the territory named. It is further said that under the association the business has been fairly divided between the companies, and that they have been enabled to keep all of the plants in operation, their operatives at work, and the machinery from becoming idle. I think it could be safely stated that in some instances prices have been above what was probably fair or reasonable, but the proof fails to show that the average prices have been so. The leading witness for the government was for some time a stenographer in the service of the defendant Chattanooga Foundry & Pipe Works, and in that position did the work of the association, became familiar with all of the details by which the business was conducted, and, after giving up his position, made known to the government's law officer all the facts of the case, and has persistently and industriously corresponded with persons who had dealings with members of the association, and has done all in his power to instigate suits by purchasers from these companies against the associated companies, and has offered to become a witness in their behalf in such suits; always making the condition that he was to be liberally compensated, exacting generally a very large per cent. of what might be recovered. A complete exposure of all the business details of these companies has been thus made. So far, he has not been able to cause any suit to be instituted. But, upon the facts laid before him, the district attorney, under the direc-

tion of the attorney general, instituted the present suit. It was certainly eminently proper, in view of the disclosures made to the district attorney, that suit should be brought, and an investigation had.

This suit is based upon the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," com- [716] monly called the "Anti-Trust Act" (26 Stat. 209, c. 647; Supp. Rev. St. p. 762). Such of the provisions of the act as affect the matter now under consideration are as follows:

"Section 1. Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine to conspire with any other person or persons, to monopolize any part of the trade or commerce among several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act."

When the petition was filed, a restraining order was allowed, and the case is now heard upon the application for a preliminary injunction. The discussion on this motion has taken a wide range, and has proceeded upon the basis that the entire case has been practically developed as much as could be done upon full preparation and a final hearing. The record, so far as made up, consists of the petition, answer, affidavits, and exhibits thereto. A demurrer is incorporated in the answer of the defendants, and the defense rests upon two grounds: (1) That the association is not one subject to the provisions of the act of congress, to enforce which alone this suit is brought; and (2) that the association, in its purposes and mode of doing business, does not constitute a monopoly, and causes no restraint of trade, such as would be unlawful at the common law. It will depend upon the solution of the first question made as to whether or not it will become necessary to examine the second. The question whether this is an association such as subjects it to the provisions of the act of congress is one of some difficulty. This act, like what is known as the "Interstate Commerce Act," is new and experimental legislation by congress. The discussion which attended the passage of the act by congress, as shown by the records, makes it plain that the ablest and most thoughtful jurists of that body experienced much of the same difficulty which has since been felt by the courts in the attempt to enforce the act. It was recognized that congress was restricted in anything that it might do upon the particular subjects named in the act to a very narrow field; that the constitutional validity of the legislation was doubtful as a whole. Up to the date of the enactment of the interstate commerce law, and of the act now under consideration, the interstate commerce clause of the constitution, under which legislation of this character is justified, has been considered by the courts almost entirely with relation to state legislation, and its constitutional validity. Nevertheless it will be profitable to refer briefly to the doctrine announced in some of these cases before making any more particular reference to cases in which this act has been considered. It has, of course, been recognized from the beginning that it was no more within the province of congress to legislate upon domestic commerce, or commerce wholly within a state, than it was within the power of the legislature of a state to legislate upon the subject of interstate commerce or trade. In *Nathan* v. *Louisiana*, 8 How. 73, a tax was [717] imposed on every money or exchange broker, and this legislation was objected to upon the ground that the sole business of the defendant in that case was the buying and selling of foreign bills of exchange, which were instruments of commerce, and the act was repugnant to the constitutional power of congress to regulate commerce with foreign nations and among the several states. It was admitted by the court that foreign bills of exchange were instruments of commerce, but the court also said, in effect, that the products of agriculture or manufacture were in like manner instruments of commerce. Mr. Justice McLean, giving the opinion of the court, said:

"He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on."

The court further pointed out that domestic bills or promissory notes were as necessary to the commerce of a state as

foreign bills were to the commerce of the Union. In the *State Freight Tax Cases*, 15 Wall. 272, the court observed:

"The transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution, when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired."

In *Railroad Co.* v. *Richmond*, 19 Wall. 584, a contract had been entered into between the Dubuque & Sioux City Railway Company and the Dubuque Elevator Company, both created corporations by the laws of Iowa, by the terms of which contract, among other things, the elevator company was to erect an elevator on land leased from the railroad company, to be situated at Dubuque, for the purpose of receiving, storing, delivering, and handling all grain that should be received by the cars of the railroad company, not otherwise consigned, and to receive and discharge at Dubuque, for the company, all "through grain" by which was meant grain transported, by the terms of shipment, through that place to points beyond, at a certain stated price per bushel. The railroad company stipulated on its part that it would not erect a similar building for receiving, storing, or delivering grain at Dubuque, and would not lease to any others the right to erect any such building; that the elevator company should have the exclusive right to handle all through grain at Dubuque at the stipulated price per bushel. The railroad company having leased its road and property to the Illinois Central Railroad Company, the latter company disregarded the contract; and suit was brought in the United States court to enforce the same on behalf of the elevator company, and the defense was that the contract was repugnant to the constitution, as violating the interstate commerce clause. This defense was overruled, and decree entered in favor of the elevator company, and the case was taken to the supreme court of the United States. The ruling of the lower court was affirmed, and the supreme court, in doing so, enunciated again the controlling rule upon this subject, by saying:

"The power to regulate commerce among the several states was vested in congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation. It was never intended that the power should be [718] exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse."

In *Sherlock* v. *Alling*, 93 U. S. 100, a statute of the state of Indiana was drawn in question. This statute contained provisions designed for the better security of the lives of the passengers on board vessels propelled in whole or in part by steam, and the contention was that, as applied to marine torts, the act was invalid, as interfering with the exclusive regulation of commerce vested in congress. Mr. Justice Field, discussing this point and referring to previous decisions, used the following language:

"In supposed support of this position, numerous decisions of this court are cited by counsel, to the effect that the states cannot, by legislation, place burdens upon commerce with foreign nations, or among the several states. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles, as between particular places, was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Thus, in the *Passenger Cases*, 7 How. 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports, for every passenger landed. In the *Wheeling Bridge Case*, 13 How. 518, the statute of Virginia authorized the erection of a bridge which was held to obstruct the free navigation of the river Ohio. In the case of *Smnot* v. *Davenport*, 22 How. 227, the statute of Alabama required the owner of a steamer navigating the waters of the state to file, before the boat left the port of Mobile, in the office of the probate judge of Mobile county, a statement, in writing, setting forth the name of the vessel, and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the state, in addition to those prescribed by congress. And in all the other cases where legislation of a state has been held to be null for interfering with the commercial power of congress, as in *Brown* v. *Maryland*, 12 Wheat. 425, *State Tonnage Tax Cases*, 12 Wall. 204, and *Welton* v. *Missouri*, 91 U. S. 275, the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom."

And in the further progress of the opinion the court observed:

"In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects

relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution."

It will be readily seen that the cases recognize the distinction between the subjects of commerce and commerce itself, as well as between the instruments and aids to such commerce, and the actual business of commerce. In regard to state legislation, it has been declared from the beginning that, to render such legislation subject to constitutional objection under the commerce clause, the effect of the legislation upon interstate commerce must be direct, and not incidental or indirect. This general statement of the law so often repeated has been illustrated by the varying facts of many cases, but it would extend this opinion beyond reasonable limits to now refer to [719] these. It has often been observed that the line of demarkation between state and federal jurisdiction and regulation is a delicate one, and at times grows dim and shadowy. In considering a question of this delicate nature, proper and practical distinctions become extremely important. A particular business must be distinguished from the mere subjects of the business, and from mere incidents to or instruments by which the business is carried on. It is hardly conceivable that any large industrial or manufacturing establishment could be carried on without shipping products from one state to another, and such would certainly be the course of business contemplated. Nevertheless the business of such an establishment would be related to interstate commerce only incidentally and indirectly. Commerce would not be the main business, nor within the main purpose of the ordinary manufacturing establishment. Interstate commerce would be altogether an incident. There is no direct relation between the two. It is probably true that every wholesale establishment within the limits of the larger cities is engaged in such mode of business as that it is known that the business can be conducted only by the method of interstate commerce in part. Such commerce is, however, not directly affected, and least of all impeded or restricted. If every private enterprise which is carried on in part or chiefly by interstate shipments,

or by a mode of business which makes this necessary, is to be regarded as thereby so related to interstate commerce as to come within the regulating power of congress, it is obvious that this power could at once be extended to almost every form of business in the country which is conducted on anything like an extensive scale. So liberal an interpretation as this would obviously, in a large sense, obliterate the lines between federal and state jurisdiction, and, as an act of congress is paramount in authority, would strike down the autonomy of the states. The doctrine applicable to this subject was thoughtfully and fully restated by Mr. Justice Lamar in *Kidd* v. *Pearson*, 128 U. S. 120, 9 Sup. Ct. 10, in language as follows:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation,—the fashioning of raw materials into a change of form, for use. The functions of commerce are different. The buying and selling, and the transportation incidental thereto, constitute commerce, and the regulation of at least such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining,—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in congress and denied to the states, it would follow as an inevitable result that the duty would devolve on congress to regulate all of these delicate, multiform, and vital interests,—interests which, in their nature, are and must be local in all the details of their successful management. The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable, and utterly inconsistent. Any [720] movement towards the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement towards the local, detailed, and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These

instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be exercised by the state, and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the states, and less likely to have been what the framers of the constitution intended, it would be difficult to imagine."

The distinction before referred to between commerce and the subjects of commerce, and between the direct and indirect effect of the business, or mode of doing business, upon interstate commerce, is here clearly recognized and declared, as was also done in *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, in which the opinion in *Kidd* v. *Pearson* is expressly referred to, and the ruling reaffirmed. It was easy to anticipate that, when called upon to enforce the provisions of the anti-trust act, the interpretation would be in harmony with the construction of the commerce clause which had been uniformly given in considering state enactments alleged to infringe, or supposed to be an infringement upon, this provision of the constitution. *In re Greene*, 52 Fed. 104–119, is the first case in which the act in question was extensively treated. The question arose upon a petition for a writ of habeas corpus. The defendants and others, under the form of what was called the Distilling & Cattle-Feeding Company, a corporation organized under the laws of Illinois, had obtained possession and authority over such a number of distilleries that the company controlled the manufacture and sale of 75 per cent. of all distillery products in the United States, and the defendants had fixed the price at which the purchasers should and did sell the products of the distilleries. Sales were made to agencies established in Massachusetts and other places, and one of the questions considered was whether this was a combination subject to the provisions of the anti-trust act, under which the defendant had been indicted, and Judge Jackson (afterwards Mr. Justice Jackson) ruled that it was not. Discussing the point of

whether the whisky trust was subject to the act, the eminent judge observed:

"It is certain that congress could not, and did not by this enactment, attempt to prescribe limits to the acquisition, either by the private citizens or state corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and [721] manufacture of commodities which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities, just in proportion as the owner's business is increased, enlarged, and developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns." 52 Fed. 115.

And, speaking somewhat more specifically, it was further said:

"It was certainly not a 'monopoly,' in the legal sense of the term, for the accused or the distilling and cattle-feeding company to own seventy distilleries and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. In this acquisition and operation of the seventy distilleries, which enabled the accused or said distilling and cattle-feeding company to manufacture and control the sale of 75 per cent. of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distillery products by the enlargement and extension of business was not an attempt to monopolize trade and commerce in such products, within the meaning of the statute, and may therefore be left out of further consideration."

Much of the discussion in the opinion is devoted to showing that the trust arrangement there considered was neither a monopoly nor a contract in restraint of trade, according to the common-law sense, which it was held, in that and subsequent cases, must be allowed to settle the question of what is a monopoly or contract in restraint of trade, in the

absence of any definition in the act of congress. In the previous case of *In re Terrell*, 51 Fed. 215, Judge Lacombe had declared that:

"It is not the actual restraint of trade (if such be restraint of trade) that is made illegal by the statute, but the making of a contract in restraint of trade,—of a contract which restrains, or is intended to restrain, trade."

The statute came before the supreme court of the United States for the first time in *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249. The American Sugar-Refining Company, a corporation existing under the laws of the state of New Jersey, being in control of a large majority of the manufactories of refined sugar in the United States, acquired, through the purchase of stock, four other refineries in Philadelphia, and thus obtained such disposition over these refineries throughout the United States as gave it a practical monopoly of the business, and it was held that the result of the transaction was the creation of a monopoly in the manufacture and sale of a necessary of life; but it was nevertheless distinctly held that the monopoly was not one which could be suppressed under the provisions of the act of congress now in question, and that the business of sugar refining in Pennsylvania bore no direct relation to commerce between the states, nor with foreign nations. And the doctrine upon this subject, and the distinctions before adverted to, which pervade all of the previous cases, are again declared in the opinion with great clearness. Mr. Chief Justice Fuller, speaking for the court, said:

[722] "The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall

be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond or union, the other is essential to the preservation of the autonomy of the states, as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences, by resorts to expedients of even doubtful constitutionally. It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected."

After referring with approval to *Gibbons* v. *Ogden*, 9 Wheat. 1, 210, *Brown* v. *Maryland*, and other previous cases, the opinion was concluded by saying:

"It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly direct, as such; or to limit and restrict the rights of corporations created by the states, or the citizens of the states, in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property, or the products thereof, should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned and permitted. Aside from the provisions applicable where congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states, or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries, and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed, and the suppression of the alleged monopoly in manufacture by the restoration of the status quo before the transfers; yet the act of congress only authorized the circuit courts to proceed by way of preventing and restraining violations of the act in respect to contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce."

It is a doctrine expressly stated and clearly implied in these cases that the act of congress does not, and could not constitutionally, deal directly with a monopoly or a contract in restraint of trade, as such, according to the common-law definition of these terms; and, as has been seen, the act of congress gives no definition of its own. To do so would be

clearly to trench upon the exclusive jurisdiction of the states. Federal authority exists only when a monopoly or a contract in restraint of trade assumes such form or has such effect as to go beyond any common-law conception of these terms, and interferes di- [723] rectly and substantially with interstate commerce or commerce with foreign nations; and this it must do directly, and not incidentally. Now, I am unable to perceive, in the light of these cases, that the act of congress can be regarded as applicable to the association under consideration. It cannot be suggested, and has not been, that this association had in contemplation as one of its purposes the subject of interstate commerce, any more than any ordinary manufacturing establishment would have, where the products of such manufactory must find a market in other states as well as in domestic markets. It seems to me evident that private gain was the object of the association, just as was observed in regard to the sugar trust in *U. S.* v. *E. C. Knight Co.* Nor does the mode in which the association conducts its business have any direct relation to interstate commerce, so far as I can see. The sugar trust was confessedly a monopoly, in the common-law sense, and in a commodity of prime necessity. And the extent to which interstate commerce would be used in carrying on its business would be in magnitude out of all proportion to a similar use made by the association in question.

The learned district attorney has leveled most of his criticism at the bonus feature of the association, but it has not been pointed out, and, I think, cannot be, how the manner of using the bonus operates in restraint of interstate commerce. The object of the bonus and of the association really is not to prevent all members of the association from furnishing and shipping their manufactured products, but to determine among themselves which one of them shall do so, and it is really contemplated that some one will do so. There is certainly no restraint in this, as the supply in such case is regulated by the demand, so far as shipment is concerned. It has not been argued that the fact that certain cities are reserved to a particular company would bring the association within the provisions of the act. It is true that generally one of the

reserved cities is that in which the company has its chief place of business. For example, the Chattanooga Foundry & Pipe Works is allowed, under the arrangement, to supply the cities of Chattanooga and New Orleans. If it be argued that this prevents companies in other states from shipping goods to Chattanooga, it would be merely to follow a theory having no practical bearing on the case, because, in the absence of an association, the entire freight charges being in favor of the local company, and the disposition to patronize a local concern being in its favor, it would easily furnish the supplies.

It remains to remark, as should have been done before, that upon the bill and answer, where the contract of the association is admitted in the answer, as is virtually done here, but the allegations tending to show its sinister purpose, tendencies, and effects, contained in the bill, are denied by the answer, and averments are made in the answer tending to show a just and equitable purpose and effect, the averments in such answer upon this application stand admitted, and the contract must be presumed to have been made for the purposes honestly as stated in the answer, unless the provisions of the agreement and the mode of doing business clearly show the contrary. In examination of such a contract, fraud and illegality are not to be presumed, but [724] must be proved as in all other cases. *U. S.* v. *Trans-Missouri Freight Ass'n*, 7 C. C. A. 15, 58 Fed. 58. It may be further observed, to prevent misconstruction, that in a suit such as this, in the name of the United States, jurisdiction depends alone upon the act giving jurisdiction to enforce its provisions, and the court is concerned with no case between private persons or corporations, where jurisdiction depends on other conditions, and in which proceeding a common-law remedy might become available. Having reached the conclusion that the defendant association is not subject to the provisions of the act of congress, according to the ruling in *Re Greene* and in *U. S.* v. *E. C. Knight Co.*, I do not feel called upon to dispose of the other issues made in this case, and the bill is therefore dismissed.

Syllabus.

[290] UNITED STATES *v.* TRANS-MISSOURI FREIGHT ASSOCIATION.[a]

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 67. Argued December 8, 9, 1896.—Decided March 22, 1897.

[166 U. S., 290.]

The dissolution of the freight association does not prevent this court from taking cognizance of the appeal and deciding the case on its merits; as, where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law, and the jurisdiction of the court has attached by the filing of a bill to restrain such or like action under a similar agreement, and a trial has been had and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit.[b]

While the statutory amount must as a matter of fact be in controversy, yet the fact that it is so need not appear in the bill, but may be shown to the satisfaction of the court.

The provisions respecting contracts, combinations and conspiracies in restraint of trade or commerce among the several States or with foreign countries, contained in the act of July 2, 1890, c. 647, "to protect trade and commerce against unlawful restraints and monopolies," apply to and cover common carriers by railroad; and a contract between them in restraint of such trade or commerce is prohibited, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property.

The act of February 4, 1887, c. 104, "to regulate commerce," is not incon- [291] sistent with the act of July 2, 1890, as it does not confer upon competing railroad companies power to enter into a contract in restraint of trade and commerce, like the one which forms the subject of this suit.

Debates in Congress are not appropriate sources of information, from which to discover the meaning of the language of a statute passed by that body.

[a] Bill asking the dissolution of the association and for an injunction to restrain the several companies from carrying into effect the agreement was dismissed by the Circuit Court of the United States for the District of Kansas (53 Fed., 440). See p. 80. The decree was affirmed by the Circuit Court of Appeals, Eighth Circuit (58 Fed., 58). See p. 186. Reversed by the Supreme Court in the present case (166 U. S., 290).

[b] Syllabus copyrighted, 1897, by Banks & Bros.

Statement of the Case.

The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable.

In order to maintain this suit the government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, if such restraint is its necessary effect.

This agreement, though legal when made, became illegal on the passage of the act of July 2, 1890, and acts done under it after that statute became operative were done in violation of it.

The fourth section of the act invests the Government with full power and authority to bring such a suit as this; and, if the facts alleged are proved, an injunction should issue.

On the 2d of July, 1890, an act was passed by the Congress of the United States, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." 26 Stat. 209, c. 647. This act is given in full in the margin.[a]

[a] An act to protect trade and commerce against unlawful restraints and monopolies.

Be in enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall

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[292] On the 15th day of March, 1889, all but three of the defendants, the railway companies named in the bill,

be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved, July 2, 1890.

Statement of the Case.

made and entered into an agreement by which they formed themselves into an association to be known as the "Trans-Missouri Freight Association," and they agreed to be governed by the provisions contained in the articles of agreement.

The memorandum of agreement entered into between the railway companies named therein, stated, among other things, as follows: "For the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local, the subscribers do hereby form an association to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions."

"ARTICLE I. .

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

[293] "1. All traffic competitive between any two or more members hereof, passing between points in the following described territory: Commencing at the Gulf of Mexico, on the 95th meridian, thence north to the Red River; thence via that river to the eastern boundary line of the Indian Territory; thence north by said boundary line and the eastern line of the State of Kansas to the Missouri River at Kansas City; thence via the said Missouri River to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the international line,—the foregoing to be known as the 'Missouri River line,'—thence via said international line to the Pacific coast; thence via the Pacific coast to the international line between the United States and Mexico; thence via said international line to the Gulf of Mexico, and thence via said gulf to the point of beginning, including business between points on the boundary line as described.

[294] "2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri River line."

Certain exceptions to the above article are then stated as to the particular business of several railway companies, which was to be regarded as outside and beyond the provisions of the agreement.

Article II provided for the election of a chairman of the organization and for meetings at Kansas City, or otherwise, as might be provided for. By section 2 of that article each road was to "designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings, when possible, and shall represent his road, unless a superior officer is

present. If unable to attend he shall send a substitute with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents."

Section 3 provides that: "A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree it shall be arbitrated in the manner provided in article VII."

By section 4 it was provided that: "At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah."

Sections 5, 6, 7, 8, 9, 10 and 11 of article II read as follows:

SEC. 5. At each monthly meeting the association shall consider and vote upon all changes proposed, of which due notice has been given, and all parties shall be bound by the decision of the association, as expressed, unless then and there [295] the parties shall give the association definite written notice that, in ten days thereafter, they shall make such modification notwithstanding the vote of the association: *Provided*, That if the member giving notice of change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of such majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote, upon such other traffic put into effect corresponding rates to take effect on the same day. By unanimous consent, any rate, rule or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"SEC. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule or regulations as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman, upon investigation, shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate, it shall be reported to the association, and if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending

shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"SEC. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agrement shall be made by authority of the association: *Provided, however*, That when one road has a proprietary interest in another, the divisions between such roads shall be [296] what they may elect, and shall not be the property of the association: *Provided, further*, That, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"SEC. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine, by a majority vote (the member against whom complaint is made to have no vote), what, if any, penalty shall be assessed, the amount of each fine not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules and regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, the traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"SEC. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"SEC. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"SEC. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented."

Articles 3, 5, 6 and 7 contain appropriate provisions for the carrying out of the purposes of the agreement, but it is not necessary to here set them forth in detail.

[297] Article IV reads as follows:

"ARTICLE IV.

"Any wilful underbilling in weights, or billing of freight at wrong classification, shall be considered a violation of this agreement; and the rules and regulations of any weighing association or inspection bureau, as established by it or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any wilful violation of them shall be subject to the penalties provided herein."

Article VIII provides that the agreement should take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from the same.

Statement of the Case.

On the 6th of January, 1892, the United States, as complainant, filed in the Circuit Court of the United States for the District of Kansas, through the United States attorney for that district, and under the direction of the Attorney General of the United States, its bill of complaint against the Trans-Missouri Freight Association, named in the agreement above mentioned, the Atchison, Topeka and Santa Fé Railroad Company, and some seventeen other railroad companies, the officers of which had, it was alleged, signed the agreement above mentioned in behalf of and for their respective companies. The bill was filed by the Government for the purpose of having the agreement between the defendant railroad companies set aside and declared illegal and void, and to have the association dissolved.

It alleged that the defendant railroad corporations, signing the agreement, were at that time and ever since had been common carriers of all classes and kinds of freight and commodities which were commonly moved, carried and transported by railroad companies in their freight traffic, and at all such times had been, and then were, continuously engaged in transporting freight and commodities in the commerce, trade and traffic which is continuously carried on among and between the several States of the United States, and among [298] and between the several States and Territories of the United States, and between the people residing in, and all persons engaged in trade and commerce within and among and between, the States, Territories and countries aforesaid; that each of the defendants was, prior to the 15th day of March, 1889, the owner and in the control of, and that they were respectively operating and using, distinct and separate lines of railroad, fitted up for carrying on business as such carriers in the freight traffic above mentioned, independently and disconnectedly with each other, and that said lines of railroad had been and then were the only lines of transportation and communication engaged in the freight traffic between and among the States and Territories of the United States having through lines for said freight traffic in all that region of country lying to the westward of the Mississippi and Missouri rivers and east of the Pacific Ocean; that these lines of railroad furnish to the public and to persons engaged

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in trade and traffic and commerce between the several States and Territories and countries above mentioned separate, distinct and competitive lines of transportation and communication extending along and between the States and Territories of the United States lying westward of the Mississippi and Missouri rivers to the Pacific Ocean, and that the construction and maintenance of said several separate, distinct and competitive lines of railroad aforesaid had been encouraged and assisted by the United States and by the States and Territories in the region of country aforesaid, and by the people of the said several States and Territories, by franchises and by grants and donations of large amounts of land of great value, and of money and securities, for the purpose of securing to the public and to the people engaged in trade and commerce throughout the region of country aforesaid competitive lines of transportation and communication, and that prior to the 15th day of March, 1889, and subsequently and up to the present time, each and all of said defendants have been and are engaged as common carriers in the railway freight traffic connected with the interstate commerce of the United States.

It was then alleged in the bill as follows:

[299] "And your orator further avers that on or about the fifteenth day of March, 1889, the defendants not being content with the usual rates and prices for which they and others were accustomed to move, carry and transport property, freight and commodities in the trade and commerce aforesaid and in their said business and occupation, but contriving and intending unjustly and oppressively to increase and augment the said rates and prices, and to counteract the effect of free competition on the facilities and prices of trasporation, and to establish and maintain arbitrary rates, and to prevent any one of said defendants form reducing such arbitrary rates, and thereby exact and procure great sums of money from the people of the said States and Territories aforesaid, and from the people engaged in the interstate commerce, trade and traffic within the region of country aforesaid, and from all persons having goods, wares and merchandise to be transported by said railroads, and intending to monopolize the trade, traffic and commerce among and between the States and Territories aforesaid, did combine, conspire, confederate and unlawfully agree together, and did then and there enter into a written contract, combination, agreement and compact, known as a memorandum of agreement of the Trans-Missouri Freight Association, which was signed by each of said above-named defendants."

The bill then set forth the agreement signed by the various corporations defendant.

It was further alleged that the agreement went into effect

on the 1st day of April, 1889, and that since that time each and all of the defendants, by reason of the agreement, have put into effect and kept in force upon the several lines of railroads the rules and regulations and rates and prices for moving, carrying and transporting freight fixed and established by the association, and have declined and refused to fix or establish and maintain or give on their railroads rates and prices for the carrying of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each [300] particular road, and the people of the States and Territories subject to said association, and all persons engaged in trade and commerce within, among and between the different States and Territories had been compelled to and were still compelled to pay the arbitrary rates of freight and submit to the arbitrary rules and regulations established and maintained by the association, and ever since that date had been and still were deprived of the benefits that might be expected to flow from free competition between said several lines of transportation and communication, and were deprived of the better facilities and cheaper rates of freight that might be reasonably expected to flow from free competition between the lines above mentioned, and that the trade, traffic and commerce in such region of country, and the freight traffic in connection therewith, had been and were monopolized and restrained, hindered, injured and retarded by the defendants by means of and through the instrumentality of such association.

The bill further averred that notwithstanding the passage of the act of Congress above mentioned on the 2d day of July, 1890, the "defendants still continue in and still engage in said unlawful combination and conspiracy, and still maintain said Trans-Missouri Freight Association, with all the powers specified in the memorandum of agreement and articles of association hereinbefore set forth, which said agreement, combination and conspiracy so as aforesaid entered into and maintained by said defendants is of great injury and grievous prejudice to the common and public

good and to the welfare of the people of the United States."

The prayer of the bill was as follows:

"In consideration whereof, and inasmuch as your orator can only have adequate relief in the premises in this honorable court where matters of this nature are properly cognizable and relievable, your orator prays that this honorable court may order, adjudge and decree that said Trans-Missouri Freight Association be dissolved, and that said defendants, and all and each of them, be enjoined and prohibited from further agreeing, combining and conpiring and acting together to maintain rules and regulations and rates for carry- [301] ing freight upon their several lines of railroad to hinder trade and commerce between the States and Territories of the United States, and that all and each of them be enjoined and prohibited from entering or continuing in a combination, association or conspiracy to deprive the people engaged in trade and commerce between and among the States and Territories of the United States of such facilities and rates and charges of freight transporation as will be afforded by free and unrestrained competition between the said several lines of railroad, and that all and each of said defendants be enjoined and prohibited from agreeing, combining and conspiring and acting together to monopolize or attempt to monopolize the freight traffic in the trade and commerce between the States and Territories of the Unied States, and that all and each of said defendants be enjoined and prohibited from agreeing, combining and conspiring and acting together to prevent each and any of their associates from carrying freight and commodities in the trade and commerce between the States and Territories of the United States at such rates as shall be voluntarily fixed by the officers and agents of each of said roads acting independently and separately in its own behalf."

The defendants were required to answer fully, etc., each and all of the matters charged in the bill, but such answer was not required to be under oath, an answer under oath being specially waived.

The Chicago, Kansas and Nebraska Railway Company, the Missouri, Kansas and Texas Railway Company and the Denver, Texas and Fort Worth Railroad Company denied being parties to the association. The other fifteen companies filed separate answers, each setting up substantially the same defence.

They admitted they were common carriers engaged in the transportation of persons and property in the States and Territories mentioned in the agreement, and they alleged that as such common carriers they were subject to the provisions of the act of Congress, approved February 4, 1887, c. 104, 24 Stat. 379, entitled "An act to regulate commerce," with the various amendments thereof and additions thereto, [302] and they alleged that that act and the amendments con-

stituted a system of regulations established by Congress for common carriers subject to the act, and they denied that they were subject to the provisions of the act of Congress passed July 2, 1890, above set forth.

They admit that they severally own, control and operate separate and distinct lines of railroad constructed and fitted for carrying on business as common carriers of freight, independently and disconnectedly with each other; except that a common interest exists between certain companies, named in the answer. They admit that the lines of railroad mentioned in the bill furnish lines of transportation and communication to persons engaged in freight traffic between and among the States and Territories of the United States, having through lines for freight traffic in that region of country lying to the westward of the Mississippi and Missouri rivers and east of the Pacific Ocean, but deny that they are the only such lines, and allege that there are several others, naming them.

They further admitted that prior to the organization of the freight association the defendants furnished to the public and to persons engaged in trade, traffic and commerce between the several States and Territories named in the agreement, separate, distinct and competitive lines of transportation and communication, and they allege that they still continue to do so.

They admitted that some of the roads mentioned in the bill received aid by land grants from the United States, and others received aid from States and Territories by loans of credits, donations of depot sites and rights of way, and in a few cases by investments of money, and that the people of the States and Territories to a limited extent made investments in the stocks and bonds of some of the roads, while others, mentioned in the bill, were almost exclusively constructed by capital furnished by non-residents of that region.

It was also admitted that the purpose of the land grants, loans, donations and investments was to obtain the construction of competitive lines of transportation and communication to the end that the public and the people engaged in trade [303] and commerce throughout that region of country might have facilities afforded by railways in communicating

with each other and with other portions of the United States and the world, and denied that they were granted for any other purpose.

The defendants admitted the formation on or about March 15, 1889, of the voluntary association described in the bill as the "Trans-Missouri Freight Association."

They denied the allegation that they were not content with the rates and prices prevailing at the date of the agreement; they denied any intent to unjustly increase rates, and denied that the agreement destroyed, prevented or illegally limited or influenced competition; they denied that arbitrary rates were fixed or charged, or that rates had been increased, or that the effect of free competition had been counteracted; they denied any purpose in the formation of the association to monopolize trade, traffic and commerce between the States and Territories within the region mentioned in the bill; and they denied that the agreement was in any respect the illegal result of any unlawful confederation or conspiracy. The defendants alleged that the proper object of the association was to establish reasonable rates, rules and regulations on all freight traffic, and the maintenance of such rates until changed in the manner provided by law; that the agreement was filed with the Interstate Commerce Commission as required by section 6 of the act of February 4, 1887. They also alleged that it was not the purpose of the association to prevent the members from reducing rates or changing the rules and regulations fixed by the association; that by the terms of the agreement each member might do so, the preliminary requirement being that the proposed change should be voted upon at a meeting of the association, after which, if the proposal was not agreed to, the line making the proposal could make such reduced rate notwithstanding the objection of the other lines; that the purpose of this provision was to afford opportunity for the consideration of the reasonableness of any proposed rate, rule or regulation by all lines interested and an interchange of views on the effect of such [304] reduction, and that reductions of rates had been made in numerous instances through said process by the association. They admitted that the agreement took effect April 1, 1889, and that it had remained in operation since, and that

the rates, rules and regulations fixed and established from time to time under said agreement had been put into effect and maintained in conformity to law; and it was denied that by reason of the agreement or under duress of fines and penalties, or otherwise, the defendants had refused to establish and maintain just and reasonable rates; and it was alleged that the object of the association at all times had been and was to establish all rates, rules and regulations upon a just and reasonable basis, and to avoid unjust discrimination and undue preference. They denied that shippers or the public were in any way oppressed or injured by reason of the rates fixed by the association, but on the contrary they alleged that the agreement and the association established under it had been beneficial to the patrons of the railway lines composing the association and the public at large. These in substance were the allegations in the various answers.

The cause came on for hearing on bill and answer before the Circuit Court of the United States for the District of Kansas, First Division. That court dismissed the bill without costs against the complainant. 53 Fed. Rep. 440. The Government duly appealed from the judgment to the United States Circuit Court of Appeals for the Eighth Circuit, and that court after argument affirmed, in October, 1893, the judgment of the Circuit Court, without costs, Shiras, District Judge, dissenting. 19 U. S. App. 36. From that judgment the Government appealed to this court.

A motion was made upon affidavits to dismiss the appeal. The affidavits show that on the 18th of November, 1892, a resolution was adopted by the Trans-Missouri Freight Association, one of the defendants, providing that the organization should be discontinued from and after the 19th of November, 1892, and the secretary was instructed to wind up its affairs at as early a date as possible. It further appeared by the affidavits that the Trans-Missouri Freight Association was **[305]** actually dissolved and its existence ended on the above date, November 19, 1892, and that it has not since that date been revived, nor has it since that date had any activity of any kind, "and that it has not conducted or been engaged in any operations or business whatever, but that it has been dead and out of existence."

It also alleged as another ground for dismissing the appeal that the matter in controversy does not exceed $1000, and that the case does not come under any other provision of the act of 1891, allowing an appeal from the Circuit Courts of Appeals to this court. In opposition to the motion it appeared upon the part of the appellant that at the same meeting at which the resolution above referred to was adopted, the following resolution was also adopted: "*Resolved*, That a committee of seven be appointed by the chairman of this meeting to draw up a new agreement for the conduct of business now substantially covered by the Trans-Missouri agreement and to make a report to all lines in the Trans-Missouri Association at a meeting to be called in Chicago on December 6, 1892." A committee of seven was accordingly appointed, which adopted a resolution calling a meeting for the 6th of December, 1892, of the lines formerly members of the Trans-Missouri Association and representatives of other interested lines for the purpose of considering any changes in the tariffs and of business which was under the jurisdiction of that association and which might be submitted to the parties at that time, and to further consider the organization of one or more rate committees to govern the manner of making rates on such traffic until some permanent organization could be effected. In the early days of December, 1892, the meeting so called was held and was participated in by most of the railroad companies which were parties to the Trans-Missouri agreement, and at that meeting an agreement was made upon the subject of rates of freight, and a West-Missouri freight rate committee was appointed, the duties of which committee were to establish and maintain reasonable rates in the territory described, and other lines not therein represented but interested in the freight traffic of such territory were to be invited to become members. A plan for **[306]** the establishment of subrate committees for the purpose of agreeing upon rates was therein set forth and agreed to. The agreement was to become effective on the 1st of January, 1892, and to remain in force until the following April, during which time it was supposed that a new and permanent association to provide for an agreement relating to rates of freight might be founded. It does not appear whether such permanent asso-

Counsel for Parties.

ciation has been formed or that the temporary agreement has been actually terminated.

In answer to the motion to dismiss on the ground that the matter in controversy did not amount to over a thousand dollars, the parties have stipulated as follows: "It is hereby stipulated for the purposes of this case and no other, and without waiving any right to question the legal effect of such fact, that the daily freight charges on interstate shipments collected by all the railway companies at points where they compete with each other were, at the time of the agreement mentioned in the pleadings herein, and have been since, more than one thousand dollars."

To the motion made to dismiss the appeal for want of jurisdiction, briefs were filed as follows:

Mr. W. F. Guthrie filed a brief on behalf of the Burlington and Missouri River Railroad Company in support of the motion.

Mr. Lloyd W. Bowers filed a brief on behalf of the Atchison, Topeka and Santa Fé Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, the Fremont, Elkhorn and Missouri Valley Railroad Company, The Sioux City and Pacific Railroad Company and the Chicago, St. Paul, Minneapolis and Omaha Railway Company in support of the motion.

Mr. Attorney General and *Mr. Assistant Attorney General Whitney* for the United States filed a brief opposing the motion.

[307] At the hearing on the merits one hour additional time was, on motion of *Mr. Dillon*, allowed to each side.

Mr. Attorney General for the United States, appellants.

Mr. John F. Dillon for the Freight Association, appellees. *Mr. A. L. Williams*, *Mr. Harry Hubbard* and *Mr. John M. Dillon* were on his brief.

Mr. James C. Carter for the Freight Association, appellees.

Mr. E. J. Phelps for the Freight Association and the New York Central and Hudson River Railroad Company, appellees.

Opinion of the Court.

Mr. Attorney General concluded for appellants.

Mr. W. F. Guthrie filed a brief on behalf of the Burlington and Missouri River Railroad Company.

Mr. Lloyd W. Bowers filed a brief for the Fremont, Elkhorn and Missouri Valley Railroad Company and the Sioux City and Pacific Railroad Company.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

The defendants object to the hearing of this appeal, and ask that it be dismissed on the ground that the Trans-Missouri Freight Association has been dissolved by a vote of its members since the judgment entered in this suit in the court below. A further ground urged for the dismissal of the appeal is that the requisite amount (over one thousand dollars) is not in controversy in the suit, and that as an appeal would only lie to this court in this character of suit under the act of March 3, 1891, c. 517, 28 Stat. 826, where that amount is in controversy, the appeal should be dismissed.

As to the first ground, we think the fact of the dissolution of the association does not prevent this court from taking cognizance of the appeal and deciding the case upon its merits.

[308] The prayer of the bill filed in this suit asks not only for the dissolution of the association, but, among other things, that the defendants should be restrained from continuing in a like combination, and that they should be enjoined from further conspiring, agreeing or combining and acting together to maintain rules and regulations and rates for carrying freight upon their several lines, etc. The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future.

The defendants, in bringing to the notice of the court the fact of the dissolution of the association, take pains to show that such dissolution had no connection or relation whatever

with the pendency of this suit, and that the association was not terminated on that account. They do not admit the illegality of the agreement, nor do they allege their purpose not to enter into a similar one in the immediate future. On the contrary, by their answers the defendants claim that the agreement is a perfectly proper, legitimate and salutary one, and that it or one like it is necessary to the prosperity of the companies. If the injunction were limited to the prevention of any action by the defendants under the particular agreement set out, or if the judgment were to be limited to the dissolution of the association mentioned in the bill, the relief obtained would be totally inadequate to the necessities of the occasion, provided an agreement of that nature were determined to be illegal. The injunction should go further, and enjoin defendants from entering into or acting under any similar agreement in the future. In other words, the relief granted should be adequate to the occasion.

As an answer to the fact of the dissolution of the association, it is shown on the part of the Government that these very defendants, or most of them, immediately entered into a substantially similar agreement, which was to remain in force for **[309]** a certain time, and under which the companies acted, and in regard to which it does not appear that they are not still acting. If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. Although the general rule is that equity does not interfere simply to restrain a possible future violation of law, yet where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law and the jurisdiction of the court has attached by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had,

and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit.

Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case. By designating the agreement in question as illegal and the alleged combination as an unlawful one, we simply mean to say that such is the character of the agreement as claimed by **[310]** the Government. That question the Government has the right to bring before the court and obtain its judgment thereon. Whether the agreement is of that character is the question herein to be decided.

We think, therefore, the first ground urged by defendants for the dismissal of the appeal is untenable.

We have no difficulty either in sustaining the jurisdiction of this court in regard to the second ground, that of the amount in controversy in the suit.

The bill need not state, in so many words, that a certain amount exceeding one thousand dollars is in controversy in order that this court may have jurisdiction on appeal. The statutory amount must as a matter of fact be in controversy, yet that fact may appear by affidavit after the appeal is taken to this court, *Whiteside* v. *Haselton*, 110 U. S. 296; *Red River Cattle Co.* v. *Needham*, 137 U. S. 632, or it may be made to appear in such other manner as shall establish it to the satisfaction of the court. A stipulation between the parties as to the amount is not controlling, but in the discretion of the court it may be regarded in a particular case, and with reference to the other facts appearing in the record as suffi-

cient proof of the amount in controversy to sustain the jurisdiction of this court.

The bill shows here an agreement entered into (as stated in the agreement itself) for the purpose of maintaining reasonable rates to be received by each company executing the agreement, and the stipulation entered into between the parties hereto shows that the daily freight charges on interstate shipments collected by the railway companies at points where they compete with each other were, at the time of the making of the agreement mentioned in the pleadings herein and have been since, more than one thousand dollars. This agreement so made, the Government alleges, is illegal as being in restraint of trade, and was entered into between the companies for the purpose of enhancing the freight rates. The companies, while denying the illegality of the agreement or its purpose to be other than to maintain reasonable rates, yet allege that without some such agreement the competition between them for [311] traffic would be so severe as to cause great losses to each defendant and possibly ruin the companies represented in the agreement. Such a result, it is claimed, is avoided by reason of the agreement. Upon the existence, therefore, of this or some similar agreement directly depends (as is alleged) the prosperity, if not the life, of each company. It must follow that an amount much more than a thousand dollars is involved in the maintenance of the agreement or in the right to maintain it or something like it. These facts, appearing in the record and the stipulation, show that the right involved is a right which is of the requisite pecuniary value. A reduction of the rates by only the fractional part of one per centum would, in the aggregate, amount to over a thousand dollars in a very few days. This is sufficient to give the court jurisdiction on appeal. *South Carolina* v. *Seymour*, 153 U. S. 353, 357. There is directly involved in this suit the validity and the life of this agreement, or one similar to it. Out of this agreement directly springs the ability as well as the right to maintain these rates, and each company is interested in maintaining the validity of the agreement to the same extent as all the others. As against the agreement the Government represents the interest of the public, and thus the parties stand opposed to

each other—the one in favor of dissolving and the other of maintaining the agreement.

Unlike the case of *Gibson* v. *Shufeldt*, 122 U. S. 27, and the cases therein cited in the opinion of the court delivered by Mr. Justice Gray, the defendants here are jointly interested in the question, and it is not the case of a fund amounting to more than the requisite sum which is to be paid to different parties in sums less than the jurisdictional amount

For the reasons above stated, we think the jurisdictional fact in regard to each defendant appears plainly and necessarily from the record and the stipulation, and that the duty is thus laid upon this court to entertain the appeal.

Coming to the merits of the suit, there are two important questions which demand our examination. They are, first, whether the above-cited act of Congress (called herein the Trust Act) applies to and covers common carriers by railroad; [312] and, if so, second, does the agreement set forth in the bill violate any provision of that act?

As to the first question:

The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract therefore that is in restraint of trade or commerce is by the strict language of the act prohibited even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrain trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by this act. It cannot be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the

owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it. The point urged on the defendants' part is that the statute was not really intended to reach that kind of an agreement relating only to traffic rates entered into by competing common carriers by railroad; that it was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who by means of trusts, combinations and conspiracies were engaged in affecting the supply or the price or the place of manufacture of such articles. The terms of the act do not bear out such construction. Railroad companies are instruments of commerce, and their business is commerce itself. *State Freight Tax case*, 15 Wall. 232, 275; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464. **[313]** An act which prohibits the making of every contract, etc., in restraint of trade or commerce among the several States, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the States, provided such contract by its direct effect produces a restraint of trade or commerce. What amounts to a restraint within the meaning of the act if thus construed need not now be discussed.

We have held that the Trust Act did not apply to a company engaged in one State in the refining of sugar under the circumstances detailed in the case of *United States* v. *E. C. Knight Company*, 156 U. S. 1, because the refining of sugar under those circumstances bore no distinct relation to commerce between the States or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the States would leave little for the act to take effect upon.

Nor do we think that because the sixth section does not forfeit the property of the railroad company when merely engaged in the transportation of property owned under and which was the subject of a contract or combination mentioned in the first section, any ground is shown for holding the rest of the act inapplicable to carriers by railroad. It is not perceived why, if the rest of the act were intended to apply to such a carrier, the sixth section ought necessarily

to have provided for the seizure and condemnation of the locomotives and cars of the carrier engaged in the transportation between the States of those articles of commerce owned as stated in that sixth section. There is some justice and propriety in forfeiting those articles, but we see none in forfeiting the locomotives or cars of the carrier simply because such carrier was transporting articles as described from one State to another, even though the carrier knew that they had been manufactured or sold under a contract or combination in violation of the act. In the case of a simple transportation of such articles the carrier would be guilty of no violation of any of the provisions of the act. Why, there- **[314]** fore, would it follow that the sixth section should provide for the forfeiture of the property of the carrier if the rest of the act were intended to apply to it? To subject the locomotives and cars to forfeiture under such circumstances might also cause great confusion to the general business of the carrier and in that way inflict unmerited punishment upon the innocent owners of other property in the course of transportation in the same cars and drawn by the same locomotives. If the company itself violates the act, the penalties are sufficient as provided for therein.

But it is maintained that an agreement like the one in question on the part of the railroad companies is authorized by the Commerce Act, which is a special statute applicable only to railroads, and that a construction of the Trust Act (which is a general act) so as to include within its provisions the case of railroads, carries with it the repeal by implication of so much of the Commerce Act as authorized the agreement. It is added that there is no language in the Trust Act which is sufficiently plain to indicate a purpose to repeal those provisions of the Commerce Act which permit the agreement; that both acts may stand, the special or Commerce Act as relating solely to railroads and their proper regulation and management, while the later and general act will apply to all contracts of the nature therein described, entered into by any one other than competing common carriers by railroad for the purpose of establishing rates of traffic for transportation. On a line with this reasoning it is said that if Congress had intended to in any manner affect

the railroad carrier as governed by the Commerce Act, it would have amended that act directly and in terms, and not have left it as a question of construction to be determined whether so important a change in the commerce statute had been accomplished by the passage of the statute relating to trusts.

The first answer to this argument is that, in our opinion, the Commerce Act does not authorize an agreement of this nature. It may not in terms prohibit, but it is far from conferring either directly or by implication any authority to make it. If the agreement be legal it does not owe its [315] validity to any provision of the Commerce Act, and if illegal it is not made so by that act. The fifth section prohibits what is termed "pooling," but there is no express provision in the act prohibiting the maintenance of traffic rates among competing roads by making such an agreement as this, nor is there any provision which permits it. Prior to the passage of the act the companies had sometimes endeavored to regulate competition and to maintain rates by pooling arrangements, and in the act that kind of an arrangement was forbidden. After its passage other devices were resorted to for the purpose of curbing competition and maintaining rates. The general nature of a contract like the one before us is not mentioned in or provided for by the act. The provisions of that act look to the prevention of discrimination, to the furnishing of equal facilities for the interchange of traffic, to the rate of compensation for what is termed the long and the short haul, to the attainment of a continuous passage from the point of shipment to the point of destination, at a known and published schedule, and, in the language of counsel for defendants, "without reference to the location of those points or the lines over which it is necessary for the traffic to pass," to procuring uniformity of rates charged by each company to its patrons, and to other objects of a similar nature. The act was not directed to the securing of uniformity of rates to be charged by competing companies, nor was there any provision therein as to a maximum or minimum of rates. Competing and non-connecting roads are not authorized by this statute to make an agreement like this one.

As the Commerce Act does not authorize this agreement, argument against a repeal by implication, of the provisions of the act which it is alleged grant such authority, becomes ineffective. There is no repeal in the case, and both statutes may stand, as neither is inconsistent with the other.

It is plain, also, that an amendment of the Commerce Act would not be an appropriate method of enacting the legislation contained in the Trust Act, for the reason that the latter act includes other subjects in addition to the contracts of or combinations among railroads, and is addressed to the [316] prohibition of other contracts besides those relating to transportation. The omission, therefore, to amend the Commerce Act furnishes no reason for claiming that the later statute does not apply to railroad transportation. Although the commerce statute may be described as a general code for the regulation and government of railroads upon the subjects treated of therein, it cannot be contended that it furnishes a complete and perfect set of rules and regulations which are to govern them in all cases, and that any subsequent act in relation to them must, when passed, in effect amend or repeal some provision of that statute. The statute does not cover all cases concerning transportation by railroad and all contracts relating thereto. It does not purport to cover such an extensive field.

The existence of agreements similar to this one may have been known to Congress at the time it passed the Commerce Act, although we are not aware, from the record, that an agreement of this kind had ever been made and publicly known prior to the passage of the Commerce Act. Yet if it had been known to Congress, its omission to prohibit it at that time, while prohibiting the pooling arrangements, is no reason for assuming that when passing the Trust Act it meant to except all contracts of railroad companies in regard to traffic rates from the operation of such act. Congress for its own reasons, even if aware of the existence of such agreements, did not see fit when it passed the Commerce Act to prohibit them with regard to railroad companies alone, and the act was not an appropriate place for general legislation on the subject. And at that time, and for several years thereafter, Congress did not think proper to legislate upon the

subject at all. Finally it passed this Trust Act, and in our opinion no obstacle to its application to contracts relating to transportation by railroads is to be found in the fact that the Commerce Act had been passed several years before, in which the entering into such agreements was not in terms prohibited.

It is also urged that the debates in Congress show beyond a doubt that the act as passed does not include railroads. Coun- [317] sel for the defendants refer in considerable detail to its history from the time of its introduction in the Senate to its final passage. As the act originally passed the Senate the first section was in substance as it stands at present in the statute. On its receipt by the House that body proposed an amendment, by which it was in terms made unlawful to enter into any contract for the purpose of preventing competition in the transportation of persons or property. As thus amended the bill went back to the Senate, which itself amended the amendment by making the act apply to any such contract as tended to raise prices for transportation above what was just and reasonable. This amendment by the Senate of the amendment proposed by the House was disagreed to by that body. The amendments were then considered by conference committees, and the first conference committee reported to each house in favor of the amendment of the Senate. This report was disagreed to and another committee appointed, which agreed to strike out both amendments and leave the bill as it stood when it first passed the Senate, and that report was finally adopted, and the bill thus passed.

Looking at the debates during the various times when the bill was before the Senate and the House, both on its original passage by the Senate and upon the report from the conference committees, it is seen that various views were declared in regard to the legal import of the act. Some of the members of the House wanted it placed beyond doubt or cavil that contracts in relation to the transportation of persons and property were included in the bill. Some thought the amendment unnecessary as the language of the act already covered it, and some refused to vote for the amendment or for the bill if the amendments were adopted on the ground that it would then interfere with the Interstate Commerce Act, and tend to cre-

ate confusion as to the meaning of each act. Senator Hoar (who was a member of the first committee of conference from the Senate), when reporting the result arrived at by the judiciary committee recommending the adoption of the House amendment, said: "The other clause of the House amendment is that contracts or agreements entered into for the pur- pose of [318] preventing competition in the transportation of persons or property from one State or Territory into another shall be deemed unlawful. That, the committee recommend shall be concurred in. *We suppose that it is already covered by the bill as it stands;* that is, that transportation is as much trade or commerce among the several States as the sale of goods in one State to be delivered in another, and, therefore, that it is covered already by the bill as it stands. But there is no harm in agreeing in an amendment which expressly describes it, and an objection to the amendment might be construed as if the Senate did not mean to include it; so we let it stand."

Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* v. *Union Pacific Railroad Company*, 91 U. S. 72, 79; *Aldridge* v. *Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell* v. *Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen* v. *Hertford College*, 3 Q. B. D. 693, 707.

The reason is that it is impossible to determine with certainty what construction was put upon an act by the members

of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort **[319]** to the history of the times when it was passed. (Cases cited, *supra*.) If such resort be had, we are still unable to see that the railroads were not intended to be included in this legislation.

It is said that Congress had very different matters in view and very different objects to accomplish in the passage of the act in question; that a number of combinations in the form of trusts and conspiracies in restraint of trade were to be found throughout the country, and that it was impossible for the state governments to successfully cope with them because of their commercial character and of their business extension through the different States of the Union. Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whiskey Trust and many others, and these trusts it was stated had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. To combinations and conspiracies of this kind it is contended that the act in question was directed, and not to the combinations of competing railroads to keep up their prices to a reasonable sum for the transportation of persons and property. It is true that many and various trusts were in existence at the time of the passage of the act, and it was probably sought to cover them by the provisions of the act. Many of them had rendered themselve offensive by the manner in which they exercised the great power that combined capital gave them. But a further investigation of "the history of the times" shows also that those trusts were not the only associations controlling a great combination of capital which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations among the different **[320]** roads. Whether these complaints were well or ill founded we do not presume at this time and under these circumstances to determine or to discuss. It is simply for the purpose of answering the statement that it was only to trusts of the nature above set forth that this legislation was directed, that the subject of the opinions of the people in regard to the actions of the railroad companies in this particular is referred to. A reference to this history of the times does not, as we think, furnish us with any strong reason for believing that it was only trusts that were in the minds of the members of Congress, and that railroads and their manner of doing business were wholly excluded therefrom.

Our attention is also called to one of the rules for the construction of statutes which has been approved by this court; that while it is the duty of courts to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so in order to carry out the legislative intent. *Brewer* v. *Blougher*, 14 Pet. 178, 198; *Petri* v. *Commercial Bank of Chicago*, 142 U. S. 644, 650; *McKee* v. *United States*, 164 U. S. 287. It is therefore urged that if, by a strict construction of the language of this statute it may be made to include railroads, yet it is evident from other considerations now to be mentioned that the real meaning of the legislature would not include them, and they must for that reason be excluded. It is said that this meaning is plainly to be inferred, because of fundamental differences both in an economic way and before the law between trade and manufacture on the one hand, and railroad transportation on the other. Among these differences are the public character of railroad business, and as a result the peculiar power of control and regulation possessed by the State over railroad companies. The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different

individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or [321] unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction; while, on the contrary, a railroad company must transport all persons and property that come to it, and it must do so at the same price for the same service, and the price must be reasonable, and it cannot at its will discontinue its business. It is also urged that there are evils arising from unrestricted competition in regard to railroads which do not exist in regard to any other kind of property, that it is so admitted by the latest and best writers on the subject, and that practical experience of the results of unrestricted competition among railroads tends directly to the same view; that the difference between railroad property on the one hand, and all other kinds of property on the other hand, is so plain that entirely different economic results follow from unrestricted competition among railroads from those which obtain in regard to all other kinds of business. It is also said that the contemporaneous industrial history of the country, the legal situation in regard to railroad properties at the time of the enactment of this statute, its legislative history, the ancient and constantly maintained different legal effect and policy regarding railway transportation and ordinary trade and manufacture, together with a just regard for interests of such enormous magnitude as are represented by the railroads of the country, all tend to show that Congress in passing the Anti-Trust Act never could have contemplated the inclusion of railroads within its provisions. It is, therefore, claimed to be the duty of the court, in carrying out the rule of statutory construction, above stated, to restrict the meaning of these general words of the statute which would include railroads, because, from the considerations above mentioned, it is plain that Congress never intended that railroads should be included.

Many of the foregoing assertions may be well founded, while at the same time the correctness of the conclusions sought to be drawn therefrom need not be conceded. The points of difference between the railroad and other corporations are many and great. It cannot be disputed that a railroad [322] is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature. The company may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things. But the very fact of the public character of a railroad would itself seem to call for special care by the legislature in regard to its conduct, so that its business should be carried on with as much reference to the proper and fair interests of the public as possible. While the points of difference just mentioned and others do exist between the two classes of corporations, it must be remembered they have also some points of resemblance. Trading, manufacturing and railroad corporations are all engaged in the transaction of business with regard to articles of trade and commerce, each in its special sphere, either in manufacturing or trading in commodities or in their transportation by rail. A contract among those engaged in the latter business by which the prices for the transportation of commodities traded in or manufactured by the others is greatly enhanced from what it otherwise would be if free competition were the rule, affects and to a certain extent restricts trade and commerce, and affects the price of the commodity. Of this there can be no question. Manufacturing or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade and commerce, which when carried out affect the interests of the public. Why should not a railroad company be included in general legislation aimed at the prevention of that kind of agreement made in restraint of trade, which may exist in all companies, which is substantially of the same nature wherever found, and which tends very much towards the same results, whether put in practice by a trading and manufacturing or by a railroad company? It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggran- [323] dizement as against the public interest. In business or trading combi-

nations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital. In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress and, perhaps, ruin shall be its accompaniment in regard to some of those who were engaged in the old methods. A change from stage coaches and canal boats to railroads threw at once a large number of men out of employment; changes from hand labor to that of machinery, and from operating machinery by hand to the application of steam for such purpose, leave behind them for the time a number of men who must seek other avenues of livelihood. These are misfortunes which seem to be the necessary accompaniment of all great industrial changes. It takes time to effect a readjustment of industrial life so that those who are thrown out of their old employment, by reason of such changes as we have spoken of, may find opportunities for labor in other departments than those to which they have been accustomed. It is a misfortune, but yet in such cases it seems to be the inevitable accompaniment of change and improvement.

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the com- [324] bination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to

raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results naturally flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common. It is entirely appropriate generally to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business; but when the evil to be remedied is similar in both kinds of corporations, such as contracts which are unquestionably in restraint of trade, we see no reason why similar rules should not be promulgated in regard to both, and both be covered in the same [325] statute by general language sufficiently broad to include them both. We see nothing either in contemporaneous history, in the legal situation at the time of the passage of the statute, in its legislative history, or in any general difference in the nature or kind of these trading

or manufacturing companies from railroad companies, which would lead us to the conclusion that it cannot be supposed the legislature in prohibiting the making of contracts in restraint of trade intended to include railroads within the purview of that act.

Neither is the statute, in our judgment, so uncertain in its meaning, or its language so vague, that it ought not to be held applicable to railroads. It prohibits contracts, combinations, etc., in restraint of trade or commerce. Transporting commodities is commerce, and if from one State to or through another it is interstate commerce. To be reached by the Federal statute it must be commerce among the several States or with foreign nations. When the act prohibits contracts in restraint of trade or commerce, the plain meaning of the language used includes contracts which relate to either or both subjects. Both trade and commerce are included so long as each relates to that which is interstate or foreign. Transportation of commodities among the several States or with foreign nations falls within the description of the words of the statute with regard to that subject, and there is also included in that language that kind of trade in commodities among the States or with foreign nations which is not confined to their mere transportation. It includes their purchase and sale. Precisely at what point in the course of the trade in or manufacture of commodities the statute may have effect upon them, or upon contracts relating to them, may be somewhat difficult to determine, but interstate transportation presents no difficulties. In *United States* v. *E. C. Knight Co.* 156 U. S. 1, heretofore cited, it was in substance held, reiterating the language of Mr. Justice Lamar in *Kidd* v. *Pearson*, 128 U. S. 1, that the intent to manufacture or export a manufactured article to foreign nations or to send it to another State did not determine the time when the article or product passed from the control of the State and **[326]** belonged to commerce. The difficulty in determining that question, however, is no reason for denying effect to language which, by its terms, plainly includes the transportation of commodities among the several States or with foreign nations, and which may also be the subject of contracts or combinations in restraint of such commerce. The difficulty

of the subject, so far as the trade in or the manufacture of commodities is concerned, arises from the limited control which Congress has over the matter of trade or manufacture. It was said by Mr. Justice Lamar in *Kidd* v. *Pearson* (*supra*): "If it be held that the term" (commerce) "includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include the productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries and mining—in short, every branch of human industry."

In the *Knight Company case* (*supra*) it was said that this statute applied to monopolies in restraint of interstate or international trade or commerce, and not to monopolies in the manufacture even of a necessary of life. It is readily seen from these cases that if the act do not apply to the transportation of commodities by railroads from one State to another or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative.

Still another ground for holding the act inapplicable is urged, and that is that the language covers only contracts or combinations like trusts or those which, while not exactly trusts, are otherwise of the same form or nature. This is clearly not so.

While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever.

We think, after a careful examination, that the statute **[327]** covers, and was intended to cover, common carriers by railroad.

Second. The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or

with foreign nations, is hereby declared to be illegal"? Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature?

We are asked to regard the title of this act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a Federal statute in order to be dealt with in a Federal court. It is said that when terms which are known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is "to protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the Federal statute. We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.

It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the [328] act; that the common law meaning of the term "contract in restraint of trade" includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact

restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

Proceeding, however, upon the theory that the statute did not mean what its plain language imported, and that it intended in its prohibition to denounce as illegal only those contracts which were in unreasonable restraint of trade, the courts below have made an exhaustive investigation as to the general rules which guide courts in declaring contracts to be void as being in restraint of trade, and therefore against the public policy of the country. In the course of their discussion [329] of that subject they have shown that there has been a gradual though great alteration in the extent of the liberty granted to the vendor of property in agreeing, as part consideration for his sale, not to enter into the same kind of business for a certain time or within a certain territory. So long as the sale was the *bona fide* consideration for the promise and was not made a mere excuse for an evasion of the rule itself, the later authorities, both in England and in this country, exhibit a strong tendency towards enabling the parties to make such a contract in relation to the sale of property, including an agreement not to enter into the same kind of business, as they may think proper, and this with the view to

granting to a vendor the freest opportunity to obtain the largest consideration for the sale of that which is his own. A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question. But we cannot see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the law-making body that enacted it.

The great stress of the argument for the defendants on this branch of the case has been to show, if possible, some reason in the attendant circumstances, or some fact existing in the nature of railroad property and business upon which to found the claim, that although by the language of the statute agreements or combinations in restraint of trade or commerce are included, the statute really means to declare illegal only those contracts, etc., which are in unreasonable restrain of trade. In order to do this the defendants call attention to many facts which they have already referred to in their argument, upon the point that railroads were not included at all in the statute. They again draw attention to the fact of the peculiar nature of [330] railroad property. When a railroad is once built, it is said, it must be kept in operation; it must transport property, when necessary in order to keep its business, at the smallest price and for the narrowest profit, or even for no profit, provided running expenses can be paid, rather than not to do the work; that railroad property cannot be altered for use for any other purpose, at least without such loss as may fairly be called destructive; that competition while, perhaps, right and proper in other business, simply leads in railroad business to financial ruin and insolvency, and to the operation of the road by receivers in the interest of its creditors instead of in that of its owners and the public; that a contest between a receiver of an insolvent corporation and one which is still

solvent tends to ruin the latter company, while being of no benefit to the former; that a receiver is only bound to pay operating expenses, so he can compete with the solvent company and oblige it to come down to prices incompatible with any profit for the work done, and until ruin overtakes it to the destruction of innocent stockholders and the impairment of the public interests.

To the question why competition should necessarily be conducted to such an extent as to result in this relentless and continued war, to eventuate only in the financial ruin of one or all of the companies indulging in it, the answer is made that if competing railroad companies be left subject to the sway of free and unrestricted competition the results above foreshadowed necessarily happen from the nature of the case; that competition being the rule, each company will seek business to the extent of its power, and will underbid its rival in order to get the business, and such underbidding will act and react upon each company until the prices are so reduced as to make it impossible to prosper or live under them; that it is too much to ask of human nature for one company to insist upon charges sufficiently high to afford a reasonable compensation, and while doing so to see its patrons leave for rival roads who are obtaining its business by offering less rates for doing it than can be afforded and a fair profit obtained therefrom. Sooner than experience ruin from mere inanition, efforts will [331] be made in the direction of meeting the underbidding of its rival until both shall end in ruin. The only refuge, it is said, from this wretched end lies in the power of competing roads agreeing among themselves to keep up prices for transportation to such sums as shall be reasonable in themselves, so that companies may be allowed to save themselves from themselves, and to agree not to attack each other, but to keep up reasonable and living rates for the services performed. It is said that as railroads have a right to charge reasonable rates it must follow that a contract among themselves to keep up their charges to that extent is valid. Viewed in the light of all these facts it is broadly and confidently asserted that it is impossible to believe that Congress or any other intelligent and honest legislative body could ever have intended to include all contracts or combinations in re-

straint of trade, and as a consequence thereof to prohibit competing railways from agreeing among themselves to keep up prices for transportation to such a rate as should be fair and reasonable.

These arguments it must be confessed bear with much force upon the policy of an act which should prevent a general agreement upon the question of rates among competing railroad companies to the extent simply of maintaining those rates which were reasonable and fair.

There is another side to this question, however, and it may not be amiss to refer to one or two facts which tend to somewhat modify and alter the light in which the subject should be regarded. If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is **[332]** the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill-will of the road itself in all his future dealings with it. To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

It must also be remembered that railways are public corporations organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of the citizen *in invitum* is not the least, *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, 657; that many of them are the donees of large tracts of public lands and of gifts of money by municipal corporations, and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for **[333]** their shareholders. The business which the railroads do is of a public nature, closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer and the trader. It is of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interest.

We recognize the argument upon the part of the defendants that restraint upon the business of railroads will not be prejudicial to the public interest so long as such restraint provides for reasonable rates for transportation and prevents the deadly competition so liable to result in the ruin of the roads and to thereby impair their usefulness to the public, and in that way to prejudice the public interest. But it must be remembered that these results are by no means admitted with unanimity; on the contrary, they are earnestly and warmly denied on the part of the public and by those who assume to

defend its interests both in and out of Congress. Competition, they urge, is a necessity for the purpose of securing in the end just and proper rates.

It was said in *Gibbs* v. *Baltimore Gas Company*, 130 U. S. 396, at page 408, by Mr. Chief Justice Fuller, as follows: "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *Shepard* v. *Milwaukee Gas Co.*, 6 Wisconsin, 539; *Chicago Gas Light & Coke Co.* v. *People's Gas Light & Coke Co.*, 121 Illinois, 530; *St. Louis* v. *St. Louis Gas Light Co.*, 70 Missouri, 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, *Printing &c. Registering Co.* v. *Sampson*, L. R. 19 Eq. 462, yet in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or **[334]** sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transportation Co.* v. *Ohio River Pipe Line Co.*, 22 West Va. 600; *Chicago &c. Gas Co.* v. *People's Gas Co.*, 121 Illinois, 530; *Western Union Telegraph Co.* v. *American Union Telegraph Co.*, 65 Georgia, 160."

It is true that in the *Gibbs case* there was a special statute which prohibited the company from entering into any consolidation, combination or contract with any other gas company whatever, and it was provided that any attempt to do so or to make such combination or contract should be utterly null and void. The above extract from the opinion of the court is made for the purpose of showing the difference which exists between a private and a public corporation—that kind of a public corporation which, while doing business for remuneration, is yet so connected in interest with the public as to give a public character to its business—and it is seen that while, in the absence of a statute prohibiting them, contracts

of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads where it well may be that any restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interests.

The plaintiffs are, however, under no obligation in order to maintain this action to show that by the common law all agreements among competing railroad companies to keep up rates to such as are reasonable were void as in restraint of trade or commerce. There are many cases which look in that direction if they do not precisely decide that point. Some of them are referred to in the opinion in the *Baltimore Gas Company case*, above cited. The case of the *Mogul Steamship Company* v. *McGregor*, 21 Q. B. D. 544; 23 Q. B. D. 598; 1892, App. Cas. 25, has been cited by the courts below as holding in principle that contracts of this nature are valid at common law. The agreement held valid there was **[335]** an agreement for lowering rates of transportation among the parties thereto, and it was entered into for the purpose of driving out of trade rival steamships in order that thereafter the rates might be advanced. The English courts held that the agreement was not a conspiracy, and that it was valid, although the result aimed at was to drive a rival out of the field, because so long as the injury to such rival was not the sole reason for the agreement, but self-interest the predominating motive, there was nothing wrong in law with an agreement of that kind. But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration. The provisions of the Interstate Commerce Act relating to reasonable rates, discriminations, etc., do not authorize such an agreement as this, nor do they authorize any other agreements which would be inconsistent with the provisions of this act.

The general reasons for holding agreements of this nature to be invalid even at common law, on the part of railroad companies are quite strong, if not entirely conclusive.

Considering the public character of such corporations, the privileges and franchises which they have received from the public in order that they might transact business, and bearing in mind how closely and immediately the question of rates for transportation affects the whole public, it may be urged that Congress had in mind all the difficulties which we have before suggested of proving the unreasonableness of the rate, and might, in consideration of all the circumstances, have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce, regardless of the question whether such agreements were reasonable or the reverse.

It is true that, as to a majority of those living along its line, each railroad is a monopoly. Upon the subject now under consideration it is well said by Judge Oliver P. Shiras, United States District Judge, Northern District of Iowa, in his very able dissenting opinion in this case in the United States Circuit Court of Appeals, as follows:

[336] "As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact the action of this corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer and the merchant, from the sale of the products of the farm, the workshop and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country. . . . A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein. . . . . In the opinion of the court are found citations from the reports of the Interstate Commerce Commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate

charges, and the advantages that are gained in many directions by proper conference and concert of action among the com- [337] peting lines. It may be entirely true that as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community, but I fail to perceive the force of the argument that because railway companies *through their own action cause evils to themselves* and the public by sudden changes or reductions in tariff rates they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they can not, by combination and agreements among themselves, bring about this change. The fact that the provisions of the Interstate Commerce act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in does not show that it was the intent of Congress in the enactment of that statute to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates."

[338] The whole opinion is a remarkably strong presentation of the views of the learned judge who wrote it.

Still, again, it is answered that the effects of free competition among railroad companies, as described by the counsel for the companies themselves in the course of their argument, are greatly exaggerated. According to that argument, the moment an agreement of this nature is prohibited the railroads commence to cut their rates, and they cease only with their utter financial ruin, leaving, perhaps, one to raise rates indefinitely when its rivals have been driven away. It is said that this is a most overdrawn statement, and that while absolutely free competition may have in some instances and for a time resulted in injury to some of the railroads, it is not at all clear that the general result has been other than beneficial to the whole public, and not in the long run detrimental to

the prosperity of the roads. It is matter of common knowledge that agreements as to rates have been continually made of late years, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent. Rate wars go on notwithstanding any agreement to the contrary, and the struggle for business among competing roads keeps on, and in the nature of things will keep on, any alleged agreement to the contrary notwithstanding, and it is only by the exercise of good sense and by the presence of a common interest that railroads, without entering into any affirmative agreement in regard thereto, will keep within the limit of exacting a fair and reasonable return for services rendered. These agreements have never been found really effectual for any extended period.

The Interstate Commerce Commission, from whose reports quotations have been quite freely made by counsel for the purpose of proving the views of its learned members in regard to this subject, has never distinctly stated that agreements among competing railroads to maintain prices are to be commended, or that the general effect is to be regarded as beneficial. They have stated in their fourth annual report that competition may degenerate into rate wars, and that such wars are as unsettling to the business of the country **[339]** as they are mischievous to the carriers, and that the spirit of existing law is against them. They then add: "Agreements between railroad companies which from time to time they have entered into with a view to prevent such occurrences have never been found effectual, and for the very sufficient reason, that the mental reservations in forming them have been quite as numerous and more influential than the written stipulations." It would seem true, therefore, that there is no guaranty of financial health to be found in entering into agreements for the maintenance of rates, nor is financial ruin or insolvency the necessary result of their absence.

The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the

way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.

As a result of this review of the situation, we find two very widely divergent views of the effects which might be expected to result from declaring illegal all contracts in restraint of trade, etc.; one side predicting financial disaster and ruin to competing railroads, including thereby the ruin of shareholders, the destruction of immensely valuable properties, and the consequent prejudice to the public interest; while on the other side predictions equally earnest are made that no such mournful results will follow, and it is urged that there is a necessity, in order that the public interest may be fairly and justly protected, to allow free and open competition among railroads upon the subject of the rates for the transportation of persons and property.

[340] The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and

ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable. Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any con- **[341]** tract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject.

The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust Act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself cannot be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is

denied on the part of the defendants; and if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the Government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt **[342]** that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.

For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

One or two subsidiary questions remain to be decided.

It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation.

Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise.

It is also argued that the United States have no standing in court to maintain this bill; that they have no pecuniary interest in the result of the litigation or in the question to be decided by the court. We think that the fourth section of **[343]** the act invests the Government with full power and authority to bring such an action as this, and if the facts be proved, an injunction should issue. Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy. The subject is fully and ably discussed in the case of *In re Debs*, 158 U. S. 564. See also *Cincinnati, New Orleans &c. Railway* v. *Interstate Commerce Commission*, 162 U. S. 184; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197.

For the reasons given, the decrees of the United States Circuit Court of Appeals and of the Circuit Court for the District of Kansas must be

Reversed, and the case remanded to the Circuit Court for further proceedings in conformity with this opinion.

Mr. Justice White, with whom concurred Mr. Justice Field, Mr. Justice Gray and Mr. Justice Shiras, dissenting.

It is unnecessary to refer to the authorities showing that although a contract may in some measure restrain trade, it is not for that reason void or even voidable unless the restraint

which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine.

The contract between the railway companies which the court holds to be void because it is found to violate the act of Congress of the 2d of July, 1890, 26 Stat. 209, substantially embodies only an agreement between the corporations by which a uniform classification of freight is obtained, by which the secret under-cutting of rates is sought to be avoided, and the rates as stated in the published rate sheets, and which, as a general rule, are required by law to be filed with the Interstate Commerce Commission, are secured against arbitrary and sudden changes. I content myself with giving this mere outline of the results of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of **[344]** the court rests upon that hypothesis. I commence, then, with these two conceded propositions, one of law and the other of fact, first, that only such contracts as unreasonably restrain trade are violative of the general law, and, second, that the particular contract here under consideration is reasonable, and therefore not unlawful if the general principles of law are to be applied to it.

The theory upon which the contract is held to be illegal is that even though it be reasonable, and hence valid, under the general principles of law, it is yet void, because it conflicts with the act of Congress already referred to. Now, at the outset, it is necessary to understand the full import of this conclusion. As it is conceded that the contract does not unreasonably restrain trade, and that if it does not so unreasonably restrain, it is valid under the general law, the decision, substantially, is that the act of Congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts. But this proposition, I submit, is tantamount to an assertion that the act of Congress is itself unreasonable. The difficulty of meeting, by reasoning, a premise of this nature is frankly conceded, for, of course, where the fundamental proposition upon which the whole contention rests is that the act of Congress is unreasonable, it would seem conducive to no useful purpose to invoke reason

as applicable to and as controlling the construction of a statute which is admitted to be beyond the pale of reason. The question, then, is, is the act of Congress relied on to be so interpreted as to give it a reasonable meaning, or is it to be construed as being unreasonable and as violative of the elementary principles of justice?

The argument upon which it is held that the act forbids those reasonable contracts which are universally admitted to be legal is thus stated in the opinion of the court, and I quote the exact language in which it is there expressed, lest in seeking to epitomize I may not accurately reproduce the thought which it conveys:

"Contracts in restraint of trade have been known and [345] spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain trade. Some of such contracts have been held void and unenforcible in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforcible as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

To state the proposition in the form in which it was earnestly pressed in the argument at bar, it is as follows: Congress has said every contract in restraint of trade is illegal. When the law says every, there is no power in the courts, if they correctly interpret and apply the statute, to substitute the word "some" for the word "every." If Congress had meant to forbid only restraints of trade which were unreasonable it would have said so; instead of doing this it has said *every*, and this word of universality embraces both contracts which are reasonable and unreasonable.

Is the proposition which is thus announced by the court, and which was thus stated at bar, well founded? is the first question which arises for solution. I quote the title and the

first section of the act which, it is asserted, if correctly interpreted, destroys the right to make just and reasonable contracts:

[346] "An act to protect trade and commerce against unlawful restraints and monopolies.

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

Is it correct to say that at common law the words "restraint of trade" had a generic signification which embraced all contracts which restrained the freedom of trade, whether reasonable or unreasonable, and, therefore, that all such contracts are within the meaning of the words "every contract in restraint of trade"? I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, "restrain trade," are not within the meaning of the words. It is true that in the adjudged cases language may be found referring to contracts in restraint of trade which are valid because reasonable. But this mere form of expression, used not as a definition, does not maintain the contention that such contracts are embraced within the general terms every contract in restraint of trade. The rudiments of the doctrine of contracts in restraint of trade are found in the common law at a very early date. The first case on the subject is reported in 6 Year Book 5, 2 Hen. V, and is known as *Dier's case*. That was an action of damages upon a bond conditioned that the defendant should not practise his trade as a dyer at a particular place during a limited period, and it was held that the contract was illegal. The principle upon which this case was decided was not described as one forbidding contracts in restraint of trade, but was stated to be one by which contracts restricting the liberty of

[347] the subject were forbidden. The doctrine declared in that case was applied in subsequent cases in England prior to the case of *Mitchel* v. *Reynolds*, decided in 1711, and reported in 1 P. Wms. 181. There the distinction between general restraints and partial restraints was first definitely formulated, and it was held that a contract creating a partial restraint was valid and one creating a general restraint was not. The theory of partial and general restraints established by that case was followed in many decided cases in England, not, however, without the correctness of the difference between the two being in some instances denied and in others questioned, until the matter was set finally at rest by the House of Lords in *Nordenfelt* v. *The Maxim Nordenfelt Guns and Ammunition Co.*, reported in (1894) App. Cas. 535. In that case it was held that the distinction between partial and general restrant was an incorrect criterion, but that whether a contract was invalid because in restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreasonable. If reasonable, it was not a contract in restraint of trade, and if unreasonable it was.

The decisions of the American courts substantially conform to both the development and ultimate results of the English cases. Whilst the rule of partial and general restraint has been either expressly or impliedly admitted, the exact scope of the distinction between the two has been the subject of discussion and varying adjudication. And although it is accurate to say that in the cases expression may be found speaking of contracts as being in form, in restraint of trade and yet valid, it results from an analysis of all the American cases, as it does from the English, that these expressions in no way imply that contracts which were valid because they only partially restrained trade were yet considered as embraced within the definition of contracts in restraint of trade. On the contrary, the reason of the cases, where contracts partially restraining trade were excepted and hence held to be valid, was because they were not contracts in restraint of trade in the legal meaning of those words. Referring to the modern and Ameri- [348] can rule on the

subject, Beach in his recent treatise on the Modern Law of Contracts, at section 1569, says:

> "The tendency of modern thought and decisions has been no longer to uphold in its strictness the doctrine which formerly prevailed respecting agreements in restraint of trade. The severity with which such agreements were treated in the beginning has relaxed more and more *by exceptions and qualifications*, and a gradual change has taken place, brought about by the growth of industrial activities, and the enlargement of commercial facilities which tend to render such agreements less dangerous, because monopolies are less easy of accomplishment."

The fact that the exclusion of reasonable contracts from the doctrine of restraint of trade was predicated on the conclusion that such contracts were no longer considered as coming within the meaning of the words "restraint of trade," is nowhere more clearly and cogently stated than in the opinion of the Court of Appeals of the State of New York, in the case of *Matthews* v. *Associated Press of New York*, 136 N. Y. 333. In considering the contention that a by-law of the defendant association which prohibited its members from receiving or publishing "the regular news dispatches of any other news association covering a like territory and organized for a like purpose" was void, because it tended to restrain trade and competition and to create a monopoly, the learned judge said (p. 340):

> "We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of a trade. The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. *The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England.* The [349] cases in this court which are the latest manifestations of the turn in the tide are cited in the opinion in this case at general term, and are *Diamond Match Co.* v. *Roeber*, 106 N. Y. 73; *Hodge* v. *Neill*, 107 N. Y. 244; *Leslie* v. *Lorillard*, 110 N. Y. 519.
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> "So that when we agree that a by-law which is in restraint of trade is void, we are still brought back *to the question what is a restraint of trade in the modern definition of that term?* The authority to make by-laws must also be limited by the scope and purpose of the association. I think this by-law is thus limited, and that *it is not in restraint of trade as the courts now interpret that phrase.*"

This lucid statement aptly sums up the process of reasoning by which partial and reasonable contracts came no longer

to be considered as included in the words contracts in restraint of trade, and points to the fallacy embodied in the proposition that contracts which were held not to be in restraint of trade were yet covered by the words in restraint of trade; that is, that although they were not such contracts, yet they continued so to be. After analyzing the provisions of the by-law the opinion proceeds as follows (p. 341):

"Thus a by-law of the nature complained of would have a tendency to strengthen the association and to render it more capable of filling the duty it was incorporated to perform. A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business and must give up all such business as he had theretofore done. *Such an agreement would not be in restraint of trade*, although its direct effect might be to restrain to some extent the trade which had been done."

This adds cogency to the demonstration, and shows in the most conclusive manner that the words contracts in restraint of trade do not continue to define those contracts which are no longer covered by the legal meaning of the words.

This court has not only recognized and applied the distinction between partial and general restraints, but has also decided that the true test whether a contract be in restraint of trade is **[350]** not whether in a measure it produces such effect, but whether under all the circumstances it is reasonable. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, 68; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 409. As it is unnecessary here to enter into a detailed examination of the cases, I append in the margin a reference to decisions of some of the state courts and to several writers on the subject of contracts in restraint of trade, by whom the doctrine is reviewed and the authorities very fully referred to.[1]

It follows from the foregoing statement that at common

[1] *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Leslie* v. *Lorillard*, 110 N. Y. 519, 533; *Beal* v. *Chase*, 31 Michigan, 490, 518; *National Benefit Co.* v. *Union Hospital Co.*, 45 Minnesota, 272; *Ellerman* v. *Chicago Junction Railways &c. Co.*, 49 N. J. Eq. 215, 217; *Richards* v. *Am. Desk &c. Co.*, 87 Wisconsin, 503, 514; Note to 2 Parsons on Contracts, p. 748; Note to *Angier* v. *Webber*, 92 Am. Dec. 751 (1867); Note to *Mitchel* v. *Reymolds*, 1 Smith's Leading Cases, 705, and Supplemental Note, 9th Am. ed. 716 (1888); Review of Cases by A. M. Eaton in 4 Harv. Law Review, p. 129 (1890); Patterson on Restraint of Trade (1891).

law contracts which only partially restrain trade, to use the precise language of Maule, Justice, in *Rannie* v. *Irvine*, 7 Man. & G. 969, 978, were "*an exception engrafted upon that rule*," that is, the rule as to contracts in restraint of trade, "*and that the exception is in furtherance of the rule itself.*" I submit, also, manifestly that the further development of the doctrine by which it was decided that if a contract was reasonable it would not be held to be included within contracts in restraint of trade, although such contract might, in some measure, produce such an effect, was also an exception to the general rule as to the invalidity of contracts in restraint of trade. The theory, then, that the words restraint of trade define and embrace all such contracts without reference to whether they are reasonable, amounts substantially to saying that, by the common law and the adjudged American cases, certain classes of contracts were carved out of and excepted from the general rule, and yet were held to remain embraced within the general rule from which they were removed. But the obvious conflict which is shown by this contradictory result to which the contention leads rests not upon the mere form of statement but upon the **[351]** reason of things. This will, I submit, be shown by a very brief analysis of the reasons by which partial restraints were held not to be embraced in contracts in restraint of trade, and by which ultimately all reasonable contracts were likewise decided not to be so embraced. That is to say, that the reasoning by which the exceptions were created conclusively shows the error of contending that the words contracts in restraint of trade continued to embrace those reasonable contracts which those words no longer described.

It is perhaps true that the principle by which contracts in restraint of the freedom of the subject or of trade were held to be illegal was first understood to embrace all contracts which in any degree accomplished these results. But as trade developed it came to be understood that if contracts which only partially restrained the freedom of the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, both the freedom of contract and trade itself would be destroyed. Hence, from the reason of things, arose the distinction that where contracts operated

only a partial restraint of the freedom of contract or of trade they were not in contemplation of law contracts in restraint of trade. And it was this conception also which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which, in some measure, restrained the freedom of contract and of trade, was in reality, when considered in all its aspects, a contract of that character or one which was necessary to the freedom of contract and of trade. To define, then, the words "in restraint of trade" as embracing every contract which in any degree produced that effect would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade, and therefore nothing to restrain. The dilemma which would necessarily arise from defining the words "contracts in restraint of trade" so as to destroy trade by rendering illegal the contracts upon which trade depends, and yet presupposing that trade would continue and should not be restrained, is shown by an argument advanced, and which has been com- **[352]** pelled by the exigency of the premise upon which it is based. Thus, after insisting that the word "every" is all-embracing, it is said from the necessity of things it will not be held to apply to covenants in restraint of trade which are collateral to a sale of property, because not "supposed" to be within the letter or spirit of the statute. But how, I submit, can it be held that the words "*every* contract in restraint of trade" *embrace all* such contracts, and yet at the same time be said that certain contracts of that nature are not included? The asserted exception not only destroys the rule which is relied on, but it rests upon no foundation of reason. It must either result from the exclusion of particular classes of contracts, whether they be reasonable or not, or it must arise from the fact that the contracts referred to are merely collateral contracts. But many collateral contracts may contain provisions which make them unreasonable. The exception which is relied upon, therefore, as rendering possible the existence of trade to be restrained is either arbitrary or it is unreasonable.

But, admitting *arguendo* the correctness of the proposition by which it is sought to include every contract, however reasonable, within the inhibition of the law, the statute, considered as a whole, shows, I think, the error of the construction placed upon it. Its title is "An act to protect trade and commerce against unlawful restraints and monopolies." The word "unlawful" clearly distinguishes between contracts in restraint of trade which are lawful and those which are not. In other words, between those which are unreasonably in restraint of trade, and consequently invalid, and those which are reasonable and hence lawful. When, therefore, in the very title of the act the well-settled distinction between lawful and unlawful contracts is broadly marked, how can an interpretation be correct which holds that all contracts, whether lawful or not, are included in its provisions? Whilst it is true that the title of an act cannot be used to destroy the plain import of the language found in its body, yet when a literal interpretation will work out wrong or injury, or where the words of the statute are ambiguous, the title may be resorted to as an instrument of construction. In *United States* **[353]** v. *Palmer*, 3 Wheat. 610, where general language found in the body of a criminal statute was given a narrow and restricted meaning, Mr. Chief Justice Marshall, in the course of the opinion, said (p. 631): "The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is 'An act for the punishment of certain crimes against the United States.' It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish."

So, also, in *United States* v. *Union Pacific Railroad*, 91 U. S. 72, where the construction of a statute was involved, it was held that the interpretation adopted was supported by the title, which disclosed the general purpose which Congress had in view in adopting the law under consideration. The same rule was announced in *Smythe* v. *Fiske*, 23 Wall. 374, 380, and *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, and cases there cited.

Pretermitting the consideration of the title, it cannot be

denied that the words "restraint of trade" used in the act in question had long prior to the adoption of that act been construed as not embracing reasonable contracts. The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled, by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. Particularly is this rule imperative where the statute in which the words are used creates a crime, as does the statute under consideration, and gives no specific definition of the crime created. Thus in *United States* v. *Palmer* (*supra*), Mr. Chief Justice Marshall, referring to the term "robbery" as used in the statute, said (p. 630): "Of the meaning of the term 'robbery,' as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law."

[354] If these obvious rules of interpretation be applied, it seems to me they render it impossible to construe the words every restraint of trade used in the act in any other sense than as excluding reasonable contracts, as the fact that such contracts were not considered to be within the rule of contracts in restraint of trade, was thoroughly established both in England and in this country at the time the act was adopted. It is, I submit, not to be doubted that the interpretation of the words "every contract in restraint of trade," so as to embrace within its purview every contract, however reasonable, would certainly work an enormous injustice and operate to the undue restraint of the liberties of the citizen. But there is no canon of interpretation which requires that the letter be followed, when by so doing an unreasonable result is accomplished. On the contrary, the rule is the other way, and exacts that the spirit which vivifies, and not the letter which killeth, is the proper guide by which to correctly interpret a statute. In *Smythe* v. *Fiske*, 23 Wall. 374, 380, this court declared that "a thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." In *Lau Ow Bew* v. *The United States*, 144 U. S. 47,

this court, speaking through Mr. Chief Justice Fuller, said (p. 59):

"Nothing is better settled than that statutes should receive a sensible contruction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of the Holy Trinity* v. *United States*, 143 U. S., 457; *Henderson* v. *Mayor of New York*, 92 U. S., 259; *United States* v. *Kirby*, 7 Wall., 482; *Oates* v. *National Bank*, 100 U. S., 239."

In all the cases there cited the literal language of the statute was disregarded, in order to restrict its operation within reason. To those cases may also be added *United States* v. *Mooney*, 116 U. S. 104, where it was contended that by the act of March 3, 1875, c. 137, the Circuit Courts were vested with jurisdiction concurrent with District Courts over certain suits. The plausibility of the argument, based upon the literal language of the statute, was conceded by the court, but the **[355]** results which would follow from sustaining the construction contended for were pointed out by the court, and it was observed (p. 107): "A construction which involves such results was clearly not contemplated by Congress."

Indeed, it seems to me there can be no doubt that reasonable contracts cannot be embraced within the provisions of the statute if it be interpreted by the light of the supreme rule commanding that the intention of the law must be carried out, and it must be so construed as to afford the remedy and frustrate the wrong contemplated by its enactment.

The plain intention of the law was to protect the liberty of contract and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the liberty of the individual to contract and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority. Thus, a law in favor of freedom of contract, it seems to me, is so interpreted as to gravely impair that freedom. Progress and not reaction was the purpose of the act of Congress. The construction now

given the act disregards the whole current of judicial authority and tests the right to contract by the conceptions of that right entertained at the time of the year-books instead of by the light of reason and the necessity of modern society. To do this violates, as I see it, the plainest conception of public policy; for as said by Sir G. Jessel, Master of the Rolls, in *Printing &c. Company* v. *Sampson*, L. R. 19 Eq. 462, "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."

The remedy intended to be accomplished by the act of Congress was to shield against the danger of contract or combi- **[356]** nation by the few against the interest of the many and to the detriment of freedom. The construction now given, I think, strikes down the interest of the many to the advantage and benefit of the few. It has been held in a case involving a combination among workingmen, that such combinations are embraced in the act of Congress in question, and this view was not doubted by this court. *In re Debs*, 64 Fed. Rep. 724, 745–755; 158 U. S. 564. The interpretation of the statute, therefore, which holds that reasonable agreements are within its purview, makes it embrace every peaceable organization or combination of the laborer to benefit his condition either by obtaining an increase of wages or diminution of the hours of labor. Combinations among labor for this purpose were treated as illegal under the construction of the law which included reasonable contracts within the doctrine of the invalidity of contract or combinations in restraint of trade, and they were only held not to be embraced within that doctrine either by statutory exemption therefrom or by the progress which made reason the controlling factor on the subject. It follows that the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition. It is therefore, as I see it, absolutely true to say that the construction now adopted which works out such results not only frustrates the plain purpose intended to be accomplished by Congress, but also makes the statute

tend to an end never contemplated, and against the accomplishment of which its provisions were enacted.

But conceding for the sake of argument that the words "every contract in restraint of trade," as used in the act of Congress in question, prohibits all such contracts however reasonable they may be, and therefore that all that great body of contracts which are commonly entered into between individuals or corporations and which promote and develop trade, and which have been heretofore considered as lawful, are no longer such; and conceding also that agreements entered into by associations of workingmen to peaceably better their condition either by obtaining an increase or preventing a decrease **[357]** of wages, or by securing a reduction in the hours of labor, or for mutually protecting each other from unjust discharge, or for other reasonable purposes, have become unlawful, it remains to consider whether the provisions of the act of 1890 were intended to apply to agreements made between carriers for the purpose of classifying the freight to be by them carried, or preventing secret cutting of the published rates; in other words, whether the terms of the statute were intended to apply to contracts between carriers entered into for the purpose of securing fairness in their dealings with each other and tending to protect the public against improper discrimination and sudden changes in rates. To answer this question involves deciding whether the act here relied upon was intended to abrogate the provisions of the act of Congress of the 4th of February, 1887, and the amendments thereto, commonly known as the Interstate Commerce Act. The question is not whether railway companies may not violate the terms of the statute of 1890 if they do acts which it forbids and punishes, but whether that statute was intended to abrogate the power of railway companies to make contracts with each other which are either expressly sanctioned by the Interstate Commerce Act or the right to make which arises by reasonable implication from the terms of that act; that is to say, not whether the act of 1890 is not operative upon all persons and corporations, but whether, being so generally operative, it was intended to forbid, as in restraint of trade, all contracts on the subjects embraced within and controlled by the interstate commerce law. The

statute, commonly known as the Interstate Commerce Act, was a special act, and it was intended to regulate interstate commerce transported by railway carriers. All its provisions directly and expressly related to this subject. The act of 1890, on the contrary, is a general law, not referring specifically to carriers of interstate commerce. The rule is that a general will not be held to repeal a special statute unless there be a clear implication unavoidably resulting from the general law that it was the intention that the provisions of the general law should cover the subject-matter previously expressly and specifically provided for by particular legislation. The doctrine on this **[358]** subject is thus stated in *Ex parte Crow Dog*, 109 U. S. 556, 570:

"'The general principle to be applied,' said Bovill, C. J., in *Thorpe v. Adams*, L. R. 6 C. P. 135, 'to the construction of acts of Parliament, is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in *Fitzgerald v. Champenys*, 30 L. J. N. S. Eq. 782; 2 Johns. & Hem. 31-54, 'that the legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterward to derogate from its own act when it makes no special mention of its intention so to do.'"

These principles thus announced are treated as elementary by the text writers. Endlich on Interpretation of Statutes, § 223; Sedgwick on Statutory Construction, §§ 157, 158; Sutherland on Statutory Construction, § 157.

Does, therefore, the implication irresistibly arise that Congress intended in the act of 1890 to abrogate, in whole or in part, the provisions of the act of 1887, regulating interstate commerce? It seems to me that the nature of the two enactments clearly demonstrates that there was no such intention. The act to regulate interstate commerce expressed the purpose of Congress to deal with a complex and particular subject which, from its very nature, required special legislation. That act was the initiation of a policy by Congress looking to the development and working out of a harmonious system to regulate the highly important subject of interstate transportation.

Conceding *arguendo* that the debates which took place at the time of the passage of the act of 1890 may not be resorted

to as a means of interpreting its text, yet a review of the proceedings connected with the passage of the act of July 2, 1890, through the two houses of Congress, it seems to me, leaves no room for question that the act was not designed to cover the particular subjects which had been theretofore specially regulated by provisions of the interstate commerce law.

[359] Prior to the passage of the act of 1890, various reports had been made to Congress concerning the operations of the Interstate Commerce Act, in which the commission pointed out the desirability and necessity of contracts between railroad companies in the matter of classification, stable rates, etc. After the act of 1890 had been adopted in the Senate, it was amended in the House of Representatives so as to specifically include among the contracts declared lawful "contracts for the transportation of persons or property from one State or Territory into another." Cong. Rec. vol. 21, part 5, pp. 4099, 4144. On the return of the bill to the Senate the amendment was agreed to with the added provision that the contracts for transportation to be prohibited, "should only be such as raise the rates of transportation above what is just and reasonable." Ib. 4753. The House refused to concur in the Senate amendment. A conference committee was appointed by both bodies, which recommended that the House of Representatives recede from its disagreement to the amendments of the Senate and agree to the same, modified by the addition of the provision that "nothing in this act shall be deemed or held to impair the powers of the several States in respect to any of the matters in this act mentioned." In a statement accompanying the report, Mr. Stewart, for the conferees on the part of the House, said:

"A majority of the committee of conference on the part of the House on the disagreeing votes of the two Houses on Senate bill one, submit the following statement:

"In the original bill two things were declared illegal, namely: contracts in restraint of interstate trade or commerce, and the monopolization of such trade.

"Its only object was the control of trusts, so called, so far as such combinations in their relation to interstate trade are within reach of Federal legislation.

"The House amendment extends the scope of the act to all agreements entered into for the purpose of preventing competition, either in the purchase or sale of commodities, or in the transportation of persons or property within the jurisdiction of Congress.

[360] "It declares illegal any agreement for relief from the effects

of competition in the two industries of transportation and merchandising, however excessive or destructive such competition may be.

"The amendment reported by the conferees is the Senate amendment with the added proviso that the power of the States over the subjects embraced in the act shall not be impaired thereby.

"It strikes from the House amendment the clause relating to contracts for the purchase of merchandise, and modifies the transportation clause by making unlawful agreements which raise rates above what is just and reasonable." Cong. Rec., vol. 21, part 6, p. 5950.

The House rejected the report of the conference committee and adhered to its amendments. A new conference committee was appointed, and the recommendation of that committee that both houses recede was concurred in, and the bill as it originally passed the Senate was adopted. Cong. Rec. vol. 21, part 9, p. 6212.

It thus appears that the bill was originally introduced in the form in which it now appears; that this form was thought not to be sufficient to embrace railroad transportation, and that a determined effort was made by the proposed amendment to include such contracts, and that the effort was unsuccessful. The reports to Congress by the commission and by the conference committee being facts proper to be noticed in seeking to ascertain the intention of Congress, *Church of Holy Trinity* v. *United States*, 143 U. S. 457, it would seem to be manifest therefrom that there was no intention by the act to interfere with the control and regulation of railroads under the Interstate Commerce Act or with acts of the companies which had therefore been recognized as in conformity to and not in conflict with that act.

That there was and could have been no intention to repeal by the act of 1890 the earlier "act to regulate interstate commerce" is additionally evidenced by the fact that no reference is made in the later act to the prior one, and that no language is contained in the act of 1890 which could in any way be con- **[361]** strued as abrogating any of the rights conferred or powers called into existence by the Interstate Commerce Act. Nowhere, contemporaneous with the act of 1890, is there anything indicating that any one supposed that the provisions of that act were intended to repeal the Interstate Commerce Act. The understanding of Congress in this respect is shown by the circumstance that the Interstate Commerce Act has been amended in material particulars and treated as existing since the adoption of the act of 1890; and this conception of the

legislative department of the Government has also been that entertained by the executive and judicial departments, evidenced by the appointment of new members of the commission, and by decisions of the courts enforcing various provisions of that act, and treating it as still subsisting in its entirety. The two laws then coexisting—is the agreement of the carriers to secure a uniform classification of freight and to prevent secret changes of the published rates, in other words, to secure just and fair dealings between each other, sanctioned by the act to regulate interstate commerce, and, therefore, not within the inhibition of the act of 1890?

The Interstate Commerce Act provided for the appointment of a commission to whom was to be confided the supervision of the execution of the law. Without going into detailed mention of the provisions of the statute, I adopt and quote the summary statement of the leading features of the original act contained in the first annual report made to Congress by the commission, as required by the act. It is as follows:

"All charges made for services by carriers subject to the act must be reasonable and just. Every unjust and unreasonable charge is prohibited and declared to be unlawful.

"The direct or indirect charging, demanding, collecting or receiving for any service rendered a greater or less compensation from any one or more persons than from any other for a like and contemporaneous service, is declared to be unjust discrimination and is prohibited.

"The giving of any undue or unreasonable preferences, as between persons or localities, or kinds of traffic, or the subject **[362]** ing any one of them to undue or unreasonable prejudice or disadvantage, is declared to be unlawful.

"Reasonable, proper and equal facilities for the interchange of traffic between lines, and for the receiving, forwarding and delivering of passengers and property between connecting lines is required, and discrimination in rates and charges as between connecting lines is forbidden.

"It is made unlawful to charge or receive any greater compensation in the aggregate for the transportation of passengers or the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

"Contracts, agreements or combinations for the pooling of freights of different and competing railroads, or for dividing between them the aggregate or net earnings of such railroads or any portion thereof, are declared to be unlawful.

"All carriers subject to the law are required to print their tariffs for the transportation of persons and property, and to keep them for public inspection at every depot or station on their roads. An advance in rates is not to be made until after ten days' public notice, but a reduction in rates may be made to take effect at once, the notice of the same being immediately and publicly given. The rates publicly

notified are to be the maximum as well as the minimum charges which can be collected or received for the services respectively for which they purport to be established.

"Copies of all tariffs are required to be filed with this commission, which is also to be promptly notified of all changes that shall be made in the same. The joint tariffs of connecting roads are also required to be filed, and also copies of all contracts, agreements or arrangements between carriers in relation to traffic affected by the act.

"It is made unlawful for any carrier to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination."

[363] These provisions substantially exist in the act as now in force, except that by an amendment made March 2, 1889, it was provided that rates should not be reduced by carriers except upon three days' public notice of an intention so to do.

This summary of the act, which omits reference to a number of its provisions relating to the power of the commission and the mode in which these powers are to be exercised, will suffice for an examination of the matter in hand.

Now, a consideration of the terms of the statute, I submit, makes it clear that the contract here sought to be avoided as illegal is either directly sanctioned or impliedly authorized thereby. That the act did not contemplate that the relations of the carrier should be confined to his own line and to business going over such line alone, is conclusively shown by the fact that the act specifically provides for joint and continuous lines; in other words, for agreements between several roads to compose a joint line. That these agreements are to arise from contract is also shown by the fact that the law provides for the filing of such contracts with the commission. And it was also contemplated that the agreements should cover joint rates, since it provides for the making of such joint tariffs and for their publication and filing with the commission. The making of a tariff of this character includes necessarily agreements for the classification of freight, as the freight classification is the essential element in the making up of a rate. That the interstate commerce rates, all of which are controlled by the provisions as to reasonableness, were not intended to fluctuate hourly and daily as competition might ebb and flow, results from the fact that the published rates could not either be increased or reduced,

except after a specified time. It follows, then, that agreements as to reasonable rates and against their secret reduction conform exactly to the terms of the act. Indeed, the authority to make agreements on this subject not only results from the terms of the act just referred to, but from its mandatory provisions forbidding discrimination against or preference to persons and places. The argument that these provisions referred to joint lines alone and not to competitive lines is without force; since joint rates necessarily relate to and **[364]** are influenced by the rates on competitive lines. To illustrate, suppose three joint lines of railroads between Chicago and New York, each made up of many roads. How could a joint rate be agreed on by the roads composing one of these continuous lines, without an ascertainment of the rate existing on the other continuous line? What contract could be made with safety for transportation over one of the lines without taking into account the rate of all the others? There certainly could be no prevention of unjust discrimination as to the persons and places within a given territory, unless the rates of all competing lines within the territory be considered and the sudden change of the published rates of all such lines be guarded against.

I do not further elaborate the reasons demonstrating that classification is essential to rate making, and that a joint rate to be feasible must consider the competitive rates in the same territory, since these propositions are to me self-evident, and their correctness is substantiated by statements found in the reports of the Interstate Commerce Commission to Congress, of which reports judicial notice may be taken. *Heath* v. *Wallace*, 138 U. S. 573, 584.

I excerpt from some of these reports of the commission to Congress statements bearing on these subjects, as well as other statements indicating that agreements among carriers, competitive as well as connecting, for the purpose of securing a uniform classification and preventing of undercutting of rates, underbilling, etc., existed prior to the Interstate Commerce Act, were continued thereafter, and were deemed not to be forbidden by law, but, on the contrary, were considered as instruments tending to secure its successful evolution. Whilst it is doubtless true that in a recent report the com-

mission, as now constituted, has said that agreements between competitors to prevent the undercutting of rates may operate to cause carriers to disregard the lawful orders of the commission, this fact does not change the legal inference to be deduced from the construction placed upon the law by those charged with its administration in the period immediately following its adoption and which was then reported to Congress.

[365] On the subject of relative rates, the commission, at page 39 of their first annual report said: "Questions of rates on one line or at one point cannot be considered by themselves exclusively; a change in them may affect rates in a considerable part of the country. . . . Just rates are always relative; the act itself provides for its being so when it forbids unjust discrimination as between localities." That is to say, if one continuous line made joint rates and fixed and published them, and the other then made a different rate, not only would the first joint rate be injurious to the interests of the railroads making it, during the period in which it could not be changed, but would also be against the interests of the public and of those who had contracted to ship, since it would create among shippers and the receivers that inequality which it was the express purpose of the act to prevent.

In the same report of the commission, at page 33, not only the expediency but the necessity of contractual relations between railroad companies is pointed out in the following language:

"To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements, an interchange of cars and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and even if they were not, could be best settled and all the incidents and qualifications fixed by the voluntary action of the parties in control of the roads respectively."

Also at page 35, after referring to the fact that the former railroad associations had been continued in existence since the enactment of the interstate commerce law, though pooling had been prohibited, among other objects, for the "making of regulations for uninterrupted and harmonious railroad communication and exchange of traffic within the territories embraced by their workings," the commission observed

that "some regulations in addition to those made by the law are almost if not altogether indispensable."

On the same page the fact is emphasized that classification had not been taken, by the act, out of the hands of the carriers, [366] and it was observed that classification was best made by the joint action of the railroads themselves. In its second annual report the commission, in commenting upon the evils arising from the want of friendly business relations between railroads and the injury that a short road might cause by simply abstaining from extending accommodation that could not be lawfully forced from it, said (p. 28):

"The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibility, just as far as may be possible, so that the public may have in the service performed all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers, as well as to the public, and their voluntary extension may be looked for until in the strife between the roads the limits of competition are passed and warfare is entered upon. But in order to form them great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

At page 29 of the report the existence of traffic arrangements between railroads is called to the attention of Congress in the following language:

"While the commission is not at this time prepared to recommend general legislation towards the establishment and promotion of relations between the carriers that shall better subserve the public interest than those that are now common, it must nevertheless look forward to the possibility of something of that nature becoming at some time imperative, unless a great improvement in the existing condition of things is voluntarily inaugurated."

So, also, the existence of traffic associations, between competitive roads, for purposes recognized by the act as lawful, [367] and their favorable tendency seems to be conceded in the fourth annual report of the commissioners, where, at page 29, it is said:

"If the regulations which are established by the railroad associations were uniformly, or even generally, observed by their members, respectively, there would be little difficulty in enforcing a rule of reasonable rates, for the competition between the roads which even then would exist would be such as would prevent the establishment

of rates which are altogether unreasonable, and the public would not be likely to complain if they were satisfied that the rate sheets were observed."

The character of associations such as that under consideration is alluded to at page 26 of the same report, where, in discussing the subject of how best to secure a unity of railroad interests, it was observed "without legislation to favor it little can be done beyond the formation of consulting and advisory associations, and the work of these is not only necessarily defective, but it is also limited to a circumscribed territory."

The significance of the statement that to obtain uniformity of classification, a result most desirable for the best interests of the public, agreements between the railroads themselves was essential, is apparent from the fact, frequently declared by the commission in its reports, that uniformity of classification is one of the prerequisites of uniformity of rates. 1 Ann. Rep. 30, 35; 2 Ann. Rep. 40; 3 Ann. Rep. 51, 52; 4 Ann. Rep. 32. The very great importance of uniform and stable rates has also frequently been reiterated in the reports of the commission. Thus, at page 6 of the first annual report, in reviewing the causes which led to the adoption of the Interstate Commerce Act, it is said:

"Permanence of rates was also seen to be of very high importance to every man engaged in business enterprises, since without it business contracts were lottery ventures. It was also perceived that the absolute sum of the money charges exacted for transportation, if not clearly beyond the bounds of reason, was of inferior importance in comparison with the obtaining of rates that sholud be open, equal, relatively just [368] as between places and as steady as in the nature of things was practicable."

That unstable rates between competing carriers lead to injurious discrimination, one of the evils sought to be remedied by the act, was mentioned in the same report at pages 36 and 37, in connection with a discussion of the subject of reasonable charges, in the following language:

"Among the reasons most frequently operating to cause complaints of rates may be mentioned: the want of steadiness in rates. . . . More often, perhaps, growing out of disagreements between competing companies, which, when they become serious, may result in wars of rates between them. Wars of rates, when mutual injury is the chief purpose in view, as is sometimes the case, are not only mischievous in their immediate effects upon the parties to them, and upon the business community whose calculations and plans must for a time be

disturbed, but they have a permanently injurious influence upon the railroad service because of their effect upon the public mind."

The evil effects of shifting rates was also treated of at page 22 of the second annual report, where the commission inserted a letter received from a business man of Kansas City, not connected with railroads, who said:

"The frequent and violent changes in railway rates which have taken place during the past few years and which seem likely to be unabated, seems to me to call for new legislation in the way of amendment of the interstate commerce bill. These changes are ruinous to all business men, as well as the railways, and are the cause of great discontent among shippers everywhere, and especially to the farmers. What is needed is a fixed permanent rate, which shall be reasonable, and which can be counted upon by any one engaging in business."

So, also, in the fourth annual report it was observed that shifting, unstable rates, by competing roads, was contrary to the purpose of the Interstate Commerce Act, and hampered the operations of the commission. It was said at page 21:

[369] "In former reports the commission has referred to the undoubted fact that competition for business between railroad copmanies is often pushed to ruinous extremes, and the most serious difficulty in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of existing law is against them."

In addition to the text of the law heretofore commented on, the section which forbids pooling adds cogency to the construction that the law could not have been intended to forbid contracts between carriers for the purpose of preventing the doing of those things which the law forbade. For, as I have said, it cannot be denied that at the time of the passage of the act there existed associations and contracts between carriers for other purposes than the pooling of their earnings. Whilst the exact scope of these contracts is not shown, the fact that their existence was considered by Congress results from the face of the act, since it requires that agreements and contracts between carriers shall be filed with the commission. Moreover, the earlier reports of the commission, as I have shown, refer to such traffic agreements, and state that after the passage of the act they continued to exist as they had existed before eliminating only the pooling feature.

In view of these facts, when the act *expressly forbids con-*

tracts and combinations between railroads for pooling, and makes no mention of other contracts, it is clear that the continued existence of such contracts was contemplated, and they are not intended to be forbidden by the act. The elementary rule of *expressio unius* entirely justifies this implication.

And it is, I submit, no answer to this reasoning to say that the record does not show the terms of these contracts, since judicial notice may be taken of the reports made by the commission to Congress, from which reports the nature of the contracts is sufficiently pointed out to authorize the conclusion that they were of the general character of the one here assailed.

Whilst the excerpts from the reports of the commission which have been heretofore made, serve to elucidate the text **[370]** of the act, they also, I submit, constitute a contemporaneous construction of the provisions of the act made by the officers charged with its administration, which is entitled to very great weight. *Brown* v. *United States*, 113 U. S. 568, 571, and cases there cited.

The rule sustained by these authorities receives additional sanction here, from the fact that the construction at the time made by the commission was reported to Congress, and the act was subsequently amended by that body without any repudiation of such construction.

It is, I submit, therefore not to be denied that the agreement between the carriers, the validity of which is here drawn in question, seeking to secure uniform classification and to prevent the undercutting of the published rates, even though such agreements be made with competing as well as joint lines, is in accord with the plain text of the Interstate Commerce Act, and is in harmony with the views of the purposes of that law contemporaneously expressed to Congress by the body immediately charged with its administration, and tacitly approved by Congress.

But, departing from a consideration of the mere text and looking at the Interstate Commerce Act from a broader aspect, in order to discover the intention of the lawmaker and to discern the evils which it was intended to suppress and the remedies which it was proposed to afford by its enactment, it

seems to me very clear that the contract in question is in accord with the act and should not be avoided.

It cannot be questioned that the Interstate Commerce Act was intended by Congress to inaugurate a new policy for the purpose of reasonably controlling interstate commerce rates and the dealings of carriers with reference to such rates. Two systems were necessarily presented: the one a prohibition against the exaction of all unreasonable rates and subject to this restriction, allowing the hourly and daily play of untrammelled competition, resulting in inequality and discrimination; the other imposing a like duty as to reasonable rates, and whilst allowing competition subject to this limitation, preventing the injurious consequences arising from a **[371]** constant and daily change of rates between connecting or competing lines, thus avoiding discrimination and preference as to persons and places.

The second of these systems is, I submit, plainly the one embodied in the Interstate Commerce Act. At the outset reasonable rates are exacted, and the power to strike down rates which are unreasonable is provided. In the subsequent provisions discrimination against persons and against places to arise from daily fluctuations in rates is guarded against by requiring publication of rates and forbidding changes of the published rates, whether by way of increase or reduction during a limited time. To hold, then, the contract under consideration to be invalid when it simply provides for uniform classification, and seeks to prevent secret or sudden changes in the published rates, would be to avoid a contract covered by the law and embodied in its policy. It cannot, I think, be correctly said that whilst the avowed purpose of the contract in question embraced only the foregoing objects, its ulterior intent was to bring about results in conflict with the interstate commerce law. The answers to the bill of complaint specially denied the allegations as to the improper motives of the parties to the contract, and also expressly averred their lawful and innocent intention. As the case was heard upon bill and answer, improper motives cannot therefore be imputed. Indeed, the opinion of the court sustains this view, since it eliminates all consideration of improper motives and

holds that the validity of the contract must depend upon its face, and deduces as a legal conclusion from this premise that the contract is invalid, because even reasonable contracts are embraced within the purview of the act of 1890. To my mind, the judicial declaration that carriers cannot agree among themselves for the purpose of aiding in the enforcement of the provisions of the interstate commerce law, will strike a blow at the beneficial results of that act, and will have a direct tendency to produce the preferences and discriminations which it was one of the main objects of the act to frustrate. The great complexity of the subject, the numerous interests concerned in it, the vast area over which it [372] operates, present difficulties enough without, it seems to me, its being advisable to add to them by holding that a contract which is supported by the text of the law is invalid, because, although it is reasonable and just, it must be considered as in restraint of trade.

Nor, do I think that the danger of these evil consequences is avoided by the statement that if the contract be annulled, these dangers will not arise, because experience shows that contracts such as that here in question, when entered into by railroads, are never observed, and therefore it is just as though the contract did not exist. How, may I ask, can judicial notice be taken of this fact, when it is said that judicial notice cannot be taken of the fact that there are such contracts? How, moreover, may I ask, can it be said on one branch of the case that the contract, although reasonable, must be avoided, because it is a contract in restraint of trade, and then on the other branch declared that contracts of that character never do restrain trade because they are never carried out between the parties who enter into them?

There is another contention which, I submit, is also unsound, that is the suggestion that it is impossible to say that there can be such a thing as a reasonable contract between railroads seeking to avoid sudden or secret changes in reasonable rates because the question of railroad rates is so complex and is involved in so much difficulty that to say that a rate is reasonable is equivalent to saying that it must be fixed by the railroads themselves, as no mind outside of the officials of

the particular roads can determine whether a rate is reasonable or not. But this proposition absolutely conflicts with the methods of dealing with railroad rates adopted in England and expressly put in force by Congress in the Interstate Commerce Act and by many of the States of the Union. For years, the rule in England was reasonable rates enforced by judicial power, and subsequently by enactment securing such reasonable rates by administrative authority. The Interstate Commerce Act especially provides for reasonable rates, and vests primarily in the commission, and then in the courts the power to enforce the provision and like machinery is provided [373] in many of the States. Will it be said that Congress and other legislative bodies have provided for reasonable rates and created the machinery to enforce them, when whether rates are reasonable or not is impossible of ascertainment? If this proposition be correct, what, may I ask, becomes of the judgment of this court in *Cincinnati, New Orleans &c. Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, where it is held that the order of the commission finding certain rates charged by a railroad to be unreasonable was correct?

In conclusion, I notice briefly the proposition that though it be admitted that contracts, when made by individuals or private corporations, when reasonable, will not be considered as in restraint of trade, yet such is not the case as to public corporations, because any contract made by them in any measure in restraint of trade, even when reasonable, is presumptively injurious to the public interests, and therefore invalid. The fallacy in this proposition consists in overlooking the distinction between acts of a public corporation which are *ultra vires* and those which are not. If the contract of such a corporation which is assailed be *ultra vires*, of course the question of reasonableness becomes irrelevant, since the charter is the reason of the being of the corporation. The doctrine is predicated on the following expressions taken from the opinion of the court expressed by Mr. Chief Justice Fuller in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 408:

"That in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interests, courts decline to enforce or sustain con-

tracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transportation Co.* v. *Ohio River Pipe Line Co.*, 22 West Va. 600; *Chicago &c. Gas Co.* v. *People's Gas Co.*, 121 Illinois, 530; *Western Union Telegraph Co.* v. *American Union Telegraph Co.*, 65 Georgia, 160."

But, manifestly, this language must be construed with reference to the facts of the case in which it was used. What the facts were in that case is shown by the statement in the [374] opinion (p. 406) that the contract there considered "was an agreement for the abandonment by one of the companies of the discharge of its duties to the public." It is also to be remembered that it was this character of contract, that is, one which was *ultra vires*, which was held to be illegal in the West Virginia, Illinois and Georgia cases, which were cited in the *Gibbs case* in support of the excerpt just quoted. That the language in the *Gibbs case* referred to conditions of fact like that there passed upon, that is, contracts *ultra vires*, is shown by the subsequent case of *Chicago &c. Railway Co.* v. *Pullman Car Co.*, 139 U. S. 79, where a contract of the railway company was assailed as in restraint of trade, and the court held that although by the contract the company had restrained itself for a long period of years from using other than certain drawing room and sleeping cars, the contract was yet a valid and proper contract. Manifestly, this decision is utterly irreconcilable with the view that in the case of a railroad company, every restraint imposed by contract upon its freedom of action is necessarily injurious to the public interests, and hence invalid. Indeed, the proposition that any restraint of its conduct which a railroad may create by contract is invalid, because such road is a public corporation, is demonstrated to be erroneous by the Interstate Commerce Act, which, in the provisions heretofore referred to, not only expressly authorizes, but in some instances, commands agreements from which restraint of the action of the corporation necessarily arises.

I am authorized to say that MR. JUSTICE FIELD, MR. JUSTICE GRAY, and MR. JUSTICE SHIRAS concur in this dissent.

[529] UNITED STATES *v.* HOPKINS ET AL.[a]

(Circuit Court, D. Kansas, First Division. September 20, 1897.)

[82 Fed., 529.]

MONOPOLIES AND RESTRAINTS OF TRADE.—In a suit to restrain alleged violations of the law of July 2, 1890, against trusts and monopolies affecting interstate commerce, the existence of an illegal combination among the defendants is to be determined not alone from what appears on the face of the preamble, rules, and by-laws of their association, but from the entire situation, and the practical working and results of their methods of doing business, as disclosed by the evidence.[b]

SAME—LIVE-STOCK EXCHANGE.—The defendants were members of a voluntary, unincorporated exchange or association at Kansas City, and had agreed to be bound by its articles of association, rules, and by-laws. Their business consisted in receiving, buying, selling, and handling, as commission merchants, live stock received at the Kansas City stock yards from, and sold for shipment to, various states and territories. These stock yards furnished the only available public market for that purpose for an exceedingly large area, including many states and territories. One of the rules of the association fixed a minimum rate of commissions to be charged by members of the association, and prohibited the employment, by any commission firm or corporation, of more than three persons to travel and solicit business, and prohibited the sending of prepaid telegram or telephone messages quoting the markets; and another rule shut out all dealings and business intercourse between members and nonmembers. Persons attempting to carry on business without joining the exchange were systematically blacklisted and boycotted, and thus effectually prevented from securing or transacting business. *Held*, that the association was an illegal combination to restrict, monopolize, and control that class of trade and commerce.

SAME—REASONABLENESS OF RESTRAINTS.—The act of congress is aimed against all restraints of interstate commerce, and its purpose is to permit commerce between the states to flow in its natural channels, unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever. The reasonableness of the restrictions in a given case is immaterial.

COMMERCE BETWEEN THE STATES.—The fact that the place of business of an association is located upon both sides of the line dividing two

[a] Appealed to the Circuit Court of Appeals, Eighth Circuit, and removed to the Supreme Court on writ of certiorari (84 Fed., 1018). Memorandum notation. See p. 748. Reversed by Supreme Court, with directions to dismiss the bill (171 U. S., 578). See p. 941.

[b] Syllabus copyrighted, 1898, by West Publishing Co.

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states is in itself of no material importance in determining whether the business transacted by it is commerce between the states.

SAME.—The shipments of live stock from growers, dealers, and traders in various states and territories to the defendants was solicited by the latter chiefly through personal solicitation of traveling agents, and through advertisements. The course of business involved frequent loans to shippers in other states, secured by chattel mortgages on herds, and frequent drafts drawn by shippers on the defendants, and discounted at their local banks in other states on the strength of bills of shipment attached thereto. Shipments were made to Kansas City, and the loans or drafts paid from proceeds of sale, and the balance remitted to the shippers. Sales at Kansas City were made for shipment to markets in other states, as well as for slaughter at packing houses near by. The traffic was of immense proportions, and defendants were active promoters, and frequently interested parties, and gathered in for sale and slaughter millions of cattle, sheep, and hogs; and their rules and regulations covered the entire business, and extended over the whole field of operation. *Held*, that defendants were engaged in commerce between the states, and were subject to the provisions of the law of July 2, 1890, against trusts and monopolies.

SUBJECTS OF INTERSTATE COMMERCE.—The live stock shipped to defendants from other states through their solicitation and procurement, to be sold to a large extent for reshipment to [530] other states, or, if the market should be unsatisfactory, for reshipment for sale at markets in other states, does not cease to be the subject of interstate commerce as soon as it reaches Kansas City or is there unloaded, nor until it has been so acted upon that it has become incorporated and mingled with the mass of property in the state.

SAME—SUBJECTS OF INTERSTATE COMMERCE.—Live stock shipped from various states to the yards of a stock-yards association in another state, by the solicitation and procurement of the members thereof, to be there sold, or to be reshipped to other states, if the market should be unsatisfactory, does not cease to be a subject of interstate commerce as soon as it reaches such yards and is there unloaded, nor until it has been further acted upon so as to become mingled with the mass of property in the state.

The bill in this case is presented under the act of congress of July 2, 1890 (26 Stat. 209).

It charges that each of the defendants, about 300 in number, are members of a voluntary, unincorporated association, known and designated as the "Kansas City Live-Stock Exchange," and have adopted articles of association and rules and by-laws whereby they have agreed that they will faithfully observe and be bound by the same; that the government of said association is vested in a board of 11 directors, and its officers, consisting of a president, vice president, secretary, and treasurer; its place of business is in a building situated on the line between the states of Missouri and Kansas, and that defendants transact business partly in one state and partly in the other; that substantially all of the business transacted in the matter of receiving, buying, selling, and handling live stock at the Kansas City Stock Yards is carried on by defendants and other members of said exchange, as commission merchants; that a large proportion of such live stock is shipped from the states of Kansas, Nebraska, Colorado, Texas, Missouri, Iowa, and Arkansas, and the territories of Oklahoma, Arizona, and New Mexico, and is sold by the defendants to the various packing houses in Kansas City Mo., and Kan., and also for shipment to other markets; that a vast number of live stock is thus annually received and sold; that said Kansas City market is a public market, and supplies a large number of packing houses in Kansas City, Kan., and Kansas City, Mo., and other cities in different states of the Union; that the Kansas City market, next to Chicago, is the largest live-stock market in the world; that, under the practice and custom at said yards, the live stock there received is delivered to commission merchants, who receive, handle, sell, or reship the same for the consignors and owners thereof to other states and territories, charging a commission for their services; that, in the course of business at said yards, said stock is moved and shifted from one state to the other, according to the convenience of said Kansas City Stock-Yards Company; that a large portion of said stock is incumbered by mortgages, executed by the owners thereof to the defendants, members of said exchange, who advance large sums of money to growers and owners of cattle to provide the means to feed and prepare it for the market; that, when such cattle are ready for shipment, they are consigned to the defendants and other members of said exchange, who have made such advancements, and the amount thereof and interest is deducted from the proceeds of sale; that 90 per cent. of the members of said exchange make such advancements; that said stock yards accord to owners and shippers of live stock the only available means at that place for handling, selling, and reshipping live stock; that, by reason of its situation, said Kansas City Stock Yards are the only available public market for the purchase and sale of live stock for an exceedingly large territory of the United States, and the only available means for the exchange of interstate traffic between the states and territories named, the stock being sold in said yards to be shipped to other states of the Union; that it is the custom among a large number of cattle growers and shippers who consign live stock to the Kansas City Stock Yards to draw drafts on the commission merchants to whom such stock is consigned, and, attaching the bill of lading issued by the carrier therefor, to draw money on said drafts from local banks, and, when presented to the consignees, said drafts are paid by [531] them in Kansas and Missouri, and the proceeds remitted to the banks in the various towns and cities where the live stock was shipped; that by reason of the fact that said yards are in the states of Missouri and Kansas, and the live stock handled and sold therein is at times in Kansas, and at others in Missouri, and are transported from different states to be sold and shipped to other states, said business is interstate in character, and can only be controlled by federal legislation, as a part of commerce between the states. The bill further charges that, if the person or partnership to whom live stock is consigned at Kansas City is not a member of said exchange, he is not permitted to sell or dispose of such live stock on the Kansas City market, for the reason that the defendants and all other commission merchants doing and controlling the business at said yards are required by the rules of said exchange to refuse to buy live stock or in any manner deal with a person who is not a member of said exchange, and in all

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such cases the owner of the live stock is compelled to reship the same to some other market, and, by reason of said unlawful combination, is prevented from delivering said live stock to the Kansas City Stock Yards; and the sale of the same is thereby hindered and delayed, extra expense and loss entailed to the shipper, and an obstruction placed upon the marketing of such live stock; that among other rules for the government of said exchange are the following:

"RULE IX.—*Commissions.*

"Section 1. The commissions charged by members of this association for selling live stock shall not be less than the following named rates:

"Sec. 2. Six dollars per car load for single-deck car loads of hogs or sheep, and ten dollars per car load for double-deck car loads of the same: provided, members of this exchange may, after charging commissions as above provided, pay a regular sheep salesman on these yards a sum of money contingent on number of sheep sold. Said sheep salesman may be in the employ of other members of the exchange.

"Sec. 3. Fifty cents per head for cattle of all ages. In car loads of twenty-four or more, not more than twelve dollars per car load; ten dollars per single-deck car loads, and eighteen dollars per double-deck car load of veal calves.

"Sec. 4. Fifty cents per head for cattle, and twenty-five cents per head for calves, and ten cents per head for hogs and sheep in mixed car loads, but not to exceed twelve dollars per car load. Fifty cents per head for cattle and twenty-five cents per head for calves driven into the yards; and ten cents per head for hogs and sheep for sixty head or less. More than that number shall be charged for at car load rates.

"Sec. 5. Fifty cents per head for buying cattle for stockers or feeders: provided, such charges shall not exceed twelve dollars per car load. Six dollars per single-deck car load for buying sheep, and ten dollars per double-deck car load. All purchases paid for by a commission house or shipping clearance made by same shall be deemed a purchase, and charged for as above provided.

"Sec. 6. Not less than four dollars per single-deck and five dollars per double-deck car load for buying live hogs, and not less than three cents per head for hogs bought by the head.

"Sec. 7. No member or commission firm or corporation represented herein shall do business for a yard trader or speculator on this market for less charges than one-half the regular commission.

"Sec. 8. No firm shall handle the business of a nonresident commission house for less than full commissions, except said consignments be made direct to said nonresident commission house from one of the following named markets: Chicago, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Omaha, Nebraska; Wichita, Kans.; Denver, Colo.; Pueblo, Col.; St. Joseph, Mo.; Sioux City, Ia.; Peoria, Ill.; Milwaukee, Wis.; and Ft. Worth, Tex.

"Sec. 9. No member of this exchange or firm or corporation represented herein shall cause or allow to be shipped in his or its name any kind of live stock for the purpose of violating any of the provisions of this rule.

"Sec. 10. No agent, solicitor, or employé shall be hired except upon a stipulated salary, not contingent upon commissions earned (save as provided in section 2 of this rule). No solicitor shall be employed except as a bona fide traveling agent, who shall not solicit consignments local to his own neighbor- [532] hood only, nor to secure his individual trade. Nor shall any agent, solicitor, or employé be hired who is employed by any other party of parties, or who is actively engaged in other business (save as provided in section 2 of this rule). Members of this exchange must file with the secretary, within five days of employment, the names and addresses of their solicitors. More than three solicitors shall not be employed at one time by a commission firm or corporation. Members of a commission firm or corporation—resident or nonresident of Kansas City—may travel as solicitors, but must be registered as one of the three allowed each firm or corporation. It shall be a violation of this rule for any solicitor representing or claiming to represent a commission firm or corporation in any other market to solicit for any Kansas City firm; and members shall be held accountable for the acts of any solicitor who, under the guise of soliciting for a branch house, solicits for a Kansas City firm or corporation.

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"Sec. 11. Any member of this association or firm or corporation represented herein, sending or causing to be sent a prepaid telegram or telephone message quoting the markets, giving information as to the condition of the same, shall be fined not less than $100 nor more than $500. If said fine be not paid within three days, said firm or member shall be suspended until said fine is paid: provided, however, that prepaid messages may be sent to shippers quoting actual sales of their stock on the day made; also, to parties desiring to make purchases on this market.

"Sec. 12. Any member of this exchange or firm or corporation in which he may be a partner, violating any of the provisions of this rule, shall be fined not less than $500, nor more than $1,000, for the first offense. If said fine be not paid within three days, said member or firm may be suspended from membership until same is paid. For a second offense, said member or firm may be expelled from membership in the exchange.

"Sec. 13. From such fines and special assessments, the exchange shall pay a reward of $500 to any party or parties furnishing sufficient evidence to convict any member of a violation of any of the provisions of this rule, and said reward shall be paid immediately after conviction.

"Sec. 14. For the purpose of making effective section 12 of this rule, when the treasurer shall not have on hand from fines collected the sum of $500, the directors shall levy a special assessment, pro rata, on each commission firm or corporation buying or seling live stock in this market who is a member of the exchange; and they shall continue to levy such special assessments in such amounts as will keep a fund of $500 constantly on hand for this purpose. Said fund shall be kept as a special fund, and shall be used for no other purpose.

"Sec. 15. Each firm or corporation represented in this exchange shall be held responsible for any violation of this rule by any party doing any portion of a commission business in its name, and any penalty imposed for violation of the foregoing shall be on account of such party. If not paid within three days, the firm or corporation doing said business shall sever its business connections with such party within ten days. No firm or corporation shall thereafter do any business for such party until said fine is paid.

"RULE XVI.—*Limitations.*

"Section 1. No member of the Kansas City Live-Stock Exchange shall transact any business with any person violating any of the rules or regulations of this exchange, or an expelled or suspended member, after notice of such violation, suspension, or expulsion has been issued by the secretary or board of directors of the exchange."

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The bill further charges that the defendants, by the adoption of said articles of association, have confederated and conspired together in violation of the laws of the United States, and particularly of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and to monopolize the business of buying and selling live stock at the Kansas City market, and to illegally fix and establish a minimum price for buying and selling the same, and have further, in restraint of trade and commerce between the states, confederated together to prevent and restrain the free transmission of information regarding the state of the market by telegraphic messages, and have restricted the free employment of agents and solicitors in the prosecution of business at said stock yards; that [533] the purpose of defendants in organizing said exchange is to prevent the shipment of any live stock to the Kansas City market, unless shipped to the Kansas City Stock Yards, and to defendants or other members of said exchange, and the further purpose was to compel shippers to pay to defendants and their associates the commissions provided for in rule 9, and to prevent the shipment and sale of property on said market unless such commissions were so paid. The bill further charges that it was also the purpose of said defendants and their associates to monopolize the business of receiving, handling, and selling live stock received at said market, and also to prevent its sale by any person not a member of said exchange, and to obstruct and retard the owners of such live stock in the sale of the same on the market at Kansas City. Thereupon the complainant prays for a decree dissolving said exchange, and for an injunction against said defendants, restraining them from enforcing or acting pursuant to the rules and by-laws of said association.

The defendants, for answer to said bill, admit the organization of said defendants into an association known as the "Kansas City Live-Stock Exchange," and aver that similar associations, under the names of "Boards of Trade" or "Exchanges," exist in practically every city of importance in the United States, devoted to the buying and selling of stocks, bonds, grain, live stock, petroleum, and all other products, with similar rules for government and transaction of business, in order that competition between the members may be fair and reasonable; that said methods are sanctioned by the experience of the commercial world, and tend to develop trade and commerce, and not to restrict the same. The preamble of their organization is as follows: "We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, nor for the transaction of business, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to promulgate and enforce amongst the members correct and high moral principles in the transaction of business, have associated, ourselves together, under the name of 'Kansas City Live-Stock Exchange,' and hereby agree each with the other that we will faithfully observe and be bound by the following rules and by-laws, and such new rules, additions, or amendments as may from time to time be adopted in conformity with the provisions thereof, from the date of organization, by the election of a board of directors and other officers, as prescribed by rule 1." The defendants deny that through their membership substantially all of the business of buying and selling live stock at Kansas City is carried on. On the contrary, any person desiring to sell live stock at said city is under no obligation to employ a commission merchant, but is at full liberty to act for himself, and the stock-yards company extends to such person all the privileges and facilities afforded by it; and persons desiring to purchase live stock at the yards may, and they constantly do, purchase direct

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from the owners and very much the largest part of the cattle purchased for feeding is bought without the employment of any commission merchant. The only restriction upon members of the exchange is that contained in rule 16, viz. that they will not deal with a person as a commission merchant who violates the rules of the exchange, or who is a suspended or expelled member thereof. It is further averred that the Kansas City market is not a public market, but is of a private character merely. Defendants further aver that with the exception of the firm of Greer, Mills & Co., which was first suspended from membership in the exchange for nonpayment of a fine imposed for a violation of the rules thereof, and which subsequently voluntarily withdrew from said exchange, all of the commission merchants at said yards are members of the exchange. Defendants further aver that, whenever drafts are drawn on a commission merchant, they are paid either at the place where payable by the terms thereof, or on presentation to the drawee; and that such place of payment is either in the state of Kansas or Missouri, according as the particular transaction is closed. Defendants are informed by counsel, and believe, that the exercising of their occupation is not commerce between the states, within the meaning of the constitution or laws of the United States; that it is not true that a consignor of live stock is not permitted or cannot sell the same at said yards, or that the members of said exchange refuse to deal with a nonmember thereof. It is not true that any person shipping live stock to said yards, and refusing [534] to employ a member of said exchange, is compelled to reship the same to some other market. Defendants deny that there is any unlawful combination among them, or that any person is prevented from delivering stock to the Kansas City Stock Yards, or that the sale thereof is hindered or delayed, or expense or loss to the shipper entailed, or any obstruction or embargo placed upon the marketing of any live stock. Defendants deny that any of the rules of said association are in restraint of commerce between the states, or otherwise. Defendants deny that they have confederated together, in violation of the laws of the United States, to monopolize the business of buying and selling live stock at said yards, or to illegally fix a minimum price for buying and selling such live stock, or to restrain the free transmission of information respecting the state of the Kansas City market by telegraphic messages, or restrict the free employment of agents or solicitors in said business; that experience has shown that, to the success of such an organization, it is absolutely essential that there should be a uniform schedule of commissions, and that all members should observe the same; and that, by permitting evasions or violations of such schedule, a condition is created by which irresponsible persons might and would bring about a state of unhealthy cutting of prices,—a practice unfair to shippers and purchasers, and ruinous to responsible persons who carry on the occupation of commission merchants fairly. They have no desire to prevent any person from acting as a commission merchant at Kansas City, but they admit that it is not to the interest of the public or shippers to employ nonmembers, and that individually and collectively the provisions of their articles of association are invoked for the purpose of preventing the success of any competitor, either in his efforts to destroy said exchange, or to succeed in driving the competitors of such parties from the field.

The act of congress of July 2, 1890 (26 Stat. 209) under which this proceeding is brought, provides as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. * * *

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"Sec. 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

Section 4 gives to circuit courts of the United States jurisdiction to prevent and restrain violations of the act, and makes it the duty of the district attorney, under directions of the attorney general, to institute proceedings in equity to restrain such violations.

W. C. Perry, United States Attorney.

Karnes, Holmes & Krauthoff, *McGrew, Watson & Watson*, and *Hutchings & Keplinger*, for defendants.

FOSTER, District Judge (after stating the facts).

It will be observed that the answer of the defendants denies and puts in issue the allegations of the bill charging a combination or conspiracy or contract in restraint of trade or commerce, and denies any monopoly or attempt to monopolize or combination to monopolize any part of the trade or commerce among the several states, and denies that the business for which the exchange was organized, and in which its members are engaged, comes under the class of commerce or trade among the states.

The first question, whether there is any combination in restraint of trade or commerce, or a combination to monopolize any part of trade or commerce, on the part of the defendant association, is to be determined, not alone from what appears upon the face of its preamble, rules, and by-laws, but from the entire situation and the prac- [535] tical working and results of the defendants' methods of doing business, as disclosed by the testimony in the case. The defendant association is located at Kansas City, on the line between Kansas and Missouri, in the immediate vicinity of the Kansas City Stock Yards, and in close association therewith, being tenants of said stock-yards company. Said yards, with, perhaps, the exception of the yards at Chicago, are the largest in the country, and handle great numbers of live stock. These yards, the packing houses, and this exchange are all situated at the gateway through which flows the great stream of commerce of several states and territories, and among all the business tributary to this locality probably

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none is as important as the live-stock business and the various industries connected therewith. The defendant association is entirely voluntary in form, and does not directly require any person engaging in the live-stock commission business to become a member; but it will be observed that rule 16 prohibits any member from dealing with any person violating any of the rules or regulations of the exchange, or an expelled or suspended member, after notice of such suspension has been issued by the secretary or board of directors. In practice, as amply appears from the testimony of many witnesses, this rule shuts out all dealings and business intercourse between members and nonmembers of the association. It is shown beyond cavil that the entire membership of the association regards a commission merchant attempting to do business at the Kansas City Stock Yards without joining the exchange as one violating this rule, and treat him accordingly. And this construction is a natural one, for a compliance with the rules of the exchange requires a party to subscribe to its rules and by-laws, and to pay a membership fee (which is now $2,500), to pay his assessments, and observe all other requirements, including the fees and commissions fixed for handling live stock; and it may well be said that any dealer or broker does business in violation of these rules who does business at all and fails to join the association. The testimony discloses several instances of parties attempting to enter the field, and do business there, without joining the exchange; and in every instance, unless protected by the courts, they have been compelled to abandon the undertaking. All parties now engaged in the business are members of the exchange, except Greer, Mills & Co., who are making a fight in the courts to maintain their business, and are temporarily protected by injunction. It appears from the testimony that any person or partnership attempting to carry on business independent of the association is invited to apply for membership, and if he fails to do so, or if rejected, and attempts to proceed, his name is written on a blackboard kept for public use in the exchange building, and all members are warned against dealing with him. This admonition is strictly obeyed, and such person is boycotted. The outcome is inevitable. The combined opposition of three hundred men

against one can produce but one result. Almost every purchaser or vendor of live stock, including the great packing houses, does business through commission merchants, and nearly the entire volume of live stock received at the yards is consigned to and con- [536] trolled by these merchants, members of the exchange. In vain does the outside dealer offer attractive bargains for the sale or purchase of stock; they will have no intercourse with him. This state of affairs is known and circulated among stock growers and shippers, and they dare not ship their stock to this boycotted broker or firm. These facts are established and amplified by a multitude of witnesses. The object and purpose of the exchange is written across its face, where all can read. It is to control and monopolize the entire business of buying and selling live stock at the Kansas City Stock Yards. It is clearly a combination to restrict, control, and monopolize that class of trade and commerce. The defendants declare that the rules, regulations, and prices for doing the business are all reasonable and fair and for the best interests of buyer and seller. Possibly that is so, although it is not apparent, looking at the interests of the stock grower or purchaser, why the number of solicitors of business should be limited to three for each firm, or why there should be a restriction on telegraphic information as to the state of the market, or why he should be compelled to pay a commission of 50 cents a head on cattle when he paid 25 cents before the exchange was organized, or why there should be discriminating charges on stock from different localities.

Counsel for defendants have, with commendable zeal and industry, submitted for our consideration the rules of a great number of exchanges and boards of trade throughout the cities of the United States, dealing in corporate stocks, grains, live stock, and various other things, and contend that they are essential, if not indispensable, to the commerce and business interests of the country, and that to grant the prayer of this bill would be the deathblow of those institutions. Courts cannot shut their eyes to the results of their judicial conclusions, but how far such results should control those conclusions depends on several conditions, not necessary to discuss here; nor would it be proper to consider here

what effect this act of congress may have on these organizations, or any of them. I may be permitted to say, however, that the methods and aims of many of these exchanges and boards of trade are not altogether beneficial to the business and commerce of the country. That they are beneficial to the members, and perhaps to the locality, may be admitted. It must also be admitted that a properly conducted agency or medium through which the vendor and vendee may readily sell and buy everything that enters into commerce or trade is demanded by the business interests of the whole country; but this agency should not be permitted to tamper with or in any way impede or restrain the natural flow of the stream of industry or commerce. The crying complaint of to-day, and the great menace to the welfare of the people, is the tendency of wealth to monopolize and control, by trusts and combinations, the products and industries of the country; and it must be confessed by every thoughtful observer that many of the so-called stock and produce exchanges are among the most potent instruments for the accomplishment of these purposes by speculators and adventurers. Men who add nothing to the productive wealth of [537] the country grow rich or poor by gambling on the wealth produced by others. Men are daily selling, through these exchanges, millions of bushels of corn, wheat, and other produce, who neither have nor expect to have a bushel; and others are buying millions, who never expect to receive a bushel. Both sides are tampering with the normal prices fixed by the law of supply and demand, and attempting, by false and dishonest means and methods, to serve their ends. The courts have uniformly condemned this class of business as illegal, and, though it is under the ban of the law, it still flourishes. The remedy must be looked for in legislation, and not in the courts alone.

This act of congress is aimed against all restrictions of interstate commerce, and we need not discuss the reasonableness of such restrictions. It is evidently the purpose of the law to permit commerce between the states to flow in its natural channels, unrestricted by any combinations, contracts, or conspiracies, or monopolies whatsoever. *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540; *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249;

Leisy v. *Hardin*, 135 U. S. 107, 10 Sup. Ct. 681; *Walling* v. *Michigan*, 116 U. S. 454, 6 Sup. Ct. 454; *Robbins* v. *Taxing Dist.*, 120 U. S. 490, 7 Sup. Ct. 592.

But one material question remains in the case: Is the business in which the defendants are engaged commerce between the states? The circumstance that their place of business is located on both sides of the line between the states of Kansas and Missouri is, in my opinion, a fact of no material importance in the solution of this question; no more than would be the fact that the business of a farmer or manufacturer was so located, and that he passed from one state to the other for his convenience in the transaction of his usual business. The method of business of the defendants is as follows: The shipment of live stock from growers, dealers, and traders in Kansas, Colorado, Nebraska, Missouri, Texas, New Mexico, Arizona, Oklahoma, and other states and territories is solicited by the commission merchant in various ways, but largely by the personal solicitation of agents who travel about the country and interview the stock men. Frequently the commission man makes loans of money on the herds, secured by chattel mortgage. The consignment of the stock is made to the commission man or firm at the Kansas City Stock Yards, and there unloaded. Frequently the shipper draws on the consignee through his local bank with the bill of shipment attached; and, when the stock is sold, the loan on the cattle, or the draft on the consignee, as the case may be, is paid out of the proceeds, and the balance remitted to the shipper. While the broker is soliciting consignments of stock for sale, he is also on the alert for purchasers. He sells the stock without regard to its destination. Some is reshipped to other markets in other states, notably to Chicago and St. Louis. Much of it, especially hogs, is slaughtered at the large packing houses near by, in Kansas and Missouri. Is this business, so conducted, interstate commerce, or merely an incident or aid to such commerce?

Commerce among the states has been defined as follows:

"Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and [538] the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." *County of Mobile* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826.

In Re Greene, 52 Fed. 113, Judge Jackson says:

"In the application of this comprehensive definition, it is settled by the decisions of the supreme court that such commerce includes, not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation; that it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another."

In *U. S.* v. *E. C. Knight Co.*, 156 U. S. 13, 15 Sup. Ct. 254, Mr. Chief Justice Fuller, speaking for the court, says:

"The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the states, or put in the way of such transit, may be regulated, but this is because they form part of interstate trade or commerce."

It has been repeatedly held by the supreme court that a person soliciting orders for goods or freights to be shipped from one state to another, and express agents transporting goods from state to state, are engaged in commerce between the states, and a local tax or license cannot be imposed for transacting such business. *Walling* v. *Michigan*, 116 U. S. 446, 6 Sup. Ct. 454; *Pickard* v. *Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635; *Robbins* v. *Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Asher* v. *Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *McCall* v. *California*, 136 U. S. 104, 10 Sup. Ct. 881; *Norfolk & W. R. Co.* v. *Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958; *Crutcher* v. *Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851; *Brennan* v. *City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829; *Minnesota* v. *Barber*, 136 U. S. 313, 10 Sup. Ct. 862. It has also been held that telegraphy between the states is interstate commerce. *Leloup* v. *Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460. The question of what constitutes commerce between the states, and thus protected by the constitution, and that which is merely an incident or aid to such commerce, and exempt from federal control, has been much considered by the federal courts, and

sometimes the line of distinction is difficult of discernment. Having a watchful regard for the police powers of the states, and the right of taxation, the federal courts have carefully discriminated in these cases, so that the general government should take nothing to itself not fairly delegated by the constitution. *Nathan* v. *Louisiana*, 8 How. 73; *Crutcher* v. *Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851; *Budd* v. *New York*, 143 U. S. 517, 12 Sup. Ct. 468; *Kidd* v. *Pearson*, 128 U. S. 1–20, 9 Sup. Ct. 6; *U. S.* v. *E. C. Knight Co.*, 156 U. S 1, 15 Sup. Ct. 249; *Munn* v. *Illinois*, 94 U. S. 113; *In re Greene*, 52 Fed. 113; *Henderson* v. *Mayor, etc.*, 92 U. S. 259; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532.

Perhaps a fair test of the character of defendants' rules and by-laws would be presented by these questions: Could a state, by leg- **[539]** islation, impose on this traffic the restrictions and regulations demanded by these rules and by-laws? Could it limit the number of agents a merchant should have soliciting business in other states? Could it restrain telegraphic communication between points in different states? Could it make a discrimination in rates for handling stock shipped from different localities outside of the state? It is indisputable that all the live stock shipped to these defendants for sale from states other than Kansas and Missouri, after it has entered the current of commerce between the states, continues and remains the subject of such commerce until the transportation is terminated, and the property becomes a part of the general property of the state. It is also well settled that, while this property is the subject of interstate commerce, no state, municipality, or other power but congress can impose taxes, restrictions, or regulations upon it, except so far as is proper, in the exercise of police regulations, for the protection of the health, morals, and person of the citizen, and except for proper charges and regulations for the use of local instruments as aids or incidents to such commerce, such as docks, bridges, wharves, elevators, ferries, pilotage, etc., when congress has not acted in the matter.

In the case of *Bowman* v. *Railway Co.*, 125 U. S., at page

497, 8 Sup. Ct. 704, Mr. Justice Matthews lays down this principle in the following language:

"It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property, or when it does those things which may otherwise incidentally affect commerce,—such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the constitution and laws of the United States; and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But, in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become a part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce."

Bowman v. *Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062; *License Cases*, 5 How. 504; *Passenger Cases*, 7 How. 283; *Nathan* v. *Louisiana*, 8 How. 73; *Freight Tax Case*, 15 Wall. 232; *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, (*Original Package Case*); *Henderson* v. *Mayor*, 92 U. S. 259; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 Fed. 567; *Guy* v. *Baltimore*, 100 U. S. 434; *Railway Co.* v. *Becker*, 32 Fed. 849; *Plumley* v. *Massachusetts*, 155 **[540]** U. S. 461, 15 Sup. Ct. 154; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087; *U. S.* v. *Addyston Pipe & Steel Co.*, 78 Fed. 712; *Packet Co.* v. *Keokuk*, 95 U. S. 80 (wharfage); *Welton* v. *Missouri*, 91 U. S. 275; *Walling* v. *Michigan*, 116 U. S. 446, 6 Sup. Ct. 454; *Coal Co.* v. *Bates*, 156 U. S. 577, 15 Sup. Ct. 415; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865; *In re Minor*, 69 Fed. 233; *Scott* v. *Donald*, 165 U. S. 58, 17 Sup. Ct. 265; *Pittsburg & S. Coal Co.* v. *Louisiana*, 156 U. S. 590, 15 Sup. Ct. 459; *Hooper* v. *California*, 155 U. S. 648, 15 Sup. Ct. 207; *Emert* v. *Missouri*, 156 U. S. 296, 15 Sup. Ct. 367.

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Counsel for defendants contend that their business is only an aid or incident to commerce,—something in the nature of personal service; but it is not apparent that a combination for services may not be a restraint or monopoly of commerce, under the act of congress. *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 312, 17 Sup. Ct. 540. But the business of defendants is more than personal services; it is not merely a local instrumentality in aid of commerce. Defendants are active promoters, and frequently interested partes, in this immense traffic. They reach out over many states and territories by their solicitors and advertisements, and gather in, for sale and slaughter, millions of cattle, sheep, and hogs, and their rules and regulations cover the entire business, and extend over the whole field of operation. Touching the question of what are aids or incidents to commerce, as well as police powers of the states, the following cases are in point: *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Vicksburg* v. *Tobin*, Id. 430; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Parkersburg & O. R. Transp. Co.* v. *City of Parkersburg*, 107 U. S. 691, 2 Sup. Ct. 732; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826; *Huse* v. *Glover*, 119 U. S. 543, 7 Sup. Ct. 313; *Hall* v. *De Cuir*, 95 U. S. 485; *Cooley* v. *Board*, 12 How. 298; *Packet Co.* v. *Aiken*, 121 U. S. 444, 7 Sup. Ct. 907; *Sands* v. *Improvement Co.*, 123 U. S. 288, 8 Sup. Ct. 113; *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 13 Sup. Ct. 622; *St. Louis* v. *W. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485; *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517, 12 Sup. Ct. 468; *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 15 Sup. Ct. 896; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532.

The defendants further contend that when this live stock reaches Kansas City, and is unloaded into the stock yards, it ceases to be the subject of interstate commerce. This proposition, however, covers but one point in the controversy, for several of the rules and by-laws of defendants have more than a local operation, and extend beyond state lines. Does this stock, once upon the stream of commerce, cease to be such when unloaded at Kansas City? Could the state of Kansas tax these cattle in the stock yards?

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The defendants cite the case of *Brown* v. *Houston*, 114 U. S. 623, 5 Sup. Ct. 1091, and *Coal Co.* v. *Bates*, 156 U. S. 577, 15 Sup. Ct. 415. In the former case the coal which was subjected to taxation had reached its destination,—i. e. the state of Louisiana,—and was there offered for sale in great or small quantities to suit the purchaser. The court says:

[541] "It might continue in that condition for a year or two years, or for only a day. * * * We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the city of New York, charged with the duty of collecting a tax on every wagon load or car load of produce or merchandise brought into the city, that it would not be a regulation of and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other states. We think it would be, and that it would be an encroachment upon the exclusive power of congress.

Bearing upon this question is the case of *Brown* v. *Maryland*, 12 Wheat. 419; also, *Leisy* v. *Hardin*, 135 U. S. 108, 10 Sup. Ct. 684. In this case, Mr. Chief Justice Fuller, speaking for the court, says:

"That the point of time when the prohibition ceases, and the power of the state to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer."

This live stock is shipped from different states for immediate sale, and, if the market at Kansas City is not satisfactory, it is to be shipped to another market. I cannot believe it ceases to be the subject of interstate commerce when unloaded into the stock yards. Sections 4386 and 4387 of the Revised Statutes humanely prohibit any railroad company whose road forms any part of a line over which animals are conveyed from one state to another from confining them in cars over 28 consecutive hours without unloading them for rest, water, and food for at least 5 consecutive hours. Under the act of congress of May 29, 1884, establishing a "Bureau of Animal Industry," and the act of March 3, 1891, for the inspection of live cattle, hogs, etc., the general government has established inspectors at the Kansas City Stock Yards assuming that such stock comes within the purview of said acts of congress. While realizing the importance of the issue

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involved in this case, and the responsibility of making application of the "Anti-Trust Act" to a new order of facts, I am impelled to the conclusion that, under the facts and the law applicable thereto, the prayer of this bill should be granted.

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[998] ANDERSON ET AL. *v.* UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit.)

[82 Fed., 998.]

Certified to Supreme Court for instructions upon certain questions, under the provisions of section 6 of the act of March 3, 1891.

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[Decision in the Supreme Court (171 U. S., 604). See p. 967. Case in the Circuit Court not reported.]

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[36] NATIONAL HARROW CO. *v.* HENCH ET AL.[a]

(Circuit Court of Appeals, Third Circuit. October 29, 1897.)

[83 Fed., 36.]

RESTRAINT OF TRADE—COMBINATION OF PATENTEES.—Numerous manufacturers, under various United States patents, of float spring-tooth harrows, agreed to organize a corporation, to assign to it all the patents thus owned or thereafter to be acquired, and the good will of their business, and not to be interested in the manufacture or sale of such harrows except as agents or licensees of the corporation; that the corporation should license them to manufacture and sell, for their own account, subject to uniform terms and conditions, their respective makes, and should not itself manufacture or sell; that each licensee should pay one dollar for each such harrow manufactured and sold by him, and should receive paid-up stock in return for the patents and good will. Those who entered the agreement represented 70 per cent. of the total manufacture and sales of the United States. The corporation was formed and the assignments made. The licenses issued also bound the licensees not

[a] Suit originally brought in the Circuit Court for the Eastern District of Pennsylvania (76 Fed., 667). See p. 610. A similarly entitled case (84 Fed., 226), p. 746, is another suit, brought in the Circuit Court, Northern District of New York.

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to cut prices, not to sell other float spring-tooth harrows except under the licenses, and provided liquidated damages for every breach. *Held*, that the arrangement was an unlawful combination in restraint of trade.[a]

SAME.—Though the fact that several patentees are exposed to litigation, justifies them in composing their differences, they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage.

[37] Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

W. P. Quinn, for appellant.

John G. Johnson, for appellees.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

BUTLER, District Judge.

The essential facts are well stated by the circuit court, as follows:

"The National Harrow Company, a corporation of the state of New York,—to whose contract rights and general purposes the plaintiff, a subsequently created New Jersey corporation, has succeeded,—originated in a written agreement between a number of leading and distinct manufacturers, under various United States letters patent, of float spring-tooth harrows, whereby it was agreed that they would organize a corporation under the laws of New York and would assign to the corporation all United States letters patent which they respectively then owned or should thereafter acquire relating to float spring-tooth harrows and the good will of their business in such harrows, and that they would not thereafter be interested in the manufacture or sale of such harrows except as agents or licensees of the corporation; that the corporation should issue to the persons, firms and corporations respectively so assigning to it their said patents and the good will of their business exclusive licenses to manufacture and sell upon their own account, subject to uniform terms and conditions, the same style of harrows which they were making and selling just prior to the agreement, and that the corporation itself would not manufacture and sell any style of harrows covered by its licenses; that each licensee should pay to the corporation one dollar on every float spring-tooth harrow manufactured and sold by such licensee, and that each person, firm, or corporation transferring to the corporation the good will of their float spring-tooth harrow business and their patents relating thereto, should receive in payment therefor the value thereof as agreed upon or as fixed by arbitration, in paid-up stock of the corporation.

"The agreement in the first instance was signed by six different manufacturers, but the contract contemplated and provided that others should come into the arrangement and become parties thereto. Accordingly other manufacturers of float spring-tooth harrows soon joined the combination, which then embraced twenty-two different persons, firms

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or corporations. Thus almost the entire output of float spring-tooth harrows made in the United States was brought under the regulation and control of this organization, its licensees manufacturing and selling at least 90 per cent. thereof.

"The defendants were the owners of two United States letters patent relating to float spring-tooth harrows, under which they had been manufacturing and selling harrows. They joined the combination, and, agreeably to the provisions of the above-recited agreement, they assigned to the New York corporation their patents, and that corporation then issued to the defendants a license to manufacture and sell their old style of harrows. The New Jersey corporation, which was formed in furtherance of the general scheme, issued to the defendants a second license in terms and conditions substantially like the former license. These are the two license contracts here sued on. The following stated provisions are common to both licenses: The defendants agree not to sell float spring-tooth harrows, float spring-tooth harrow frames without teeth, or attachments applicable thereto, at less prices or on more favorable terms of payment and delivery to the purchasers than is set forth in the schedule annexed to the license, unless the licensor should reduce the selling prices and make more favorable terms for purchasers, and that the defendants will not directly or indirectly manufacture or sell any other float spring-tooth harrows, etc., than those which they are thus licensed to sell and market except for another licensee, and then only of such style as he is licensed to manufacture and sell. They agree to pay to the corporation one dollar upon each float [38] spring-tooth harrow, etc., manufactured and sold by them, agreeably to the terms of the license, and the sum of five dollars as liquidated damages for every harrow, etc., manufactured or sold by them contrary to the terms and provisions of the license, and the corporation agrees to defend all suits for alleged infringement brought against the licensees. All the licenses issued by the corporation are upon the like terms and conditions."

[76 Fed. 667.]

It is manifest, as well from the contract as from the proofs outside of it, that the purpose of the parties was to form a combination between the various manufacturers of these harrows, to prevent competition in business and enhance prices; and such is the effect of their agreement. The corporation, provided to hold the legal title of the several patents, is merely an instrument to effect this object. The prior owners are still the beneficial owners, with right to continue their business, subject only to the restraint in its management imposed by the contract. The provision for licenses is made necessary by the transfers of title, and is simply another part of the scheme for combination and control of the business of the several patentees. The result would be the same in legal contemplation if the corporation and licenses had been dispensed with, and the contract had provided simply, as it does, for combination and restraint of competition. That such a contract would be unlawful

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seems clear. While it is true that all contracts in restraint of trade are not prohibited, and it is sometimes difficult to determine whether a particular one is, there is no room for doubt that such a contract as this, which provides for general and unlimited restraint, is unlawful. To justify restraint, reason for it must be found in the nature of the property or the situation of the parties, as, for instance, in the sale of a business or professional good will, and other similar cases. Even then the restraint must be confined within such reasonable limits as the circumstances require. Here there is nothing to justify retraint, and that imposed is without any limitation whatever. The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges. The object of these privileges is to promote the public benefit, as well as to reward inventors. The suggestion that the contract is justified by the situation of the parties—their exposure to litigation—is entitled to no greater weight. Patentees may compose their differences, as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage. We do not see anything to distinguish this case, in principle, from *Nester* v. *Brewing Co.*, 161 Pa. St. 473 [29 Atl. 102]; *Carbon Co.* v. *McMillin*, 119 N. Y. 46 [23 N. E. [39] 530]; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *Distilling & Cattle Feeding Co.* v. *People* [Ill. Sup.] 41 N. E. 188; *Strait* v. *Harrow Co.* [Sup.] 18 N. Y. Supp. 233. The last of these cases

arose out of this contract under circumstances substantially like those of the case before us. A similar conclusion was reached by the court in *Harrow Co.* v. *Quick*, 67 Fed. 130, where this contract was involved. The doctrine of these cases is not new, and we feel no hesitation in applying it to the contract before us.

The judgment is therefore affirmed.

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[226] NATIONAL HARROW CO. *v.* HENCH ET AL.

(Circuit Court, N. D. New York. January 3, 1898.)

[84 Fed., 226.]

MONOPOLIES—COMBINATION OF PATENT OWNERS—INFRINGEMENT SUIT.—A combination among manufacturers of spring-tooth harrows, whereby a corporation, organized for the purpose, becomes the assignee of all patents owned by the various manufacturers, and executes licenses to them, so as to control the entire business and enhance prices, is void both as to the assignments and licenses, so that the corporation cannot maintain a suit against one of its assignors who violates the agreement, for infringement.[a]

This was a bill in equity by the National Harrow Company against Samuel N. Hench and others for alleged infringement of a patent.

Risley & Love, for complainant.

Cookinham, Sherman & Martin and *Strawbridge & Taylor*, for defendants.

COXE, District Judge.

This is an equity suit for the infringement of letters patent, granted to the defendants and by them assigned to the complainant. The bill is in the usual form. The demand is for an injunction and an accounting. The plea alleges that the defendants assigned the letters patent in question to the complainant as part of an unlawful agreement, which was void as in restraint of trade and as against public policy, and

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that it was declared void by the [227] circuit court for the Eastern district of Pennsylvania, and by the circuit court of appeals for the Third circuit, in a suit between these parties. The plea has been set down for argument. In the previous litigation the Pennsylvania court decided that the agreement between these parties, and other manufacturers and venders of harrows, was an unlawful combination to enhance prices and prevent competition; that one of the means used to further this conspiracy was the creation of the complainant as a convenient instrument to take and hold the legal title to the patents owned by the members of the combination, the equitable title being still in the prior owners. In short, it was held that the organization of the complainant, the assignment to it of the patents, and the license from the complainant permitting the assignors to continue to make and sell harrows under the patents so assigned, were all steps in a general scheme to create a monopoly, and that the transaction was unlawful in its conception and purpose, as a whole and in all of its parts. These decisions will be found in *Harrow Co.* v. *Hench*, 76 Fed. 667, and 83 Fed. 36.

The bill is based upon the theory that, holding the legal title to the patent in controversy, the complainant can sue the owners of the equitable title, not as licensees but as infringers. The assignment of the patent was but one step in the combination. The license was another step. Both were necessary to carry out the illegal scheme. In the Pennsylvania circuit the complainant declared upon the license; now it declares upon the assignment. Both are invalid under the Pennsylvania judgment; the one as much as the other. To place any other interpretation upon the decision is to make it a mere brutum fulmen leading to results so illogical and inequitable as to border on the grotesque. The complainant was created solely to effectuate the purpose of the combination, the patent in suit being transferred as part of the unlawful scheme. Can it be possible that, based upon such a title, the complainant can levy tribute upon the defendants and thus accomplish by indirection the very object of the monopoly more effectually than if the court had not declared

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the whole transaction void? If as a result of the Pennsylvania litigation the complainant can seize the defendants' profits and also enjoin them from operating under their own patents their victory might better have been a defeat. In escaping Scylla they are hopelessly caught in the vortex of Charybdis. It certainly never was the intention of the parties tht the defendants should assign their patents to the complainant with no rights reserved. The assignment was in consideration of the license back and was part of the one agreement. The complainant has no title except such as it got through this agreement and this agreement has been declared void. The complainant contends that the assignment of the patent was a distinct and separate transaction, and that the bill can be supported upon the assignment alone, which was an innocent proceeding in itself. But as before stated the Pennsylvania decision treated all these steps as part of one illegal scheme. When the foundation upon which this edifice stood was shattered, the entire structure fell. The judicial bolt struck the keystone of the arch. Neither party can build upon the fragments that remain. As both were equally involved in the [228] prohibited scheme the court left them where their own acts placed them, declining affirmative relief to one as against the other. The plea is allowed.

[1018] HOPKINS ET AL. *v.* UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 27, 1897.)

[84 Fed., 1018.]

Appeal from the Circuit Court of the United States for the District of Kansas. Questions certified to the supreme court, on December 8, 1897, under the provisions of section 6 of the act of March 3, 1891. Cause removed to the supreme court on writ of certiorari. See 82 Fed., 529 [(p. 725), and 171 U. S., 578 (p. 941)].

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Statement of the Case.

[252] UNITED STATES *v.* COAL DEALERS' ASS'N OF CALIFORNIA ET AL.

(Circuit Court, N. D. California. January 28, 1898.)

[85 Fed., 252.]

MONOPOLIES—ANTI-TRUST LAW—RESTRAINING ORDER.—Under section 4 of the anti-turst law of July 2, 1890, a restraining order may be issued without notice, under the circumstances sanctioned by the established usages of equity practice in other cases.[a]

PARTIES IN EQUITY—UNINCORPORATED ASSOCIATION.—In a suit in equity to restrain an alleged unlawful combination acting as an unincorporated association, it is sufficient that the association, together with a large number of its members, as individuals and officers of the association, are made parties defendant.

MONOPOLIES—COMBINATIONS IN RESTRAINT OF TRADE—ANTI-TRUST LAW.—Under the anti-trust law of July 2, 1890, a contract or combination which imposes any restraints whatever upon interstate commerce is unlawful; and it is immaterial whether or not the restraint is a fair and reasonable one, or whether it has actually resulted in increasing the price of the commodity dealt in.

SAME—INTERSTATE COMMERCE.—Where coal is brought from other states and foreign countries to a certain city by importers and dealers, who, by a combination with a local coal dealers' association, regulate the retail prices arbitrarily, and provide against free competition, such combination is one in restraint of interstate commerce, in the meaning of the act of 1890.

In Equity.

Bill by the United States against the Coal Dealers' Association of California and the members of the association, and against Charles R. Allen, Central Coal Company, R. D. Chandler, George Fritch, J. C. Wilson & Co., Oregon Improvement Company, Oregon Coal & Navigation Company, W. G. Stafford, trading as W. G. Stafford & Co., R. Dunsmuir's Sons, John Rosenfeld, Louis Rosenfeld, and Henry Rosenfeld, partners, trading as John Rosenfeld Sons. The bill is brought to secure the dissolution of the Coal Dealers' Association of California, and to set aside an agreement between the said association and the other defendants, relating to the sale of coal in the city and county of San Francisco, alleged to be in restraint of trade and commerce, in violation of the act of July 2, 1890, and for an injunction restraining the defendants from further agreeing, combining, conspiring, and acting together in maintaining rules and regulations and rates and prices for coal brought from British Columbia, Washington, and Oregon to San Francisco, for domestic purposes as fuel.

H. S. Foote, United States District Attorney, and *Alfred L. Black*, Special Assistant United States Attorney.

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R. Y. Hayne and *William Craig*, for respondents Coal Dealers' Ass'n of California, Oregon Coal & Navigation Co., W. G. Stafford, and R. D. Chandler.

James T. Boyd and *W. H. Fifield*, for respondent R. Dunsmuir's Sons.

W. S. Goodfellow, for respondents Central Coal Co., John Rosenfeld, Louis Rosenfeld, and Henry Rosenfeld, partners trading as John Rosenfeld Sons.

John A. Wright and *George R. Lukens*, for respondents J. S. Wilson & Co.

T. C. Coogan, for respondents Charles R. Allen and George Fritch.

MORROW, Circuit Judge.

This is a bill in equity, brought by the United States attorney, upon the authority of the attorney general, in [253] the name of the United States, against the Coal Dealers' Association of California and the members of the association and certain firms and corporations doing business in San Francisco, for the purpose of dissolving the Coal Dealers' Association, as an unlawful combination, and to set aside an agreement between the said association and the other defendants, alleged to be in restraint of trade and commerce, in violation of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. It is alleged in the bill that the Coal Dealers' Association and the officers and members thereof are an unincorporated organization, composed of retail dealers in coal, residents in the city of San Francisco, and of miners and shippers of coal, who are residents of and are carrying on business in the city of San Francisco; that R. Dunsmuir's Sons are the agents and largely interested in and control and import coal from the Wellington colliers of British Columbia, from which comes a large part of the coal shipped from British Columbia; that R. D. Chandler is a wholesale coal dealer in the city of San Francisco, and imports and brings and deals in and sells coal brought from the state of Washington; that

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J. C. Wilson & Co. deal in coal brought from British Columbia; that the Oregon Coal & Navigation Company own coal mines in the state of Oregon, and import and bring coal to the state of California from said mines, and sell the same at wholesale; that W. G. Stafford & Co. import and bring coal from the state of Oregon; that the defendants and their associates comprise all the wholesale dealers who handle, bring, and import, and sell coal, used in San Francisco for domestic purposes as fuel; and that the said defendants, combined together, can absolutely control the price charged for coal for domestic purposes as fuel at said city of San Francisco, by reason of the fact that San Francisco is located at such a distance from all coal mines, other than those controlled by the defendants, that the rates of transportation are prohibitory, and make it an impossibility to import or bring coal as fuel for domestic purposes from any place or places or mines other than the mines owned, operated, and controlled by the defendants, or some of them; that all the coal mined in the state of California that is used as fuel in said San Francisco is owned and controlled by the defendants, or some of them. The bill further alleges that the city of San Francisco is a city of 290,000 population and upward; that the inhabitants generally use coal as fuel for domestic purposes, and that it is to them one of the prime and common necessaries of life; that they use, as fuel for domestic purposes, about 800,000 tons of coal annually, of which amount more than 700,000 tons are mined in British Columbia and in the states of Oregon and Washington, and imported and brought to San Francisco; that the small percentage of about 50,000 tons is mined and produced in the state of California; and that this domestic product has no practical effect on the market price of coal in San Francisco. It is further alleged that in the year 1895 there were in the city of San Francisco divers and numerous persons engaged in the retail coal business, supplying coal as fuel for domestic purposes to the inhabitants of said city; that said coal came, in large part, through the agency of the dealers mentioned in the [254] bill, from British Columbia, the state of Washington, and the state of Oregon; that the retail

dealers, in combination with certain wholesale dealers and importers of coal from British Columbia, and those bringing coal from the states of Washington and Oregon, and other dealers mentioned, with intent to form a contract, trust, and conspiracy in restraint of the trade and commerce between British Columbia, the state of Washington, the state of Oregon, and the state of California, and with intent to monopolize, and to attempt to monopolize, and combine and conspire to monopolize, the coal trade and commerce between British Columbia, Washington, Oregon, and California, to the extent of the coal used in the city of San Francisco as fuel for domestic purposes, did associate themselves together in the state of California, and on the 11th day of September, 1896, adopted a constitution and by-laws, the provisions of which are set out in full in the bill. For the present purpose, it will only be necessary to notice the following articles and sections:

CONSTITUTION.

"Article 1. Title and Object. (a) The title of this organization shall be the 'Coal Dealers' Association of California,' with principal place of business in San Francisco. (b) It shall have for its object the furnishing of information to its members as to sales of coal made by wholesale dealers to the retail dealers, and by retail dealers to consumers, and also the names of any dealers who have been guilty of violating any of the rates or rules made from time to time by this organization, and the furnishing of as complete a list as possible of delinquent consumers, and such other matters as may be decided upon.

"Art. 2. What Constitutes a Dealer. (a) Any person who engages in the sale of coal as regular business, buying to sell again, who shall own and operate a yard, keeping an office, and displaying a sign, shall be regarded as a retail dealer. (b) All miners and shippers shall be eligible to membership in this association, provided such miner and shipper shall not make a practice of selling coal, at retail, at less price than the retail dealers."

"Art. 4. Fees—Dues—Assessments. (a) The admittance fee for membership shall be two hundred (200) dollars, and must invariably accompany the application. (b) The amount of dues shall be fifty cents per month, payable quarterly in advance, and to date from the first day of the month following the month in which the member was admitted. (c) Assessments may be levied by a two-thirds vote of the members present at a regular meeting, but only in such cases when the interests of the association as a business society require it. (d) No assessment shall be levied unless it is expressed in the notice of meeting that 'a resolution to levy an assessment will be introduced.'"

"Art. 6. Failure to Pay Dues, Assessments, or Fines—Charges—

Right of Appeal. (a) If any member shall neglect or refuse to pay the monthly dues and assessments as provided in the constitution and by-laws of this association within three days after the same have become due, he or they shall no longer be considered members of this association, or participant in its benefits, and shall surrender certificate of membership; but a written or printed notice must be sent, at the expiration of said time, to all those members who are delinquent, and may be reinstated within ten days thereafter by paying in full all dues."

BY-LAWS.

"Sec. 3. Officers and Their Duties. * * * (c) The secretary, prior to taking his office, shall be required to give a bond, for the faithful performance of his duties, in the sum of one thousand (1,000) dollars, with two sureties qualifying for the sum of five hundred (500) dollars each, and satisfactory to the board of directors. He shall collect all dues, issue all communications, notices, and other correspondence not provided for. He shall keep a register of all members of the association, together with a regular set of books for the proper conduct of business; receive all moneys due the association, and pay the same over to the treasurer; sign all orders on the treasurer for the payment of such [255] bills as may be approved by a majority of the finance and certificate purchasing committees. He shall keep a record, in a book provided for the purpose, of all transfers of certificates of membership; be the custodian of all properties of the association; receive all charges made of violation of the card rates and rules, and refer the same to the grievance committee for action, after using due diligence in securing such facts in the case as possible. He shall devote his entire time to the association, and under no circumstances is he allowed to be associated in any manner with any other business. He shall, on receipt of findings of the grievance committee, notify the wholesale dealers of such report, and request, in writing, that they impose the penalty for such violation. His compensation shall be fixed by the board of directors. * * *

"Sec. 4. Standing Committees. (a) A grievance committee consisting of three persons shall be appointed by the president, from the board of directors, on the first Monday of every month, to serve without compensation until the first Monday of the following month, or until their successors are appointed. They shall assemble whenever requested to do so by the secretary, and receive and investigate all charges of violation of card rules or rates preferred against any coal dealer or agent in the city and county of San Francisco, and report their findings to the secretary. They shall have the power to fix the time limit for the payment of any fines imposed by them. * * *"

"Sec. 9. Advertising, Circulars, etc. (a) Dealers in advertising coal are not permitted to state prices without adding the names of coal to be had for the prices named; both names and prices to correspond exactly with those on rate card. (b) Any circulars, posters, dodgers, cards, or signs conflicting with the card rates or rules displayed, found on the streets or circulated in any manner whatsoever, shall subject the dealer or agent, who caused their distribution, to the penalties, as are provided in section 13 of these by-laws for selling coal in violation of card rates or rules.

"Sec. 10. Two or More Yards. A member having two or more yards cannot dispose of his certificate of membership in the sale of one yard, and retain his membership in the association.

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"Sec. 11. New Yards. Any member opening a new yard or yards after June 14th, 1895, in addition to the one that secured his admission in the association, shall be liable for an additional two hundred (200) dollars admittance fee and monthly dues for each yard so opened, in order for such yard or yards to participate in the benefits of the association.

"Sec. 12. Standard Rules and Weights. (a) No dealer shall give more or less than 100 pounds to 1 sack; 500 pounds to 5 sacks, or ¼ ton (short); 1,000 pounds to 10 sacks, or ½ ton (short); 2,000 pounds to 20 sacks, or 1 ton (short); 2,240 pounds to 1 ton (long). (b) All long tons must be delivered in bulk. Names of coal must appear on bill exactly as they read on rate card. A load of coal delivered in bulk shall be per ton of 2,240 pounds. If handled after arrival at customer's place, an additional charge of fifty cents per ton must be made. A ton of coal delivered in twenty sacks, and put in bin, shall be 2,000 pounds. No premiums or presents are permitted to be offered as inducements for purchasers to buy coal. (c) Dealers shall be permitted to sell and deliver fifty pounds of coal at one-half card rates for one hundred pounds, but in no case shall they be allowed to sell coal in quantities ranging between fifty pounds and one hundred pounds.

"Sec. 13. Violations—Penalties. (a) If a dealer or agent, member or non-member, be found guilty of selling coal in violation of the card rates or rules, he shall be subject to a fine of not less than ten (10) dollars nor more than one hundred (100) dollars for first offense, not less than twenty-five (25) dollars nor more than two hundred (200) dollars for second offense; if a member of the association, be suspended and compelled to pay retail prices for third offense until restored to membership in good standing by the board of directors. * * *

"Sec. 14. Agreement. The following agreement between the wholesale coal dealers of the city and county of San Francisco, Cal., and this association, is hereby embodied in this section, and made a part and parcel of the by-laws of this association:

"'This agreement, made this first day of June, A. D. 1896, by and between the Coal Dealers' Association of California, an association, and the undersigned wholesale coal dealers, witnesseth: (1) That the purposes of this agreement are: [256] First, protection to consumers in receiving full amount and kind of coal purchased; second, protection to dealers in obtaining sufficient margin to carry on a safe business with justice to consumers. (2) That said wholesale dealers will not, nor will any or either of them, during the continuance of this agreement, sell coal at trade rates to any one not having an established yard; nor will any or either of them sell coal at less than card rates to consumers, except in such cases as may be provided for by agreement among said wholesale dealers themselves. (3) That said wholesale coal dealers hereby acknowledge the request of the Coal Dealers' Association of California, made to them on the sixth day of May, 1896, to charge one dollar ($1.00) per ton additional over present trade rates for all coal sold by said wholesale dealers, or any or either of them, to the retail dealers in the city and county of San Francisco, who are not members of said association, and hereby agree to comply with said request, and will during the continuance of this agreement charge one dollar ($1.00) per ton additional over trade rates for all coal sold to dealers carrying on business in said city and county who are not members of said association. (4) That upon receiving proof from the Coal Dealers' Association of the violation by any retail coal dealer of any of the rules of business printed on the rate card issued by said association, and being satisfied that the

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charge is established, said wholesale coal dealers agree, and each of them agrees, to, and will, charge the dealer so violating said rules or rule consumers' rates thereafter for coal, until said retail dealer, if a member of said association, shall have been reinstated to membership in the Coal Dealers' Association of California by the vote of the board of directors of said association, or, if not a member, until he shall have paid such reasonable penalty as may be imposed upon him by said association. (5) That the following rules and rates shall be enforced during the continuance of this agreement: That rates at which coal shall be sold to consumers shall be as shown on the rate card issued from time to time by the Coal Dealers' Association of California. A ton of coal delivered in twenty (20) sacks, and deposited in bin, will be 2,000 pounds; and no more nor less than twenty sacks shall constitute a ton so delivered. A ton of coal delivered in bulk shall be 2,240 pounds. For coal in bulk handled after arrival at place of delivery, an additional charge of fifty cents per ton shall be made, provided, however, if the handling after arrival at place of delivery consists only of shoveling or dumping coal in place of deposit, no additional charge shall be made. All long tons must be delivered in bulk. (6) That any member of the Coal Dealers' Association furnishing coal to another dealer who has been duly adjudged by the Coal Dealers' Association of California guilty of violation of the rules or any rule of said association printed on said rate card will himself suffer the penalty imposed by said association for violation of said rules. (7) That no member of the Coal Dealers' Association shall have the right to transfer his certificate of membership in said association until all indebtedness due to said wholesale coal dealers, or any of them, by the member of the said Coal Dealers' Association holding said certificate, shall have been paid, or until an adjustment between the debtor and creditors shall have been satisfactorily made by such debtor and creditors. (8) That in the event of the discontinuance of business by any member of said Coal Dealers' Association, and his failure to promptly settle his indebtedness due to said wholesale coal dealers, or any of them, then said Coal Dealers' Association shall have the right to declare such delinquent member's certificate forfeited to said wholesale coal dealers parties hereto, who are his creditors. That the said wholesale coal dealers for whose benefit said forfeiture takes place shall have the right to sell said membership certificate, and, upon the sale thereof, shall apply the proceeds of sale to the payment of the claims of the wholesale coal dealers parties hereto, holding claims against such delinquent member. That, after the application of the proceeds of such sale to the payment of the claims of said wholesalers, any surplus remaining shall be paid to the delinquent member. (9) And, in the event of a sale of his business, wholesale dealers shall decline to furnish coal to his successor, at the discretion of the association's directors, until the seller has paid all bills due by him to the wholesale dealers, who are parties hereto. (10) That this agreement does not apply to steam, hotel, restaurant, or church trade, nor to such trade as must be, necessarily, reserved by wholesale dealers as a means of protection to steam trade, and referred to in section 2 of this agreement. (11) That this agreement shall continue in full force and effect for the period of two years from date hereof, and shall apply only to said wholesale coal dealers and [257] retail coal dealers carrying on business within the city and county of San Francisco.

"'In witness whereof, the parties hereunto set their hands, the day and year first above written, said Coal Dealers' Association signing by its president and secretary, thereunto authorized by resolution of said

association duly passed, and said wholesale coal dealers signing their respective names.

"'[Signed] COAL DEALERS' ASS'N OF CALIFORNIA,
"'By P. LYNCH, *President.*
"'By E. K. CARSON, *Secretary.*
"'CHARLES R. ALLEN.
"'CENTRAL COAL CO.,
"'By J. J. MCNAMARA.
"'R. D. CHANDLER.
"'GEO. FRITCH,
"'Per J. HOMER FRITCH.
"'C. WILSON & CO.
"'OREGON IMPROVEMENT CO.,
"'JOHN L. HOWARD, *Manager.*
"'OREGON COAL & NAVIGATION CO.,
"'By C. M. GOODALL, *Vice-Pres.*
"'W. G. STAFFORD & CO.
"'R. DUNSMUIR & SONS,
"'By C. H. JOUETT.'

"Sec. 15. Agencies or Offices. (a) Any member having agencies or offices other than those located at his yard, for the sale of coal, shall be compelled to have a certificate of membership for each of said agencies or offices. (b) In the event of the failure of any member to secure a certificate of membership for each agency or office, as referred to in paragraph (a) of this section, within five days after a written notice shall have been sent him by the secretary, he shall immediately cause the same to be closed, or subject himself to a fine of not less that ten (10) dollars nor more than one hundred (100) dollars for each agency or office that is known to be operated by him or for his benefit.

"Sec. 16. Sales to Nonmember Dealers or Agents. (a) No member of this association shall be permitted to sell dealers or agents, who are nonmembers, coal for less than consumers' prices. * * *"

The bill further alleges that the constitution and by-laws, since their adoption, have been, and now are, in full force and effect, save as amended by making the fee of membership $500 instead of $200, as provided in article 4 of the constitution, and by amending subdivision 3 of the agreement, set out in section 14 of the by-laws, by changing the words "one dollar ($1)" to "two dollars ($2)," where the same appears in said paragraph, and by changing the schedule of rates from time to time, so that the schedule of rates and rate card are as set forth in the bill. The terms of the agreement between the Coal Dealers' Association and the importers and wholesale dealers in coal, as set forth in the by-laws of the Coal Dealers' Association, are made the subject of still further allegations of combination, conspiracy, and confederation between the coal dealers in the establishment and maintenance of arbitrary rates for coal in San Francisco, and in depriving the residents of San Francisco of the benefits of

free competition between owners, importers, and dealers in coal from British Columbia, Washington, and Oregon, whereby the trade, traffic, and commerce in this article has been monopolized and restrained, and dealers in coal who have been refused or were unable to become members of the Coal Dealers' Association have been compelled to desist from said business, and have been restrained from carrying on their trade, business, and dealing in coal in the city of [258] San Francisco brought from British Columbia, Washington, and Oregon. The prayer of the bill is that the Coal Dealers' Association be dissolved; and that the agreement between said association and the wholesale dealers be set aside; and that the defendants be enjoined and prohibited from further agreeing, combining, conspiring, and acting together to maintain rules and regulations and rates and prices for coal brought from British Columbia, Washington, and Oregon to San Francisco, for domestic purposes as fuel, to hinder trade and commerce between said states and foreign countries; and that all and each of them be enjoined and prohibited from entering and continuing in the combination, association, and conspiracy to deprive the people of the city of San Francisco of such facilities, rates, and prices for coal brought from British Columbia, Oregon, and Washington to the city of San Francisco, in the state of California, as will be afforded by free and unrestrained competition between the owners, operators, importers, and dealers of said coal used from said places in said city of San Francisco, for domestic purposes as fuel; and that all and each of said defendants be enjoined and prohibited from agreeing, combining, and conspiring and acting together to monopolize, or attempt to monopolize, said trade and commerce in coal between said states of Oregon, Washington, California, and said foreign country of British Columbia; and that all and each of said defendants be enjoined and prohibited from agreeing, combining, and conspiring and acting together to prevent each and any of their association from importing, dealing, and delivering coal from British Columbia, Washington, and Oregon to the city of San Francisco, state of California, and from dealing in the trade and commerce of the same between said states and said foreign country at

such rates as shall be fixed by each of said defendants acting independently and separately on its own behalf.

Two affidavits supporting the material allegations of the bill were filed with the bill on December 16, 1897. One of these, made by a retail coal dealer in San Francisco, who is not a member of the Coal Dealers' Association, alleged, among other things, that, by reason of the fact that the constitution and by-laws of the Coal Dealers' Association and the agreement between the wholesale dealers and said association prohibited the sale to him of coal brought from Washington, Oregon, and British Columbia except at advanced prices, he had been greatly restrained and hindered in his dealings. Upon this showing, the court issued an order requiring the defendants to show cause, on the first Monday in January, 1898, why an injunction should not be issued, as prayed for in the bill, pending the litigation, and in the meantime the defendants were restrained and prohibited from charging or collecting from persons engaged in the retail coal trade in the city of San Francisco a price in excess of the same charged and collected from members of the Coal Dealers' Association for like purchases, in quantity and quality, of coal imported or brought from British Columbia, and from the states of Washington and Oregon. On December 18, 1897, the defendants appeared specially, and moved to set aside the preliminary restraining order, upon the grounds that the order was made without notice [259] to the defendants; that no irreparable injury had been shown to be probable by reason of the conduct of the defendants in the particulars in which they are sought to be restrained in the preliminary restraining order, nor in any particular; that the restraining order was not in accordance with the rules of practice of this court in such cases; that the act of July 2, 1890, commonly known as the "Anti-Trust Act," does not provide for any preliminary injunction or restraining order. The hearing of this motion was noticed for December 28, 1897, and afterwards continued to the first Monday in January, 1898, when it was heard at the same time with the order to show cause. The two matters will now be considered together.

Section 4 of the act of July 2, 1890, provides as follows:

"The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

Under section 718 of the Revised Statutes, the court or judge is authorized, whenever notice is given of a motion for an injunction, to grant an order restraining the act sought to be enjoined until the decision upon the motion, where there appears to be danger of irreparable injury from delay. In so far as the language of the anti-trust act differs from the provisions of the Revised Statutes, it appears to have been the intention of congress to provide a more direct and summary proceeding in reaching the mischief which it was the purpose of the statute to remedy than had prevailed before under the general rules of equity practice. I am therefore clearly of the opinion that, under section 4 of the anti-trust act, a restraining order may be issued by the court or judge without notice, under the circumstances sanctioned by the established usages of equity practice. That practice requires, as a general rule, that notice of an application for a temporary restraining order, as well as for an injunction, shall be given to the person against whom it is desired; but in very pressing cases, where the mischief sought to be prevented is serious, imminent, and irremediable, the courts will grant a restraining order without notice, and they will do so where the mere act of giving notice to the defendant of the intention to make the application might of itself be productive of the mischief apprehended, by inducing him to accelerate the act in order that it might be completed before the time for making the application has arrived. Fost. Fed. Prac. § 231. In the present case there is no allegation in the bill that the retail coal dealers or coal consumers of San Francisco, for whose benefit it may be assumed the action is

brought, will suffer irreparable injury by delay; but the anti-trust act does not, in terms, require such a showing to justify the court in issuing a restraining order, and it may well be doubted whether such a showing would be [260] required even under the general rules of equity practice in a case involving a question of monopoly and restraint of trade. *Barthet* v. *City of New Orleans*, 24 Fed. 563; *U. S.* v. *Addyston Pipe & Steel Co.*, 78 Fed. 712, 716. It will not be necessary, however, to pass definitely upon this question in this case, since it is my purpose to consider and determine, without further delay, the questions presented upon the order to show cause why an injunction should not issue pending the litigation. But, before proceeding to that feature of the case, there is a further objection to be noticed.

It is contended that, as the Coal Dealers' Association is an unincorporated company, it cannot be brought into court by making it a party defendant by that name. In equity, the action must be against the individuals comprising such an association: but there is this exception: Where the parties are numerous, some of them may be brought in as representing the whole association. The title of this case is against "The Coal Dealers' Association of California, and All the Members of Said Association," and also against 17 individuals, who are designated as "Members and Officers of said Association." The return of the marshal shows that all these individuals have been served; that the president of the association has been served as an individual, and as president of the association; and he has appeared in the capacity of president in the affidavit filed by him, as has also the secretary of the association. This, I think, is sufficient, under the rule requiring sufficient parties, to represent all the adverse interests in the suit.

In response to the order to show cause, affidavits have been interposed by the defendants for the purpose of disproving the equity upon which the motion is founded; also a demurrer to the bill and parol exceptions to its legal sufficiency. The affidavits tend to show that the statement in the bill, that 800,000 tons of coal are used annually as fuel for domestic purposes by the inhabitants of San Francisco, is not true; that the number of tons so used does not probably exceed

400,000 tons, and the amount imported and brought into San Francisco annually from British Columbia, Washington, and Oregon, and used for domestic purposes, is not in excess of 300,000 tons; that the defendants named in the bill as wholesale dealers and importers of coal are not all the wholesale dealers who handle, buy, and import, and sell coal used in San Francisco for domestic purposes; that the Black Diamond Coal Company is a corporation which handles, brings, and imports and sells coal used as fuel for domestic purposes, and that this corporation is not associated with any of the defendants, nor a party to the agreement with the Coal Dealers' Association of California; that the price and cost of mining and transporting coal from British Columbia, Washington, and Oregon have not been materially cheapened within the past few years, but have lately been increased, owing to the mine owners' inability to procure a sufficient number of miners since the exodus to the Alaska gold fields, and also by reason of the high rate for transporting coal from the above-mentioned places, due to the great demand for vessels in Alaska trade; that before the organization of the Coal Dealers' Association, and before the agreement mentioned [261] in the bill, the prices of all coals sold in the city and county of San Francisco, except British Columbia coal, used as fuel for domestic purposes, were largely in excess of the prices now charged; that in May, 1896, one month previous to the organization of the Coal Dealers' Association, British Columbia coals were $9.50 and $10 per ton, Washington coals were $8 per ton, Oregon coals $7.50 per ton; and a few months after said organization Washington coals were reduced to $7.50 per ton, and fluctuated from that price to $8, $7, and $7.50, which is the highest price; Oregon coals were reduced to $7 per ton, then $6.50 and $6.25, and now is $6.55; British Columbia coals have not changed in price, notwithstanding the duty on coal has been increased 40 cents to 67 cents per ton; that, prior to the organization of the Coal Dealers' Association, there were many persons engaged in the retail coal trade in the city of San Francisco who practiced dishonest methods, in giving short weights, substituting lower grades of coal for better grades, and in omitting to pay the amounts due from them

to the wholesale dealers, to the injury of the wholesale dealers as well as to the retail trade. It is alleged that, in order to discourage these evils, the Coal Dealers' Association was formed and the agreements entered into between the association and the wholesale dealers, and it was in consideration of this partial security that the wholesale dealers agreed to sell to members of the association at a price less than that charged to nonmembers; that the agreement was entered into only for the purpose of dealing with and affecting coal in the state of California and city and county of San Francisco, and not for the purpose of monopolizing, conspiring, or attempting to monopolize or restrain the coal trade and commerce between British Columbia, Washington, Oregon, and California. It is further alleged that no sale of coal imported from any other state or territory is made to any member of the Coal Dealers' Association until after the same has been imported and delivered to the wholesale dealers, and bulk broken. The affidavits contain other allegations in relation to the coal business, which it will not be necessary to notice, in the view I take of the matters proper to be considered on this motion.

The title of the anti-trust act indicates the comprehensive scope and purpose of the statute. It is "An act to protect trade and commerce against unlawful restraints and monopolies." It is not limited to contracts and agreements that were unlawful at common law, nor to restraints and monopolies in violation of state statutes.

In *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290–327, 17 Sup. Ct. 540, the supreme court, referring to this title, said:

"The title refers to, and includes, and was intended to include, those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in the text."

The first and second sections of the act are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be [262] deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction, thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In the Freight Ass'n Case, supra, it was contended that this statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, did not mean what its language imports, but that it only meant to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act. The court discusses this question, and arrives at the conclusion that:

"When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress."

It is therefore no defense of a contract or combination, alleged to be in violation of the act, to say that, in view of all the circumstances and conditions, the contract or combination imposes only a fair and reasonable restraint upon trade and commerce. The question is, does it impose any restraint whatever? If it does, no matter how little or reasonable it may be, it is within the prohibition. This interpretation is in harmony with the other provisions of the statute, which make it unlawful to monopolize, or attempt to monopolize, any part of the trade or commerce among the several states or with foreign nations. The contract under consideration in the Freight Ass'n Case related to traffic rates for the transportation of persons and property by competing common carriers by railroad; but the doctrine of the case applies as well to articles of commerce—the subject of transportation—as it does to the business of transportation itself; and the clear and positive purpose of the statute must be understood to be that trade and commerce within the jurisdiction of the federal government shall be absolutely free, and no contract or

combination will be tolerated that impedes or restricts their natural flow and volume.

Under the law as thus interpreted, two questions arise upon the facts in the present case. First. Do the constitution and by-laws of the Coal Dealers' Association and the agreement of the association with the importers and wholesale dealers operate in restraint of trade and commerce, or monopolize any part of the trade or commerce of San Francisco? And, if so, second, does this restraint or monopoly extend to any part of the trade and commerce carried on between this state and Oregon, Washington, or British Columbia?

There is no difficulty in arriving at a conclusion with respect to the first question. The constitution of the Coal Dealers' Association provides, among other things, that its object is to furnish information [263] to its members as to sales of coal made by wholesale dealers to the retail dealers, and by retail dealers to consumers, and also the names of any dealers who have been guilty of violating any of the rates or rules made from time to time by the organization. A retail dealer is defined as any person who engages in the sale of coal as regular business, buying to sell again, who shall own and operate a yard, keeping an office, and displaying a sign. All miners and shippers shall be eligible to membership in the association, provided such miner and shipper shall not make a practice of selling coal at retail at less prices than the retail dealers. The admittance fee for membership is $500, but the association assumes the jurisdiction over dealers who are not members, and imposes fines upon those found guilty of selling coal in violation of card rates or rules. The fine is not to be less than $10 nor more than $100 for the first offense, and not less than $25 nor more than $200 for the second offense; and, if the nonmember shall neglect or refuse to pay any fine within the time limit fixed by the grievance committee, the secretary, at the expiration of the time, shall notify the wholesale coal dealers to charge the person so defaulting consumers' prices for coal, and the wholesale dealers agree to comply with the notice. The board of directors of the association may employ detectives to purchase coal at retail through any citizen. The purpose of this provision appears to be to discover those dealers who sell coal at other

than card rates. A grievance committee is provided to assemble whenever requested to do so by the secretary, to receive and investigate all charges of violation of card rules or rates preferred against any coal dealer or agent in the city and county of San Francisco. It will be observed that the jurisdiction of this committee is not limited to the investigation of charges against members of the association, but includes all dealers. Dealers in advertising coal are not permitted to state prices without adding the name of the coal to be had for the prices named. Both names and prices to correspond exactly with those on the rate card. Any circulars, posters, dodgers, cards, or signs conflicting with the card rates or rules displayed, found on the streets, or circulated in any manner whatsoever, subjects the dealer or agent who caused their distribution to the penalties for selling coal in violation of card rates or rules. No dealer in coal is permitted to give more or less than certain weights in selling coal in specified quantities from sacks to tons. A charge is fixed for handling coal at customer's place, and no premiums or presents are allowed to be offered as inducements for purchasers to buy coal. The agreement with the wholesale dealers is made part of the by-laws of the association. The wholesale dealers agree not to sell at trade rates to any one not having an established yard, and not to sell coal at less than card rates to consumers, except in such cases as may be provided for by agreement among the wholesale dealers themselves. They agree to charge two dollars per ton additional over current trade rates to retail dealers who are not members of the Coal Dealers' Association, and consumers' rates to dealers who violate any of the rules of the association. A schedule of rates is adopted for the different qualities and classes of coal sold in San Francisco.

[264] It is claimed on the part of the defendants that the Coal Dealers' Association is a beneficial organization; that it protects the coal consumers from the dishonest methods of some of the coal dealers in giving short weights and in substituting lower grades of coal for better grades; and that it also protects the wholesale dealers in enabling them to collect their bills from the retail dealers. All this may be true, but it is clear that the power of the association extends

much further, and that it has another purpose. It establishes arbitrary rates for coal, from which the dealer is not permitted to deviate in any particular. It stifles all competition between retail dealers, restricts trade within prescribed limits, and establishes a monopoly of the most odious character in an article of daily consumption and prime necessity.

In *Nester* v. *Brewing Co.*, 161 Pa. St. 473, 29 Atl. 102, the supreme court affirmed the judgment of the court of common pleas of Philadelphia, holding that a combination among a number of brewers of that city to control the price of beer within the city was illegal, being in restraint of trade. The agreement under which that combination was formed is of the same character as the one now under consideration, and this is what the trial court had to say about it:

"Where a price is fixed arbitrarily for which a manufactured article may be sold, it necessarily limits the production of that article to the amount that can be sold for that price. An increased price put upon an article restricts its sale, and the restricted sale necessarily reduces the production. It is no answer to say: 'We do not restrict your production. You may produce any amount you like. We only restrain your sale of it.' Is this not practically a limit to production? Where a pool or combination reserves the right to regulate prices, they can, by the manipulation of prices, drive their competitors out of business, create a monopoly, and enhance at their pleasure the prices to consumers."

This is precisely the attitude of the Coal Dealers' Association, and it is no answer to the charge of arbitrary power, which it can and does exercise under its organization, that it has not increased the price of coal in San Francisco, or wholly monopolized the source of supply. The terms of the organization and the agreement between the association and the wholesale dealers clearly constitute a restraint of trade, which is injurious to the public interests, against public policy, and therefore unlawful. *Arnot* v. *Coal Co.*, 68 N. Y. 558; *Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Carbon Co.* v. *McMillin*, 119 N. Y. 46, 23 N. E. 530; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *Craft* v. *McConoughy*, 79 Ill. 346; *Lumber Co.* v. *Hayes*, 76 Cal. 387, 18 Pac. 391; *Distilling & Cattle Feeding Co.* v. *People* (Ill. Sup.) 41 N. E. 188; *Harrow Co.* v. *Hench*, 83 Fed. 36.

The next question is as to whether this restraint or monopoly extends to the trade or commerce among the several states or with foreign nations. In other words, do the facts

in the case bring it within the jurisdiction of the national government, under the provisions of the anti-trust act? The retail prices for coal at San Francisco established by the Coal Dealers' Association, and agreed to by the wholesale dealers, are for different quantities of the following named coals, used as fuel for domestic purposes, namely: Wellington (Dunsmuir), Wellington (Southfield), Roslyn, Seattle, Bryant, and Coos Bay. The Wellington coal is imported from British Co- [265] lumbia; the Roslyn, Seattle, and Bryant, from Washington; and the Coos Bay, from Oregon. No card rate appears to have been fixed for coal produced in this state, probably because this quality of coal is not generally used for domestic purposes. We start, then, with the fact that the article which is the subject of the controversy is the product of other states and a foreign country, and is brought from such other states, and imported from the foreign country, by dealers and importers engaged in that business, and that these dealers and importers have entered into an agreement and combination with the Coal Dealers' Association whereby the business in dealing in this article is regulated and its retail prices in San Francisco fixed arbitrarily. The statement of these facts seems to be sufficient to determine the question; but it is contended very earnestly, on the part of the defendants, that the case presented by the bill is not within the law, and that the line dividing local from federal authority excludes it from the jurisdiction of this court.

What, then, is trade and commerce among the several states and with foreign nations? "Trade," in a business sense, has been defined as "the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." The word "Commerce," as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *County of Mobile* v. *Kimball*, 102 U. S. 702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S.

196, 5 Sup. Ct. 826. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194.

In *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, the supreme court held that a state statute, prohibiting the sale of intoxicating liquors, except for certain purposes and under license from a county court, was unconstitutional and void when applied to a sale by an importer of liquors brought from another state in the original packages, because the operation of the law was repugnant to the power of congress to regulate commerce among the several states. The court, in passing upon the question, said:

"The power vested in congress 'to regulate commerce with foreign nations and among the several states and with the Indian tribes' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered."

Again, to make this limitation on state authority over interstate commerce more clear, the court said:

"It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its [266] regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

If a law of a state, regulating the sale of intoxicating liquors, so as to prohibit their sale except for certain purposes and under license from a county court, is unconstitutional and void when applied to a sale by an importer of liquors brought from another state in the original packages, because the law in that relation is in restraint of trade and commerce "among the several states," what shall be said of the constitution and by-laws of the Coal Dealers' Association, and the agreement of that association with the wholesale dealers respecting the sale of imported coal in San Francisco under the anti-trust act? If one is in restraint of commerce, is not the other? The claim that the coal is not sold until imported, delivered, and bulk broken is not sufficient. The

principle of the original package does not apply to the sale of coal. It must be manifest that the arbitrary rules under which the combination of wholesale and retail dealers conduct their business affects the sale and disposition of coal immediately upon its arrival at San Francisco, and that, as an article of commerce, its freedom is restrained and hampered at the point of delivery into the state, and before it has become distributed by sale, and mingled in the common mass of property in the state. But the agreement of the importers and wholesale dealers, which alone gives life and force to the combination, is directed specifically to the maintenance of card rates for certain imported coals by name; and it is this agreement, and what may be accomplished under it by the combination, that is to be considered, and not what the parties to it may be doing at any particular time.

In *Robbins* v. *Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, it was held by the supreme court that a law of Tennessee, requiring that all drummers and all persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale or selling goods, wares, or merchandise therein by sample, should pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege, was, so far as it applied to persons soliciting the sale of goods on behalf of individuals or firms doing business in another state, a regulation of commerce among the several states. This case also arose before the passage of the anti-trust act, and was considered as coming within the established doctrine that congress had the exclusive power to regulate commerce under the constitution of the United States. Now, if this doctrine is applied to the facts of the present case, how can it be said that the rules and regulations imposed by the Coal Dealers' Association upon retail coal dealers of San Francisco, selling imported coal, is less an obstruction to commerce than the law of Tennessee, imposing a license tax upon drummers soliciting the sale of goods from another state? Manifestly, a court could not consistently condemn the latter, and excuse the first. Suppose the state of California were to provide, by statute, a fixed price for the sale, at retail in San Francisco, of Wellington, Roslyn, Seattle, Bryant, and

Coos Bay coal, and require that all retail dealers in such coals should pay a license to the state of $500 for the privilege of dealing in such coals at the established rates, and, to secure the [267] enforcement of such a law, should impose penalties on dealers who did not comply with the statute. Would there be any question as to the validity of such a statute? Would it not be so plainly in violation of the constitution and laws of the United States that no court would hesitate for a moment to declare it void? With what complacency, then, should the court view the terms of the agreement of the wholesale dealers with the Coal Dealers' Association, and the regulations, fees, dues, assessments, fines, and penalties provided by the latter association for the purpose of controlling all coal dealers engaged in dealing in these imported coals?

In the *Sugar Trust Case*, 156 U. S. 15 Sup. Ct. 249, it was held, substantially, that contracts relating to commodities, to come within the range of federal jurisdiction, must be subsequent to production, but it was also said that contracts to buy, sell, or exchange goods to be transported among the several states form part of interstate trade or commerce. A case entirely in point is that of *U. S.* v. *Jellico Mountain Coal & Coke Co.*, 46 Fed. 432, brought under the anti-trust act, in 1891, against the members of the Nashville Coal Exchange. The purpose of the agreement in that case was to establish the price of coal at Nashville, and to change the same from time to time. Members found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, were fined 2 cents per bushel and $10 for the first offense, and 4 cents per bushel and $20 for the second offense. Owners or operators of mines were not to sell or ship coal to any person, firm, or corporation in Nashville who were not members of the exchange, and dealers were not to buy coal from any one not a member of the exchange. It appeared that several mining companies in Kentucky engaged in raising coal and most of the coal dealers of Nashville had entered into this agreement. The court held the agreement was in restraint of trade and commerce, and that the defendants, by the organization of the Nashville Coal Exchange, and in their operations under it,

had violated the law; and they were accordingly enjoined from further violations of the law. In *U. S.* v. *Hopkins*, 82 Fed. 529, the Kansas City Live-Stock Exchange, a voluntary unincorporated association, adopted articles of association and rules and by-laws whereby they agreed that they would faithfully observe and be bound by the same. Among the rules for the government of the exchange were fixed rates of commissions for the transaction of business, and limitations and prohibitions upon its members in dealing with nonmembers and with persons violating the rules and regulations of the exchange; these rules and regulations being enforced by means of fines, penalties, and assessments. Substantially all of the business transacted in the matter of receiving, buying, selling, and handling live stock at Kansas City stockyards was carried on by the members of the exchange as commission merchants. A large proportion of this live stock was shipped from the states of Kansas, Nebraska, Colorado, Texas, Missouri, Iowa, and Arkansas, and the territories of Oklahoma, Arizona, and New Mexico, and was sold by the members of the exchange to the packing houses in Kansas City. It was held that the association [268] was an illegal combination to restrict, monopolize, and control trade and commerce.

It is not, however, necessary to multiply authorities dealing with this question. They are numerous, and they all clearly establish the doctrine that commerce among the several states and with foreign nations must be absolutely free and untrammeled, except as it may be regulated by congress; that no state law, with certain exceptions not necessary to be here stated, will be allowed to interfere with it, and no contract or agreement on the part of individuals, associations, or corporations will be permitted, directly or indirectly, to hinder or restrain its natural current or volume. In the light of the authorities and the principles they establish, it appears to me that the constitution and by-laws of the Coal Dealers' Association and the agreement of the wholesale dealers with that association come within the prohibitions of the act of July 2, 1890, and they are therefore unlawful. A temporary injunction will be prepared in accordance with this opinion.

Syllabus.

[271] UNITED STATES *v.* ADDYSTON PIPE & STEEL CO. ET AL.[a]

(Circuit Court of Appeals, Sixth Circuit. February 8, 1898.)

[85 Fed., 271.]

MONOPOLIES—CONTRACTS IN RESTRAINT OF TRADE—COMBINATIONS.—Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or as giving rise to an action for damages to one prejudicially affected thereby, but were simply void, and not enforceable. The effect of the anti-trust law of 1890 is to render such [272] contracts, as applied to interstate commerce, unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and also to create a right of civil action for damages in favor of persons injured thereby, and a remedy by injunction in favor both of private persons and the public against the execution of such contracts and the maintenance of such trade restraints.[b]

SAME—RESTRAINTS LAWFUL AT COMMON LAW.—No contractual restraint of trade is enforceable at common law unless the covenant embodying it is merely ancillary to some lawful contract (involving some such relations as vendor and vendee, partnership, employer and employé), and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard for determining the reasonableness and validity of the restraints. But where the sole object of both parties in making the contract is merely to restrain competition, and enhance and maintain prices, the contract is void.

SAME—"ANTI-TRUST" LAW.—A number of companies manufacturing iron pipe in different states formed a combination whereby the territory in which they operated (comprising a large part of the United States) was divided into "reserved" cities and "pay" territory. The reserved cities were allotted to particular members of the combination, free of competition from the others, though provision was made for pretended bids by the latter at prices previously arranged. In the pay territory all offers to purchase pipe were

[a] Bill asking for a preliminary injunction was dismissed by the Circuit Court for the Eastern District of Tennessee (78 Fed., 712). See p. 631. Decree reversed and defendants perpetually enjoined by the Circuit Court of Appeals, Sixth Circuit (85 Fed., 271), which latter decree was modified and affirmed by the Supreme Court (175 U. S., 211). See p. 1009.

[b] Syllabus and statement copyrighted, 1898, by West Publishing Co.

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submitted to a committee, which determined the price, and then awarded the contract to that member of the combination which agreed to pay the largest "bonus" to be divided among the others. *Held*, that this was an unlawful combination, both at common law and under the act of 1890, against trusts and monopolies. 78 Fed. 712, reversed.

SAME—CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE.—Contracts which operate as a restraint upon the soliciting of orders for, and the sale of, goods in one state, to be delivered from another, are contracts in restraint of interstate commerce, within the meaning of the act of July 2, 1890. *U. S.* v. *E. C. Knight Co.*, 15 Sup. Ct. 249, 156 U. S. 1, distinguished.

SAME—SUIT IN EQUITY—FORFEITUTE OF GOODS.—In a suit in equity brought by the United States to enjoin the carrying out of a contract or combination in restraint of interstate commerce, under the act of 1890, there can be no seizure of goods in course of transportation pursuant to the unlawful contract. Such seizure can only be made under the sixth section of the act, which authorizes seizures and condemnation by like proceedings to those provided in cases of property imported into the United States contrary to law.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This was a proceeding in equity, begun by petition filed by the attorney general, on behalf of the United States, against six corporations engaged in the manufacture of cast-iron pipe, charging them with a combination and conspiracy in unlawful restraint of interstate commerce in such pipe, in violation of the so-called "Anti-Trust Law," passed by congress July 2, 1890. The defendants were the Addyston Pipe & Steel Company, of Cincinnati, Ohio; Dennis Long & Co., of Louisville, Ky.; the Howard-Harrison Iron Company, of Bessemer, Ala.; the Anniston Pipe & Foundry Company, of Anniston, Ala.; the South Pittsburg Pipe Works, of South Pittsburg, Tenn.; and the Chattanooga Foundry & Pipe Works, of Chattanooga, Tenn. The petition prayed that all pipe sold and transported from one state to another, under the combination and conspiracy described therein, be forfeited to the petitioner, and be seized and confiscated in the manner provided by law, and that a decree be entered dissolving the unlawful conspiracy of defendants, and perpetually enjoining them from operating under the same, and from selling said cast-iron pipe in accordance therewith to be transported from one state into another. The defendants filed a joint and separate demurrer to the petition in so far as it prayed for the confiscation of [273] goods in transit, on the ground that such proceedings, under the anti-trust act, are not to be had in a court of equity, but in a court of law. In addition to the demurrer, the defendants filed a joint and separate answer, in which they admitted the existence of an association between them for the purpose of avoiding the great losses they would otherwise sustain, due to ruinous competition between defendants, but denied that their association was in restraint of trade, state or interstate, or that it was organized to create a monopoly, and denied it was a violation of the anti-trust act of congress. Testimony in the form of affidavits was submitted by petitioner and defendants, and, by stipulation it

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was agreed that the final hearing might be had thereon. Judge Clark, who presided in the circuit court, dismissed the petition on the merits. His opinion is reported in 78 Fed. 712.

From the minutes of the association, a copy of which was put in evidence by the petitioner, it appeared that prior to December 28, 1894, the Anniston Company, the Howard-Harrison Company, the Chattanooga Company, and the South Pittsburg Company had been associated as the Southern Associated Pipe Works. Upon that date the Addyston Company and Dennis Long & Co. were admitted to membership, and the following plan was then adopted:

"First. The bonuses on the first 90,000 tons of pipe secured in any territory, 16" and smaller, shall be divided equally among six shops. Second. The bonuses on the next 75,000 tons, 30" and smaller sizes, to be divided among five shops, South Pittsburg not participating. Third. The bonuses on the next 40,000 tons, 36" and smaller sizes, to be divided among four shops, Anniston and South Pittsburg not participating. Fourth. The bonuses on the next 15,000 tons, consisting of all sizes of pipe, shall be divided among three shops, Chattanooga, South Pittsburg, and Anniston not participating. The above division is based on the following tonnage of capacity: South Pittsburg, 15,000 tons; Anniston, 30,000 tons; Chattanooga, 40,000 tons; Bessemer, 45,000 tons; Louisville, 45,000 tons; Cincinnati, 45,000 tons. When the 220,000 tons have been made and shipped, and the bonuses divided as hereinafter provided, the auditor shall set aside into a reserve fund all bonuses arising from the excess of shipments over 220,000 tons, and shall divide the same at the end of the year among the respective companies according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. It is also the intention of this proposition that the bonuses on all pipe larger that 36 inches in diameter shall be divided equally between the Addyston Pipe & Steel Company, Dennis Long & Co., and the Howard-Harrison Company."

"It was thereupon resolved: First. That this agreement shall last for two years from the date of the signing of same, until December 31, 1896. Second. On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote. Third. The Addyston Pipe & Steel Company shall handle the business of the gas and water companies of Cincinnati, Ohio, Covington, and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the parties to this agreement shall bid on such work such reasonable prices as they shall dictate. Fourth. Dennis Long & Company, of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville, Ind., and New Albany, Ind., furnishing all the pipe for gas and water works in above-named cities. Fifth. The Anniston Pipe & Foundry Company shall handle Anniston, Ala., and Atlanta, Ga., furnishing all pipe for gas and water companies in above-named cities. Sixth. The Chattanooga Foundry & Pipe Works shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in the above-named cities. Seventh. The Howard-Harrison Iron Company shall handle Bessemer and Birmingham, Ala., and St. Louis, Mo., furnishing all pipe for gas and water companies in the above-named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo. Eighth. South Pittsburg Pipe Works shall handle Omaha, Neb., on all sizes required by that city during the year of 1895, conferring with the other companies and co-operating with them. Thereafter they shall handle the gas and water companies of Omaha, Neb., on such sizes as they make.

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"Note: It is understood that all the shops who are members of this association shall handle the business of the gas and water companies of the cities set apart for them, including all sizes of pipe made by them.

[274] "The following bonuses were adopted for the different states as named below: All railroad or culvert pipe or pipe for any drainage or sewerage purposes on 12" and larger sizes shipped into bonus territory shall pay a bonus of $1.00 per ton. On all sizes below 12" and shipped into 'bonus territory' for the purposes above named, there shall be a bonus of $2.00 per ton.

List of Bonuses.

Alabama	$3 00	Wyoming	$4 00	Kansas	$2 00
B'gham, Ala	2 00	Oregon	1 00	Ky	2 00
Anniston, Ala	2 00	Ohio	1 50	La	3 00
Mobile, Ala	1 00	N. D	2 00	Miss	4 00
Arizona Ter	3 00	S. D	2 00	Mo	2 00
California	1 00	Florida	1 00	Montana	3 00
Colorado	2 00	Georgia	2 00	Nebraska	3 00
Ind. Ter	3 00	Atlanta, Ga	2 00	N. Mex	3 00
North C	1 00	Ga. Coast Pts	1 00	S. C	1 00
Tenn., East of C'land	2 00	Idaho	2 00	Minn	2 00
		Nev	3 00	Utah	4 00
Tenn., Middle and West	3 00	Oklahoma	3 00	Indiana	2 00
		Wis	2 00	Iowa	2 00
Illinois, except Madison and East St. Louis, as previously provided	2 00	Texas, Interior	3 00		
		Texas Coast	1 00		
		Wash'ton Ter	1 00		
		Michigan	1 50		
		West Va	1 00		

"All other territory free.

"On motion of Mr. Llewellyn, the bonuses on all city work as specially reserved shall be $2.00 per ton."

The states, for sales in which, bonuses had to be paid into the association were called "pay" territory, as distinguished from "free" territory, in which defendants were at liberty to make sales without restriction and without paying any bonus. The by-laws provided for an auditor of the association, whose duty it was to keep account of the business done by each shop both in pay and free territory. On the 1st and 16th of each month, he was required to send to each shop "a statement of all shipments reported in the previous half month, with a balance sheet showing the total amount of the premiums on shipments, the division of the same, and debit, credit, balance of each company." The system of bonuses, as a means of restricting competition and maintaining prices, was not successful. A change was therefore made by which prices were to be fixed for each contract by the association, and, except in reserved cities, the bidder was determined by competitive bidding of the members, the one agreeing to give the highest bonus for division among the others getting the contract. The plan was embodied in a resolution passed May 27, 1895, in the words following: "Whereas, the system now in operation in this association of having a fixed bonus on the several states has not, in its operation, resulted in the advancement in the prices of pipe, as was anticipated, except in reserved cities, and some further action is imperatively necessary in order to accomplish the ends for which this association was formed: Therefore, be it resolved, that from and after the first day of June, that all competition on the pipe lettings shall take place among the various pipe shops prior to

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the said letting. To accomplish this purpose it is proposed that the six competitive shops have a representative board located at some central city, to whom all inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the order shall have the protection of all the other shops." In pursuance of the new plan, it was further agreed "that all parties to this association, having quotations out, shall notify their customers that the same will be withdrawn by June 1, 1895, if not previously accepted, and upon all business accepted on and after June 1st bonuses shall be fixed by the committee." At the meeting of December 19, 1895, it was moved and carried that, upon all inquiries for prices from "reserved cities" for pipe required during the year of 1896, prices and bonuses should be fixed at a regular or called meeting of the principals. At the meeting of December 20, 1895, the plan for division of bonuses originally adopted was modified by making the basis the total amounts shipped into "pay" territory rather than the totals shipped into "pay" and "free" territory.

[275] To illustrate the mode of doing business, the following excerpt from the minutes of the meetings of December 20, 1895, February 14, 1896, and March 13, 1896, is given: "It was moved to sell the 519 pieces of 20" pipe from Omaha, Neb., for $23.40, delivered. Carried. It was moved that Anniston participate in the bonus, and the job be sold over the table. Carried. Pursuant to the motion, the 519 pieces of 20" pipe for Omaha was sold to Bessemer at a premium of $8." "Moved that 'bonus' on Anniston's Atlanta Waterworks contract be fixed at $7.10, provided freight is $1.60 a ton. Carried." An illustration of the manner in which "reserved" cities were dealt with may be seen in the case of a public letting at St. Louis. On February 4, 1896, the water department of that city let bids for 2,800 tons of pipe. St. Louis was "reserved" to the Howard-Harrison Company, of Bessemer, Ala. The price was fixed by the association at $24 a ton, and the bonus at $6.50. Before the letting, the vice president of this company wrote to the other members of the association, under date of January 24, 1896, as follows: "I write to say that, in view of the fact that I do not as yet know what the drayage will be on this pipe, I prefer that, if any of you find it necessary to put in a bid without going to St. Louis, please bid not less than $27 for the pipe, and 2¾ cents per pound for the specials. I would also like to know as to which of you would find it convenient to have a representative at the letting. It will be necessary to have two outside bidders." The contract was let to the Howard-Harrison Company, of Bessemer, at $24, who allowed the Shickle, Harrison & Howard Company, a pipe company of St. Louis, not in the association, but having the same president as the Howard-Harrison Company, of Bessemer, to fill part of the order. The only other bidders were the Addyston Pipe & Steel Company and Dennis Long & Co., the former bidding $24.37, and the latter $24.57. The evidence shows that the Chattanooga Foundry could have furnished this pipe, delivered in St. Louis, at from $17 to $18, and could have made a profit on it at that price. The record is full of instances of a similar kind, in which, after the successful bidder had been fixed by the "auction pool," or had been fixed by the arrangement as to "reserve" cities, the other defendants put in bids at the public letting as high as the selected bidder requested, in order to give the appearance of active competition between defendants.

In January, 1896, after the auction pool had been in operation for more than six months, the Chattanooga Company wrote a letter to its representative in the central committee to outline its policy for the new year, and the statements of the letter cast much light on the

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prices bid and the character of bonuses fixed. The letter is dated January 2, 1896, and is as follows: "Dear Sir: Referring to our policy for 1896, in bidding on pipe, we have had this matter under consideration for some time past, and from the information obtained from Mr. Thornton's statement, as to the amount of business done last year in pay territory, and from estimates that we have made for business that will come into that territory for 1896, we have been able to determine to what point we could bid on work and take contracts, and, if bonus is forced above this point, let it go and take the bonus. We note from your letter of yesterday that you have sized up the situation in its essential points, and it agrees exactly with our ideas on the subject. It is useless to argue that Howard-Harrison Iron Co., Cincinnati, and other shops, who have been bidding bonuses of $6 or $8 per ton, can come out and make any money if they continue to bid such bonus. In the case of the Howard-Harrison Iron Co. people, on Jacksonville, Fla., the truth of the business is they are losing money at the prices they bid for this work. If they take the contract at $19 delivered, it will only net $16 at the shop after they have paid back the bonus of $4.75. If they should continue to buy all the pipe that goes up to such figures as they have paid for Jacksonville and other points, they would wreck their shop in a few months. However, they, of course, calculate this bonus will be returned to them on work taken by other shops. We are very much pleased with the bonus that has been paid, and we only hope they will keep it up, as it is only money in our pockets. As long as there is no money to us, let them make the pipe, as we shall continue to do so. For the present you will adopt the following basis: On 16" and under standard weights, $14.25 at shop; on 18" and 36" standard weights, $13; on 16" and under light weights, $14.50 to $14.75 at shop. That is, you will bid all over $13, $14.25 and $14.50 on work. If we get work at these prices, it will be satisfactory. If the others run bonus above this point, let them take it, as it will be more **[276]** money to us to take the bonus. We note Mr. Thornton's report of average premiums from June 1st to December, that the average was $3.63. The average bonuses that are prevailing to-day are $7 to $8. We cannot expect this to continue; and we think your estimate of $6 ton average bonus is high, as we do not believe the premiums for '96 will average that price, unless there is a decided change for the better in business. We find there was sold and shipped into 'pay territory' from January 1, 1895, to date, including the 40,000 tons of old business that did not pay a bonus, about 188,000 tons; and we think a very conservative estimate of shipments into this territory will amount to fully 200,000 this year; more than that, probably overrun 240,000 tons, from the fact that the city of Chicago and several other places that annually use large quantities of pipe were not in the market last year or last season, from the fact that they were out of funds. On the basis as given you above, if the demand should reach 220,000 tons, which would give us our entire 40,000 tons, provided we did no business, then the association would pay us the average 'bonus,' which might be from $3.50 to $5 on our 40,000. If we cannot secure business in 'pay territory' at paying prices, we think we will be able to dispose of our output in 'free territory,' and, of course, make some profit on that. At the prices that Howard-Harrison people paid for Jacksonville, Des Plaines, and one or two other points, they are losing from $2.50 to $3 per ton; that is, provided 'bonuses' would not be returned to them. Therefore, when business goes at a loss, we are willing that other shops make it."

Another letter written by the same company, pending a trouble over a letting at Atlanta, is significant. The Anniston Company, to whom Atlanta had been "reserved," made its bid so high ($24) that a Philadelphia pipe firm, R. D. Wood & Co., had been able to under-

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bid the Anniston Company in spite of difference in freights. All the bids had been rejected as too high, and, upon a second letting, Anniston's bid was $1.25 a ton less, and the job was awarded to it. The charge was then made by Atlanta persons that there was a "trust" or "combine." This was vigorously denied. The letter of the Chattanooga Company evoked by this difficulty was dated February 25, 1896, and read as follows: "Gentlemen: We are in receipt of a carbon copy of your favor of the 24th instant, to F. B. Nichols, V. P., in reference to Atlanta, Ga. We certainly regret that the matter has assumed its present shape and that R. D. Wood & Company should make a lower bid by one dollar a ton than the Southern shops. You know we have always been opposed to special customers and 'reserved cities.' We do not think that it is the right principle, and we believe, if the present association continues, that all special customers and reserved cities should be wiped out. There is no good reason why we should be allowed to handle New Orleans; you, Atlanta; Howard-Harrison Iron Co., St. Louis; or South Pittsburg, Omaha. We are not in the business to award special privileges to any foundry, and we believe that the result would be more benefit to all concerned if all business was made competitive. It is hardly right, and we believe, if you will think over the matter carefully, you will concede it, for us to be put into a position of being unable to make prices or furnish pipe for the city of Atlanta, when we have always heretofore had a large share of their trade. We cannot explain our position to the Atlanta people, and we consider it is detrimental to our business, and think no combination should have the power to force us into such a position. The same argument will apply with you as to New Orleans, St. Louis, and other places. We think this matter should be considered seriously, and some action taken that will result in re-establishing ourselves (I mean the four Southern shops) in the confidence of the Atlanta people. Wistar, R. D. Wood & Company's man, has no doubt told them all about our association, or as much as he could guess, and has worked up a very bitter feeling against us. The very fact that you have been protected, and have had all their business for the past two years, is proof to them that such a 'combination' exists; and they state that, if they find out positively that we are working together, they will never receive a bid from any one of us again. We cannot afford to leave these people under that impression, and something ought to be done that would disprove Mr. Wistar's statement to them. We believe that all business ought to be competitive. The fact that certain shops have certain cities 'reserved' is all based upon mere sentiment, and no good reason exists why it should be so. We believe that, as a general thing, we have had our prices entirely too high, and especially do we believe this has been the [277] case as to prices in reserved cities. The prices made at St. Louis and Atlanta are entirely out of all reason, and the result has been, and always will be, when high prices are named, to create a bad feeling and an agitation against the combination. There is no reason why Atlanta, New Orleans, St. Louis, or Omaha should be made to pay higher prices for their pipe than other places near them, who do not use anything like the amount of pipe, and whose trade is not as desirable for many other reasons. There is no sentiment existing with us in reference to Atlanta, as we would as soon sell our pipe anywhere else, only, as stated above, it is wrong in principle that we should be forced to give up Atlanta or any other point for no good reason that we know of."

It appears quite clearly from the prices at which the Chattanooga and the South Pittsburg Companies offered pipe in free territory that any price which would net them from $13 to $15 a ton at their foundries would give them a profit. Pipe was freely offered by the defendants in free territory more than 500 miles from their foundries at less prices than their representative board fixed prices for jobs let in cities in pay territory nearer to defendants' foundries by 300 miles or more. The defendants adduced many affidavits of a formal type, chiefly from persons who had been buying pipe from defendants and other companies, who testified in a general way that the prices at which the pipe had been offered by defendants all over the country had been reasonable; but in not one of the affidavits was any attempt made to give figures as to cost of production and freight, and in not a single case were the specific instances shown by the evidence for the petitioner disputed. The evidence as to the capacity of the defendants' mills is by no means satisfactory. The division of bonuses was based on an aggregate yearly output of 220,000 tons, but there are averments in the answer that indicate that this was not a statement of the actual limit of capacity, but was only taken as a standard of restricted output upon which to calculate an equitable division of bonuses. Nowhere in the large mass of affidavits is there any statement of the per diem capacity of defendants' mills. Taking their aggregate capacity, however, as 220,000 tons, that of the other mills in the pay territory was 170,500 tons, and that of the mills in free territory was 348,000 tons, according to the affidavit of the chief officer of one of defendants. Of the nonassociation mills in the pay territory, one was at Pueblo, Colo., another was in the state penitentiary at Waco, Tex., and a third in Oregon. Their aggregate annual capacity was 45,500 tons. Another nonassociation mill was the Shickle, Howard & Harrison mill of St. Louis, Mo., with a capacity of 12,000 tons. John W. Harrison, who was president of this company, was also president of the Howard-Harrison mill of Bessemer, Ala., which was a member of the association; and it appears that an order taken by the Bessemer mill at St. Louis was partly filled by the St. Louis mill. The other mills in the pay territory were one at Columbus, Ohio, with an annual capacity of 30,000 tons; one at Cleveland, Ohio, of 60,000 tons; one at Newcomerstown, in northeastern Ohio, of 8,000 tons; and one at Detroit, Mich., of 15,000 tons; and their aggregate annual capacity was 113,000 tons. In the free territory there was one mill in eastern Virginia, with an annual capacity of 16,000 tons; four mills in eastern Pennsylvania, with a capacity of 87,000 tons; three mills in New Jersey, with a capacity of 210,000 tons; and two mills in New York, one at Utica, and another at Buffalo, with an aggregate capacity of 35,000 tons. The evidence was scanty as to rates of freight upon iron pipes, but enough appeared to show that the advantage in freight rates which the defendants had over the large pipe foundries in New York, eastern Pennsylvania, and New Jersey in bidding on contracts to deliver pipe in nearly all of the pay territory varied from $2 to $6 a ton, according to the location. The defendants filed the affidavits of their managing officers, in which they stated generally that the object of their association was not to raise prices beyond what was reasonable, but only to prevent ruinous competition between defendants, which would have carried prices far below a reasonable point; that the bonuses charged were not exorbitant profits and additions to a reasonable price, but they were deductions from a reasonable price, in the nature of a penalty or burden intended to curb the natural disposition of each member to get all the business possible, and more than his due proportion; that the prices fixed by the association were always reasonable, and were always fixed, as they must have been, with reference to the very active competition of other pipe manufacturers for every job; that the reason why they sold pipe at so much cheaper rates in the free territory than in the [278] pay territory was because they were willing to sell at a loss to keep their mills going rather than to stop them; that the prices

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at a city like St. Louis in which the specifications were detailed and precise, were higher because pipe had to be made especially for the job, and they could not use stock on hand. The defendants devoted a good deal of evidence to showing that the stenographer who furnished copies of the minutes of the association and of the correspondence between the members had a pecuniary motive in thus betraying the confidence of his employers; but no evidence was offered by them to contradict any statements made by him, or to impeach the accuracy of the copies he has produced. On one point alone was he contradicted, and that was in his statement that the bonuses represented the increase over and above a reasonable price made possible by the combination of the defendants.

J. H. Bible and *Edward B. Whitney*, for the United States.

Frank Spurlock, for appellees.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first section of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," passed July 2, 1890 (26 Stat. 209), declares illegal "every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations." The second section makes it a misdemeanor for any person to monopolize, or attempt to monopolize, or combine or conspire with others to monopolize, any part of the trade or commerce among the several states. The fourth section of the act gives the circuit courts of the United States jurisdiction to hear and determine proceedings in equity brought by the district attorneys of the United States under the direction of the attorney general to restrain violations of the act.

Two questions are presented in this case for our decision: First. Was the association of the defendants a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood in the act? Second. Was the trade thus restrained trade between the States?

The contention on behalf of defendants is that the association would have been valid at common law, and that the

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federal anti-trust law was not intended to reach any agreements that were not void and unenforceable at common law. It might be a sufficient answer to this contention to point to the decision of the supreme court of the United States in *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, in which it was held that contracts in restraint of interstate transportation were within the statute, whether the restraints would be regarded as reasonable at common law or not. It is suggested, however, that that case related to a quasi public employment necessarily under public control, and affecting public interests, and that a less stringent rule of construction applies to contracts restricting parties in sales of merchandise, which is purely a private business, having in it no element of a public or quasi public character. Whether or not there is substance in such a distinction,—a question we do not decide,—it is certain that, if the contract of association which bound the defendants was void and unenforceable at the common law because in restraint of [279] trade, it is within the inhibition of the statute if the trade it restrained was interstate. Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] App. Cas. 25; *Hornby* v. *Close*, L. R. 2 Q. B. 153; Lord Campbell, C. J., in *Hilton* v. *Eckersley*, 6 El. & Bl. 47, 66; Hannen, J., in *Farrer* v. *Close*, L. R. 4 Q. B. 602, 612. The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints.

The argument for defendants is that their contract of association was not, and could not be, a monopoly, because their aggregate tonnage capacity did not exceed 30 per cent. of the total tonnage capacity of the country; that the re-

straints upon the members of the association, if restraints they could be called, did not embrace all the states, and were not unlimited in space; that such partial restraints were justified and upheld at common law if reasonable, and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable, because without them each member would be subjected to ruinous competition by the other, and did not exceed in degree of stringency or scope what was necessary to protect the parties in securing prices for their product that were fair and reasonable to themselves and the public; that competition was not stifled by the association because the prices fixed by it had to be fixed with reference to the very active competition of pipe companies which were not members of the association, and which had more than double the defendants' capacity; that in this way the association only modified and restrained the evils of ruinous competition, while the public had all the benefit from competition which public policy demanded.

From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others.

Chief Justice Parker, in 1711, in the leading case of *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 190, stated these objections as follows:

"First. The mischief which may arise from them (1) to the party by the loss of his livelihood and the subsistence of his family; (2) to the public by depriving it of an useful member. Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible."

[280] The reasons were stated somewhat more at length in *Alger* v. *Thacher*, 19 Pick. 51, 54, in which the supreme judicial court of Massachusetts said:

"The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."

The changed conditions under which men have ceased to be so entirely dependent for a livelihood on pursuing one trade, have rendered the first and second considerations stated above less important to the community than they were in the seventeenth and eighteenth centuries, but the disposition to use every means to reduce competition and create monopolies has grown so much of late that the fourth and fifth considerations mentioned in *Alger* v. *Thacher* have certainly lost nothing in weight in the present day, if we may judge from the statute here under consideration and similar legislation by the states.

The inhibition against restraints of trade at common law seems at first to have had no exception. See language of Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26. After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and

trade, when partners dissolved, and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner. Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. [281] This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employer.

In a case of this last kind, *Mallan* v. *May*, 11 Mees. & W. 652, Baron Parke said:

"Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported. Such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is, in effect, the sale of a good will, and offers an encouragement to trade by allowing a party to dispose of all the fruits of his industry. * * * And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits. * * * In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business."

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought, or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employé of the confidential knowledge acquired in such business. Under the first class come the cases of *Mitchel* v. *Reynolds*, 1 P. Wms. 181; *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. 658; *Nordenfeldt* v. *Maxim Nordenfeldt Co.*, [1894] App. Cas. 534; *Rousillon* v. *Rousillon*, 14 Ch. Div. 351; *Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345; *Whittaker* v. *Howe*, 3 Beav. 383; *Match Co.* v. *Roeber*, 106 N. Y. 473, 13 N. E. 419; *Tode* v. *Gross*, 127 N. Y. 480, 28 N. E. 469; *Beal* v. *Chase*, [282] 31 Mich. 490; *Hubbard* v. *Miller*, 27 Mich. 15; *National Ben. Co.* v. *Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806; *Whitney* v. *Slayton*, 40 Me. 224; *Pierce* v. *Fuller*, 8 Mass. 222; *Richards* v. *Seating Co.*, 87 Wis. 503, 58 N. W. 787. In the second class are *Tallis* v.

Tallis, 1 El. & Bl. 391, and *Lange* v. *Werk*, 2 Ohio St. 520. In the third class are *Machinery Co.* v. *Dolph*, 138 U. S. 617, 11 Sup. Ct. 412, Id., 28 Fed. 553, and *Matthews* v. *Associated Press*, 136 N. Y. 333, 32 N. E. 981. In the fourth class are *American Strawboard Co.* v. *Haldeman Paper Co.*, 83 Fed. 619, and *Hitchcock* v. *Anthony*, Id. 779, both decisions of this court; *Navigation Co.* v. *Winsor*, 20 Wall. 64; *Dunlop* v. *Gregory*, 10 N. Y. 241; *Hodge* v. *Sloan*, 107 N. Y. 244, 17 N. E. 335. While in the fifth class are the cases of *Homer* v. *Ashford*, 3 Bing. 322; *Horner* v. *Graves*, 7 Bing. 735; *Hitchcock* v. *Coker*, 6 Adol. & E. 454; *Ward* v. *Byrne*, 5 Mees. & W. 547; *Dubowski* v. *Goldstein*, [1896] 1 Q. B. 478; *Peels* v. *Saalfeld*, [1892] 2 Ch. 149; *Taylor* v. *Blanchard*, 13 Allen, 370; *Keeler* v. *Taylor*, 53 Pa. St. 467; *Herreshoff* v. *Boutineau*, 17 R. I. 3, 19 Atl. 712.

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In *Horner* v. *Graves*, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see Lord Macnaghten's judgment in *Nordenfelt* v. *Maxim Nordenfelt Co.*, [1894] App. Cas. 535, 567), used the following language:

"We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the

covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the convenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse [283] the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.

Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and, therefore, that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities when all of them are considered. It is true that certain rules for determining whether a covenant in restraint of trade ancillary to the main purpose of a contract was reasonably adapted and limited to

the necessary protection of a party in the carrying out of such purpose have been somewhat modified by modern authorities. In *Mitchel* v. *Reynolds*, 1 P. Wms. 181, the leading early case on the subject, in which the main object of the contract was the sale of a bake house, and there was a covenant to protect the purchaser against competition by the seller in the bakery business, Chief Justice Parker laid down the rule that it must appear before such a covenant could be enforced that the restraint was not general, but particular or partial, as to places or persons, and was upon a good and adequate consideration, so as to make it a proper and useful contract. Subsequently, it was decided in *Hitchcock* v. *Coker*, 6 Adol. & E. 454, that the adequacy of the consideration was not to be inquired into by the court if it was a legal one, and that the operation of the covenant need not be limited in time. More recently the limitation that the restraint could not be general or unlimited as to space has been modified in some case by holding that, if the protection necessary to the covenantee reasonably requires a covenant unrestricted as to space, it will be upheld as valid. *Whittaker* v. *Howe*, 3 Beav. 383; *Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345; *Rousillon* v. *Rousillon*, 14 Ch. Div. 351; *Nordenfeldt* v. *Maxim Nordenfeldt Co.*, [1894] App. Cas. 535. See, also, *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. 658; *Match Co.* v. *Roeber*, 106 N. Y. 473, 13 N. E. 419. But these cases all involved contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract, and was necessary to the protection of the covenantee in the carrying out of that main purpose. They do not manifest any general disposition on the part of the courts to be more liberal in supporting contracts having for their sole object the restraint of trade than did the courts of an earlier time. It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have [284] set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint

of the parties, how much restraint of competition is in the public interest, and how much is not.

The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it. The cases assuming such a power in the courts are *Wickens* v. *Evans*, 3 Younge & J. 318; *Collins* v. *Locke*, 4 App. Cas. 674; *Ontario Salt Co.* v. *Merchants' Salt Co.*, 18 Grant (U. C.) 540; *Kellogg* v. *Larkin*, 3 Pin. 123; *Leslie* v. *Lorillard*, 110 N. Y. 519, 18 N. E. 363.

In *Wickens* v. *Evans*, three trunk manufacturers of England, who had competed with each other throughout the realm to their loss, agreed to divide England into three districts, each party to have one district exclusively for his trade, and, if any stranger should invade the district of either as a competitor, they agreed "to meet to devise means to promote their own views." The restraint was held partial and reasonable, because it left the trade open to any third party in either district. In answer to the suggestion that such an agreement to divide up the beer business of London among the London brewers would lead to the abuses of monopoly, it was replied that outside competition would soon cure such abuses,—an answer that would validate the most complete local monopoly of the present day. It may be, as suggested by the court, that local monopolies cannot endure long, because their very existence tempts outside capital into competition; but the public policy embodied in the common law requires the discouragement of monopolies, however temporary their existence may be. The public interest may suffer severely while new competition is slowly developing. The case can hardly be reconciled with later cases, hereafter to be referred to, in England and America. It is true that there was in this case no direct evidence of a desire by the parties to regulate prices, and it has been sometimes explained on the theory that the agreement was solely to reduce the expenses incident to a business covering the realm by restricting its territorial extent; but it is difficult to escape the conclusion that the restraint upon each two of the three parties was imposed to secure to the other a monopoly and

power to control prices in the territory assigned to him, because the final clause in the contract implies that, when it was executed, there were no other competitors except the parties in the territory divided.

Collins v. *Locke* was a case in the privy council. The action was brought to enforce certain articles of agreement by and between four of the leading master stevedore contracting firms in Melbourne, Australia, who did practically all the business of that port. The court (composed of Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier) describes the scope and purposes of the agreement and the view of the court as follows:

"The objects which this agreement has in view are to parcel out the stevedoring business of the port among the parties to it, and so to prevent competition, at least among themselves, and also, it may be, to keep up the price to be paid for the work. Their lordships are not prepared to say that an agreement having these objects is invalid if carried into effect by proper means,—that is, by [285] provisions reasonably necessary for the purpose,—though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade."

No attempt is made to justify the view thus comprehensively stated, or to support it by authority, or to reconcile it with the general doctrine of the common law that contracts restraining competition, raising prices, and tending to a monopoly, as this is conceded by the court to have been, are void. The court ignores the public interest that prices shall be regulated by competition, and assumes the power in the court to uphold and enforce a contract securing a monopoly if it affect only one port, so as to be but a partial restraint of trade. The case is directly at variance with the decision of the supreme court of Illinois in *More* v. *Bennett*, 140 Ill. 69, 29 N. E. 888, hereafter discussed, and cannot be reconciled in principle with many of the other cases cited.

The Canadian case of *Ontario Salt Co.* v. *Merchants' Salt Co.* is another one upon which counsel for the defendants rely. That was the decision of a vice chancellor. Six salt companies, in order to maintain prices, combined, and put their business under the control of a committee, and agreed not to sell except through the committee. It was held that because it appeared that there were other salt companies in the province, and because the combiners denied

that they intended to raise prices, but only to maintain them, the contract of union was not in unlawful restraint of trade. The conclusion and argument of the court in *Salt Co.* v. *Guthrie*, 35 Ohio St. 666, hereafter stated, would seem to be a sufficient answer to this case.

Kellogg v. *Larkin*, 3 Pin. 123, was an early case in Wisconsin, in which the action was on the covenant of a warehouseman in a lease of his warehouse, by which he agreed to devote his services to the lessee at certain compensation, and not to purchase or store wheat in the Milwaukee market. The covenant was held valid. Had nothing else appeared in the case, the conclusion would have been clearly right, because such a covenant might well have been reasonably necessary to the protection of the lessee in his enjoyment of the warehouse and the good will of the lessor. But it further appeared that this lease, with the covenant, was only one of many such executed by the warehousemen of Milwaukee to the united grain dealers of that city, to enable the latter to obtain absolute control of the wheat market in Milwaukee. The court held the latter combination valid also. The decision cannot be upheld, in view of the more modern authorities hereafter referred to.

The case of *Leslie* v. *Lorillard*, 110 N. Y. 519, 18 N. E. 363, would seem to be an authority against our view. In that case a stockholder sought to restrain the payment of an annual payment about to be made by the Old Dominion Steamship Company under a contract by which it bought off the Lorillard Steamship Company from continuing in competition with it in carrying passengers and freight between New York and Norfolk. The contract was held valid, although it had no purpose except the restraining of competition, and, so far as appears, the obtaining of the complete control of the business. The case is rested on *Match Co.* v. *Roeber*, 106 N. Y. 473, 13 N. E. 419, which was a case of the purchase of property and good will. It proceeds on the [286] general proposition "that competition is not invariably a public benefaction; for it may be carried on to such a degree as to become a general evil," and thus leaves it to the discretion of the court to say how much competition is desirable, and how much is mischievous, and accordingly

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to determine whether a contract is bad or not. The case is directly opposed to *Anderson* v. *Jett*, 89 Ky. 375, 12 S. W. 670, hereafter cited. It should be said that nothing appears in the report of the case to show directly that the purpose of the contract was to reserve the entire business to the Dominion Company, or to secure to it the power of regulating prices, but this natural inference from the terms of the contract is not negatived.

The case of *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] App. Cas. 25, has been cited to sustain the position of the defendants. It does not do so. It was a suit for damages, brought by a company engaged in the tea-carrying trade at Hankow, China, against six other companies engaged in the same trade, for loss inflicted by an alleged unlawful conspiracy entered into by them to drive the plaintiff out of the trade, and to obtain control of the trade themselves. It appeared that the defendants agreed to conform to a plan of association, by which they should constantly underbid the plaintiff, and take away his trade by offering exceptional and very favorable terms to customers dealing exclusively with the members of the association, and that they did this to control the business the next season after he had been thus driven out of competition. It was held by the house of lords that this was not an unlawful and indictable conspiracy, giving rise to a cause of action by the person injured thereby; but it was not held that the contract of association entered into by the defendants was not void and unenforceable at common law. On the contrary, Lord Bramwell, in his judgment (at page 46), and Lord Hannen, in his (at page 58), distinctly say that the contract of association was void as in restraint of trade; but all the law lords were of opinion that contracts void as in restraint of trade were not unlawful in a criminal sense, and gave no right of action for damages to one injured thereby. The statute we are considering expressly gives such contracts a criminal and unlawful character. It is manifest, therefore, that whatever of relevancy the Mogul Steamship Co. Case has in this discussion makes for, rather than against, our conclusion.

Two other cases deserve mention here. They are *Roller Co.* v. *Cushman*, 143 Mass. 353, 9 N. E. 629, and *Gloucester*

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Isinglass & Glue Co. v. *Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005. In these cases it was held that contracts in restraint of trade are not invalid if they affect trade in articles which, though useful and convenient, are not articles of prime or public necessity, and therefore contracts between dealers made to secure complete control of the manufacture and sale of such articles were supported. In the first case the article involved was a fastening of a certain shade roller, and in the other was glue made from fish skins. We think the cases hereafter cited show that the common law rule against restraint of trade extends to all articles of merchandise, and that the introduction of such a distinction only furnishes another opportunity for courts to give effect to the varying economical opinions of its in- [287] dividual members. It might be difficult to say why it was any more important to prevent restraints of trade in beer, mineral water, leather cloth, and wire cloth than of trade in curtain shades or glue. However this may be, the cases do not touch the case at bar, because the same court, in *Telegraph Co.* v. *Crane*, 160 Mass. 50, 35 N. E. 98, held that fire-alarm telegraph instruments were articles of sufficient public necessity to render unreasonable restraints of trade in them void, and certainly such articles are not more necessary for public use than water, gas, and sewer pipe.

There are other cases upon which counsel of defendants rely, which, in our judgment, have no bearing on the issue, or, if they have, are clearly within the rules we have already stated. One is a case in which a railroad company made a contract with a sleeping-car company by which the latter agreed to do the sleeping-car business of the railway company on a number of conditions, one of which was that no other company should be allowed to engage in the sleeping-car business on the same line. *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490. The main purpose of such a contract is to furnish sleeping-car facilities to the public. The railroad company may discharge this duty itself to the public, and allow no one else to do it, or it may hire some one to do it, and, to secure the necessary investment of capital in the discharge

of the duty, may secure to the sleeping-car company the same freedom from competition that it would have itself in discharging the duty. The restraint upon itself is properly proportioned to, and is only ancillary to, the main purpose of the contract, which is to secure proper facilities to the public. Exactly the same principle applies to similarly exclusive contracts with express companies, and stock-yard delivery companies. *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628; *Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 11 Sup. Ct. 461; *Butchers' & Drovers' Stock-Yards Co.* v. *Louisville & N. R. Co.*, 31 U. S. App. 252, 14 C. C. A. 290, and 67 Fed. 35. The fact is that it is quite difficult to conceive how competition would be possible upon the same line of railway between sleeping-car companies or express companies. Such contracts involve the hauling of sleeping cars or express cars on each express train, the assignment of offices in each station, and various running arrangements, which it would be an intolerable burden upon the railroad company to make and execute for two companies at the same time. And the same is true of contracts with a stock delivery company. The railway company could not ordinarily be expected to have more than one general station for the delivery of cattle in any one town. It would only be required by the nature of its employment to furnish such facilities as were reasonably sufficient for the business at that place. There is hardly more objection on the ground of public policy to such a restriction upon a railway company in cases like these than there would be to a restriction upon a lessor not to allow the subject-matter of the lease to be enjoyed by any one but the lessee during the lease. The privilege, when granted, is hardly capable of other than exclusive enjoyment. The public interest is satisfactorily secured by the requirement, which may be enforced by any member of the public, to [288] wit, that the charges allowed shall not be unreasonable, and the business is of such a public character that it is entirely subject to legislative regulation in the same interest.

Having considered the cases upon which the counsel for the defendants have relied to maintain the proposition that contracts having no purpose but to restrain competition and maintain prices, if reasonable, will be held valid, we must

now pass in rapid review the cases that make for an opposite view.

In *People* v. *Sheldon*, 139 N. Y. 251, 34 N. E. 785, all the coal dealers in the city of Lockport, N. Y., entered into a contract of association, forming a coal exchange to prevent competition by constituting the exchange the sole authority to fix the price to be charged by members for coal sold by them, and the price was thus fixed. The court approved a charge to the jury that even if this was merely a combination between independent coal dealers to prevent competition between themselves for the due protection of the parties to it against ruinous rivalry, and although no attempt was made to charge unreasonable or excessive prices, it was inimical to trade and commerce, whatever might be done under it, and was within the state statute making a conspiracy injurious to trade indictable. Said Andrews, C. J. (page 264, 139 N. Y., and page 789, 34 N. E.):

"If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

See, to the same effect, *Judd* v. *Harrington*, 139 N. Y. 105, 34 N. E. 790; *Leonard* v. *Poole*, 114 N. Y. 371, 21 N. E. 707; *De Witt Wire-Cloth Co.* v. *New Jersey Wire-Cloth Co.* (Com. Pl.) 14 N. Y. Supp. 277.

In *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173, five coal companies controlling the bituminous coal trade in Northern Pennsylvania agreed to allow a committee to fix prices and rates of freight, and to fix proportion of sales by each. Competition was not destroyed, because the anthracite coal and Cumberland bituminous coal were sold in competition with this coal. The association was, nevertheless, held void, as in illegal restraint of trade and competition, and tending to injure the public. In *Nester* v. *Brewing Co.*, 161 Pa. St. 473, 29 Atl. 102, 45 brewers in Philadelphia made an agreement to sell beer in Philadelphia and Camden at a certain price to be fixed by a committee of their number. Though beer could hardly be said to be an article of prime necessity like coal, yet, as it was an article of merchandise,

the contract was held void, as in restraint of trade, and tending to a monopoly.

In *Salt Co.* v. *Guthrie*, 35 Ohio St. 666, the salt manufacturers of a salt producing territory in Ohio, with some exceptions, combined to regulate the price of salt by preventing ruinous competition between themselves, and agreed to sell only at prices fixed by a committee of their number. The supreme court of Ohio held the contract void. Judge McIlvaine, who delivered the opinion of the court, said:

[289] "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on the ground of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public."

Other Ohio cases which presented similar facts, and in which the same rule was enforced, are *Emery* v. *Candle Co.*, 47 Ohio St. 320, 24 N. E. 660, and *Hoffman* v. *Brooks*, 11 Wkly. Law Bul. 258.

In *Anderson* v. *Jett*, 89 Ky. 375, 12 S. W. 670, two owners of steamboats running on the Kentucky river made an agreement to keep up rates, and divide net profits, to prevent ruinous competition and reduced rates. The contract was held void.

In *Chapin* v. *Brown*, 83 Iowa, 156, 48 N. W. 1074, the grocerymen in a town, in order to avoid a trade in butter which was burdensome, agreed not to buy any butter or to take it in trade except for use in their own families, so as to throw the business into the hands of one man who dealt in butter exclusively. The agreement was held invalid, because in restraint of trade, and tending to create a monopoly.

In *Craft* v. *McConoughy*, 79 Ill. 346, five grain dealers in Rochelle, Ill., agreed to conduct their business as if independent of each other, but secretly to fix prices at which they would sell grain, and to divide profits in a certain proportion. This was held void, as in restraint of trade, and tending to create a monopoly. In *More* v. *Bennett*, 140 Ill. 69, 29 N. E. 888, articles of association entered into by only a part of the stenographers of Chicago to fix a schedule of prices, and prevent competition among their members and a

consequent reduction of prices, was held void. The court said:

"A combination among a number of persons engaged in a particular business to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would be if left to the influence of unrestricted competition, is contrary to public policy. Contracts in partial restraint of trade which the law sustains are those entered into by a vendor of a business and its good will with its vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased."

As already said, this case is in direct conflict with *Collins* v. *Locke*, 4 App. Cas. 674, discussed above. To the same effect as *More* v. *Bennett* are *Ford* v. *Association*, 155 Ill. 166, 39 N. E. 651, and *Bishop* v. *Preservers Co.*, 157 Ill. 284, 41 N. E. 765.

In *Association* v. *Niezerowski*, 95 Wis. 129, 70 N. W. 166, the suit was on a note given in pursuance of the secret rules of an association of 60 out of the 75 master masons in Milwaukee, by which all bids for work about to be let were first made to the association, and the lowest bidder was then required to add 6 per cent. to his bid, and, if the bid was more than 8 per cent. below the next lowest bidder, more than 6 per cent. might be added. Each member was required to pay to the association 6 per cent. of his estimates when due, for subsequent distribution. In declaring the contract void, the court said:

[290] "The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof there exist no contract relations."

In *Vulcan Powder Co.* v. *Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581, four powder companies of California agreed that each should sell at a price to be fixed by a committee of their representatives, and should pay over to the others the profits on any excess of sales over a fixed proportion of the total sales. The contract was held void.

In *Oil Co.* v. *Adoue*, 83 Tex. 650, 19 S. W. 274, five owners of cotton-seed oil mills in Texas made an agreement not to sell at less than certain agreed prices. One guarantied profits to the four others, and suit was brought on the guaranty. It was held void, as restraining trade, and tending to a monop-

oly, even though the evidence failed to establish that it effected a monopoly.

In *Association* v. *Kock*, 14 La. Ann. 168, eight commercial firms in New Orleans holding a large quantity of cotton bagging entered into an agreement by which they stipulated that for three months no member should sell a bale except by a vote of the majority. It was held that the contract was "palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

In *Hilton* v. *Eckersley*, 6 El. & Bl. 47, it was held that an agreement between 18 cotton manufacturers to submit to the control of a committee of their number for 12 months the question as to prices to be paid for labor and the terms of employment, in order to resist the aggressions of an association of workingmen, was void and unenforceable, because in restraint of trade.

In *Urmston* v. *Whitelegg*, 63 L. T. (N. S.) 455, a case in the queen's bench division, before Day and Lawrence, JJ., the action was brought to enforce a penalty under the rules of the Bolton Mineral Water Manufacturers' Association, which recited that the object of the association was to maintain the price of mineral water, and bound the members for 10 years not to sell at less than 9d. a dozen bottles, or at not less than any higher price fixed by the committee, on penalty of £10 for each violation. Day, J., said:

"If a contract for raising prices against the public interest is a contract in restraint of trade, this is undoubtedly such a contract. During the last hundred years great changes have taken place in the views of the public, of the legislature, and therefore of the judges, on the matter, and many old-fashioned offenses have disappeared; but the rule still obtains that combination for the mere purpose of raising prices is not enforceable in a court of law. This contract is illegal in the sense of not being enforceable. It is not necessary that it should be such as to form the ground of criminal proceedings."

In the foregoing cases the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and vendee, or of employer and employé. Where such relation exists between the parties, as

already stated, restraints are usually enforceable if commensurate only with the reasonable pro- [291] tection of the covenantee in respect to the main transactions affected by the contract. But, in recent years, even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose. The principal cases of this class are *Richardson* v. *Buhl*, 77 Mich. 632, 43 N. W. 1102; *Arnot* v. *Coal Co.*, 68 N. Y. 558; *People* v. *Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062; *People* v. *Refining Co.*, 54 Hun, 366, 7 N. Y. Supp. 406; *State* v. *Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *State* v. *Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279; *Manufacturing Co.* v. *Klotz*, 44 Fed. 721; *Distilling & Cattle Feeding Co.* v. *People*, 156 Ill. 448, 41 N. E. 188; *Carbon Co.* v. *McMillin*, 119 N. Y. 46, 23 N. E. 530; *Harrow Co.* v. *Hench*, 83 Fed. 36; *Factor Co.* v. *Adler*, 90 Cal. 110, 27 Pac. 36; *Lumber Co.* v. *Hayes*, 76 Cal. 387, 18 Pac. 391.

In addition to the cases cited, there are others which sustain the general principle, but in them there exists the additional reason for holding the contracts invalid that the parties were engaged in a quasi public employment. They are *Gibbs* v. *Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553; *People* v. *Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798; *Stockton* v. *Railroad Co.*, 50 N. J. Eq. 52, 24 Atl. 964; *West Va. Transp. Co.* v. *Ohio River Pipe-Line Co.*, 22 W. Va. 600; *Hooker* v. *Vandewater*, 4 Denio, 349; *Stanton* v. *Allen*, 5 Denio, 434; *Railroad Co.* v. *Collins*, 40 Ga. 582; *Hazlehurst* v. *Railroad Co.*, 43 Ga. 13.

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Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. But the facts of the case do not require us to go so far as this, for they show that the attempted justification of this association on the grounds stated is without foundation.

The defendants, being manufacturers and vendors of cast-iron pipe, entered into a combination to raise the prices for pipe for all the states west and south of New York, Pennsylvania, and Virginia, constituting considerably more than three-quarters of the territory of the United States, and significantly called by the associates "pay territory." Their joint anual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the pay territory was 170,500 tons. Of this, 45,000 tons was the ca- [292] pacity of mills in Texas, Colorado, and Oregon, so far removed from that part of the pay territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in pay territory and outside of the combination, one was at Columbus, Ohio, two in northern Ohio, and one in Michigan. Their aggregate possible annual capacity was about one-half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the pay territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga, and South Pittsburg, and Anniston, and Bessemer, were grouped much nearer to the center of the pay territory. The freight upon cast-iron pipe amounts to a considerable percentage of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which Eastern manufacturers would have to pay to

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deliver pipe in pay territory, the defendants, by controlling two-thirds of the output in pay territory, were practically able to fix prices. The competition of the Ohio and Michigan mills, of course, somewhat affected their power in this respect in the northern part of the pay territory; but, the further south the place of delivery was to be, the more complete the monopoly over the trade which the defendants were able to exercise, within the limit already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices, and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from the Atlantic seaboard added, this is true; but, within that limit, they could fix prices as they chose. The most cogent evidence that they had this power is the fact, everywhere apparent in the record, that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below, upon affidavits solely, and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact. The defendants were, by their combination, therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories, and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been, if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee, and by allowing the highest bidder at the secret "auction pool" to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition, and it affected only a part of the price. But this certainly does not [293] take the contract of association out of the an-

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nulling effect of the rule against monopolies. In *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 16, 15 Sup. Ct. 255, Chief Justice Fuller, in speaking for the court, said:

"Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition."

It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe in pay territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so. But, if it were important, we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry written to the other defendants, and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed $15 a ton. It could have been delivered at Atlanta at $17 to $18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was $24.25. The same thing was true all through pay territory to a greater or less degree, and especially at "reserved cities."

Another aspect of this contract of association brings it within the term used in the statute, "a conspiracy in restraint of trade." A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means. In the answer of the defendants, it is averred that the chief way in which cast-iron pipe is sold is by contracts let after competitive

bidding invited by the intending purchaser. It would have much interfered with the smooth working of defendants' association had its existence and purposes become known to the public. A part of the plan was a deliberate attempt to create in the minds of the members of the public inviting bids the belief that competition existed between the defendants. Several of the defendants were required to bid at every letting, and to make their bids at such prices that the one already selected to obtain the contract should have the lowest bid. It is well settled that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside. *Breslin* v. *Brown*, 24 Ohio St. 565; *Atcheson* v. *Mallon*, 43 N. Y. 147; *Loyd* v. *Malone*, 23 Ill. 41; *Wooton* v. *Hinkle*, 20 Mo. 290; *Phippen* v. *Stickney*, 3 Metc. (Mass.) 384; *Kearney* v. *Taylor*, 15 How. 494, **[294]** 519; *Wilbur* v. *How*, 8 Johns. 444; *Hannah* v. *Fife*, 27 Mich. 172; *Gibbs* v. *Smith*, 115 Mass. 592; *Swan* v. *Chorpenning*, 20 Cal. 182; *Gardiner* v. *Morse*, 25 Me. 140; *Ingram* v. *Ingram*, 49 N. C. 188; *Brisbane* v. *Adams*, 3 N. Y. 129; *Woodruff* v. *Berry*, 40 Ark. 251; Wald, Pol. Cont. 310, note by Mr. Wald, and cases cited. The case of *Jones* v. *North*, L. R. 19 Eq. 426, to the contrary, cannot be supported. The largest purchasers of pipe are municipal corporations, and they are by law required to solicit bids for the sale of pipe in order that the public may get the benefit of competition. One of the means adopted by the defendants in their plan of combination was this illegal and fraudulent effort to evade such laws, and to deceive intending purchasers. No matter what the excuse for the combination by defendants in restraint of trade, the illegality of the means stamps it as a conspiracy, and so brings it within that term of the federal statute.

The second question is whether the trade restrained by the combination of the defendants was interstate trade. The mills of the defendants were situated, two in Alabama, two in Tennessee, one in Kentucky, and one in Ohio. The invariable custom in sales of pipe required the seller to deliver the pipe at the place where it was to be used by the buyer,

and to include in the price the cost of delivery. The contracts, as the answer of the defendants avers, were invariably made after public letting at the home, and in the state, of the buyer. The pay territory, sales in which it was the professed object of the defendants to regulate by their contract of association, included 36 states. The cities which were especially reserved for the benefit of the defendants were Atlanta and Anniston, reserved to the Anniston mill, in Alabama; New Orleans and Chattanooga, reserved to the Chattanooga mill, in Tennessee; St. Louis and Birmingham, reserved to the Bessemer mill, in Alabama; Omaha, reserved to the South Pittsburg mill, in Tennessee; Louisville, New Albany, and Jeffersonville, reserved to Dennis Long & Co., of Louisville; and Cincinnati, Newport, and Covington, reserved to the Addyston mill, in Ohio. Under the agreement, every request for bids from any place, except the reserved cities, sent to any one of the defendants, was submitted to the central committee, who fixed a price, and the contract was awarded to that member who would agree to pay for the benefit of the other members of the association the largest "bonus." In the case of the reserved cities, the successful bidder having been already fixed, the association determined the price and bonus to be paid. The contract of association restrained every defendant except the one selected to receive the contract from soliciting (in good faith) or making a contract for pipe with the intending purchaser at all, and restrained the defendant so selected from making the contract except at the price fixed by the committee. In cases of pipe to be purchased in any state of the 36 in pay territory, except 4, each one of the defendants, by his contract of association, restrained his freedom of trade in respect to making a contract in that state for the sale of pipe to be delivered across state lines; five of them agreeing not to make such a contract at all, and the sixth agreeing not to make the contract below a fixed price. With respect to sales in Ohio, Kentucky, [295] Tennessee, and Alabama, the effect of the contract of association was to bind at least three, sometimes four, and sometimes five, of the defendants not to make a contract at all in those states for the sale and

delivery of pipe from another state; and if the job were assigned, as it might be, to one living in a different state from the place of the contract and delivery, its effect would be to bind him not to sell and deliver pipe across state lines at less than a certain price. It thus appears that no sale or proposed sale can be suggested within the scope of the contract of association with respect to which that contract did not restrain at least three, often four, more often five, and usually all, of the defendants in the exercise of the freedom, which but for the contract would have been theirs, of selling in one state pipe to be delivered from another state at any price they might see fit to fix. Can there be any doubt that this was a restraint of interstate trade and commerce? Mr. Justice Field, in *County of Mobile* v. *Kimball*, 102 U. S. 691, 696, said:

"Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

In *Robbins* v. *Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, a law of Tennessee, which imposed a tax on all "drummers" who solicited orders on samples, was held unconstitutional in so far as it applied to the drummer of an Ohio firm, who was soliciting orders for goods to be sent from Ohio to purchasers in Tennessee, on the ground that it was a tax on interstate commerce. In delivering the opinion of the court in that case, Mr. Justice Bradley said (page 497, 120 U. S. and page 596, 7 Sup. Ct.) that a tax on the sale of goods, or the offer to sell them before they are brought into the state, was clearly a tax on interstate commerce. He further said:

"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

The principle thus announced has been reaffirmed by the court in *Corson* v. *Maryland*, 120 U. S. 502, 7 Sup. Ct. 655; in *Asher* v. *Texas*, 128 U. S. 129, 9 Sup. Ct. 1; in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 9 Sup. Ct. 256; and in *Brennan* v. *City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829. The point of these cases was emphasized by the distinction taken in *Emert* v. *Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, in which

the validity of a law of Missouri, imposing a tax on peddlers, was in question. The plaintiff in error, convicted under the law of failure to pay the tax, was the selling agent of a New Jersey sewing machine manufacturing company, who carried the machine for sale with him in his wagon. It was held that in such a case, the machine having become part of the mass of property in the state, the tax on the peddler was not a tax on interstate commerce.

If, then, the soliciting of orders for, and the sale of, goods in one state, to be delivered from another state, is interstate commerce in its strictest and highest sense,—such that the states are excluded by the federal constitution from a right to regulate or tax the same,—it seems clear that contracts in restraint of such solicita- [296] tions, negotiations, and sales are contracts in restraint of interstate commerce. The anti-trust law is an effort by congress to regulate interstate commerce. Such commerce as the states are excluded from burdening or regulating in any way by tax or otherwise, because of the power of congress to regulate interstate commerce, must, of necessity, be the commerce which congress may regulate, and which, by the terms of the anti-trust law, it has regulated. We can see no escape from the conclusion, therefore, that the contract of the defendants was in restraint of interstate commerce.

The learned judge who dismissed the bill at the circuit was of opinion that the contract of association only indirectly affected interstate commerce, and relied chiefly for this conclusion on the decision of the supreme court in the case of *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249. In that case the bill filed under the anti-trust law sought to enjoin the defendants from continuing a union of substantially all the sugar refineries of the country for the refining of raw sugars The supreme court held that the monopoly thus effected was not within the law, because the contract or agreement of union related only to the manufacture of refined sugar, and not to its sale throughout the country; that manufacture preceded commerce, and although the manufacture under a monopoly might, and doubtless would, indirectly affect both internal and interstate commerce, it was not within the power of congress to regulate manufactures within a state

on that ground. The case arose on a bill in equity filed by the United States under the anti-trust act, praying for relief in respect of certain agreements under which the American Sugar-Refining Company had purchased the stock of four Philadelphia sugar-refining companies with shares of its own stock, whereby the American Company acquired nearly complete control of the manufacture of refined sugar in this country. The relief sought was the cancellation of the agreements of purchase, the redelivery of the stock to the parties respectively, and an injunction against the further performance of the agreements and further violations of the act. The chief justice, in delivering the judgment of the court, said:

"The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessity of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. * * * Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and it affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. * * * The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact [297] that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state, and belongs to commerce."

The chief justice then refers to the prior case of *Coe* v. *Errol*, 116 U. S. 517, 6 Sup. Ct. 475, in which it was held that logs were not made subjects of interstate commerce by the mere intent of the owner to ship them into another state, so that state taxation upon them could be regarded as a burden upon interstate commerce, until that intent had been carried so far into execution that "they had commenced their final

movement from the state of their origin to that of their destination." *Kidd* v. *Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, is also referred to. In that case it was held that a law of Iowa, which forbade the manufacture of spirituous liquor except for certain purposes, was not in conflict with the commerce clause of the federal constitution, although it appeared by proof that the liquor was to be manufactured only with intent to ship the same out of the state. The chief justice further said:

"It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. Aside from the provisions applicable where congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. * * * There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected, was not enough to entitle complaints to a decree."

We have thus considered and quoted from the decision in the Knight Case at length, because it was made the principal ground for the action of the court below, and is made the chief basis of the argument on behalf of the defendants here. It seems to us clear that, from the beginning to the end of the opinion, the chief justice draws the distinction between a restraint upon the business of manufacturing and a restraint upon the trade or commerce between the states in the articles after manufacture, with the manifest purpose of showing that the regulating power of congress under the constitution could affect only the latter, while the former was not under federal control, and rested wholly with the states. Among the subjects of commercial regulation by congress, he expressly mentions "contracts to buy, sell, or exchange goods to be transported among the several states," and leaves

it to be plainly inferred that the statute does embrace combinations and conspiracies which have for their object to restrain, and which necessarily operate in restraint of, the freedom of such contracts. The citation of the case of *Coe* v. [298] *Errol* was apt to show that merchandise, before its shipment across state lines, was not within the regulating power of congress, and, a fortiori, that its manufacture was not; while *Kidd* v. *Pearson* clearly made the distinction between the absence of power in congress to control manufacturing merely because the manufacturer intends to add to interstate commerce with the product, and the power which congress has to prevent obstructions to interstate transportation in the product when made. But neither of these cases controls the one now under consideration. The subject-matter of the restraint here was not articles of merchandise or their manufacture, but contracts for sale of such articles to be delivered across state lines, and the negotiations and bids preliminary to the making of such contracts, all of which, as we have seen, do not merely affect interstate commerce, but are interstate commerce. It can hardly be said that a combination in restraint of what is interstate commerce does not directly affect and burden that commerce. The error into which the circuit court fell, it seems to us, was in not observing the difference between the regulating power of congress over contracts and negotiations for sales of goods to be delivered across state lines, and that over the merchandise, the subject of such sales and negotiations. The goods are not within the control of congress until they are in actual transit from one state to another. But the negotiations and making of sales which necessarily involve in their execution the delivery of merchandise across state lines are interstate commerce, and so within the regulating power of congress even before the transit of the goods in performance of the contract has begun.

The language of the chief justice in the last passages quoted above from his opinion, upon which so much reliance was placed by the circuit court and the defendants' counsel at the bar, is to be interpreted by the facts of the case before the court. The statement in the opinion that congress did not

intend by the anti-trust act to limit and restrict the rights of persons and corporations in the mere acquisition, control, or disposition of property, or to regulate the prices at which such property should be sold, or to make criminal the acts of persons or corporations in the acquisition and control of property which the states of their residence or creation sanctioned or permitted, does not imply that congress did not intend to strike down any combination which had for its object the restraint and attempted monopoly of trade and commerce among a given number of states in specified articles of commerce, and the resulting power to regulate prices therein. The obstacle in the way of granting the relief asked in *U. S.* v. *E. C. Knight Co.* was (to use the language of the chief justice) that "the contracts and acts of the defendant related exclusively to the acquisition of the Philadelphia refineries, and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations." The supreme court distinctly adjudged that "what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations." That the defendants in the present case combined and contracted with each other for the purpose of restraining trade **[299]** and commerce among the states covered by their agreement, in the articles manufactured by them, is too clear to admit of dispute. In the E. C. Knight Co. Case there was, the supreme court said, "nothing in the proofs to indicate any intention to put a restraint upon trade or commerce." In the present case the proofs show that no one of the companies in this pipe-trust combination was allowed to send its goods out of the state in which they were manufactured except upon the terms established by the agreement. Can it be doubted that this was a direct restraint upon interstate commerce in those goods? To give the language of the opinion in the Knight Case the construction contended for by defendants would be to assume that the court, after having in the clearest way distinguished the case it was deciding from a case like the one at bar, for the very purpose of not deciding any case but the one before it, then proceeded to confuse the cases by using language which

decided both. We cannot concur in such an interpretation of the opinion.

Counsel for the defendants also find in the language of Mr. Justice Peckham, in the case of *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 313, 326, 17 Sup. Ct. 540, an argument against our conclusion in this case. The question in that case was whether the anti-trust act applied to railroad companies which combined in establishing traffic rates for the transportation of persons and property. It was vigorously contended on behalf of the railroad companies that the act was never intended to apply to them, because congress had already provided for their regulation by the interstate commerce law. In meeting this position, Mr. Justice Peckham used the following language (page 313, 166 U. S., and page 548, 17 Sup. Ct.):

"We have held that the trust act did not apply to a company engaged in one state in the refining of sugar under circumstances detailed in the case of *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, because the refining of sugar under those circumstances bore no distinct relation to commerce between the states or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the states would leave little for the act to take effect upon."

Again, upon page 326, 166 U. S., and page 553, 17 Sup. Ct., Justice Peckham repeats the same idea:

"In the Knight Co. Case, supra, it was said that this statute applied to monopolies in restraint of interstate or international trade or commerce, and not to monopolies in the manufacture even of a necessary of life. It is readily seen from these cases that, if the act does not apply to the transportation of commodities by railroads from one state to another or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative."

This is not a declaration that cases might not arise within the statute which were not combinations of common carriers in relation to interstate transportation. The language used means nothing more than that, if such combinations were excluded from the effect of the act, the great and manifest scope for the operation of a federal statute on such a subject would be denied to it. To give the language more weight would be to violate the first canon for the construction of a judicial opinion laid down by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 340, 399:

[300] "It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which

those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all cases is seldom completely investigated."

In re Greene, 52 Fed. 104, cited for the defendants, is to be distinguished from the case at bar in exactly the same way as the Knight Co. Case. The indictment against Greene, drawn under the anti-trust act, charged him with being a member of a combination to acquire possession and control of 75 per cent. of the distilleries of the country, for the purpose of fixing the price of whisky, and controlling the trade in it between the states. The immediate object of the combination was a monopoly in manufacture. The effect upon interstate trade in whisky was as indirect as was the monopoly of the refining of sugar in the Knight Co. Case upon interstate trade in that article.

The case of *Dueber Watch Case Mfg. Co.* v. *E. Howard Watch & Clock Co.*, 35 U. S. App. 16, 14 C. C. A. 14, and 66 Fed. 637, cannot be regarded as an authority upon either of the questions considered in this case, because of the division of opinion among the judges. It was a suit brought by a watch manufacturing company against 20 other companies to recover damages for a boycott of the plaintiff. The averment was that the defendants had agreed not to sell any goods manufactured by them to any person dealing with the plaintiff, and had caused this to be known in the trade, and that they fixed an arbitrary price for the sale of their goods to the public, and, because plaintiff's competition interfered with their maintaining this price, they were using the boycott against plaintiff, to stifle competition. The pleadings were not drawn with care to bring the case within the anti-trust law. The questions arose on demurrer to the bill. Judge Lacombe held that the facts stated gave rise to no cause of action; Judge Shipman held that the averments were not sufficient to show that the trade restrained was interstate; and Judge Wallace dissented, on the ground that a cause of action was sufficiently stated, and that the restraint was upon

interstate commerce. These varying views decided the case, but they certainly furnish no precedent or authority.

There is one case which seems to be quite like the one at bar. It is the case of *U. S.* v. *Jellico Mountain Coal & Coke Co.*, 46 Fed. 432, a decision by Judge Key at the circuit. The owners of coal mines in Kentucky entered into a contract of association with coal dealers in Nashville, by which they agreed that the mine owners should only sell to dealers who were members, and the members should only buy from mine owners who were members, and that the dealers should sell at certain fixed prices, of which the mine owners should receive a proportionate part, after payment of freight, and that prices might be raised by a vote of the association, in which case the addition to the price should be divided between the dealers and **[301]** the mine owners. The contract recited that it was intended to establish and maintain the price of coal at Nashville. It was held to be an attempt to create a monopoly in the interstate trade in coal between Kentucky and Nashville, Tenn., and it was enjoined.

It is pressed upon us that there was no intention on the part of the defendants in this case to restrain interstate commerce, and in several affidavits the managing officers of the defendants make oath that they did not know what interstate commerce was, and, therefore, that they could not have combined to restrain it. Of course, the defendants, like other persons subject to the law, cannot plead ignorance of it as an excuse for its violation. They knew that the combination they were making contemplated the fixing of prices for the sale of pipe in 36 different states, and that the pipe sold would have to be delivered in those states from the 4 states in which defendants' foundries were situate. They knew that freight rates and transportation were a most important element in making the price for the pipe so to be delivered. They charged the successful bidder with a bonus to be paid upon the shipment of the pipe from his state to the state of the sale. Under their first agreement, the bonus to be paid by the successful bidder was varied according to the state in which the sale and delivery were to be made. It seems to us clear that the contract of association was on its face an extensive scheme to control the whole commerce

among 36 states in cast-iron pipe, and that the defendants were fully aware of the fact whether they appreciated the application to it of the anti-trust law or not.

Much has been said in argument as to the enlargement of the federal governmental functions in respect of all trade and industry in the states if the view we have expressed of the application of the anti-trust law in this case is to prevail, and as to the interference which is likely to follow with the control which the states have hitherto been understood to have over contracts of the character of that before us. We do not announce any new doctrine in holding either that contracts and negotiations for the sale of merchandise to be delivered across state lines are interstate commerce (see cases above cited), or that burdens or restraints upon such commerce congress may pass appropriate legislation to prevent, and courts of the United States may in proper proceedings enjoin. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900. If this extends federal jurisdiction into fields not before occupied by the general government, it is not because such jurisdiction is not within the limits allowed by the constitution of the United States.

The prayer of the petition that pipe in transportation under the contract of association be forfeited in a proceeding in equity like this is, of course, improper, and must be denied. The sixth section of the anti-trust act, after providing that property owned and in transportation from one state to another or to a foreign country under a contract inhibited by the act "shall be forfeited to the United States," continues "and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law." This requires a like procedure to that prescribed in sections [302] 3309–3391, Rev. St., and involves a trial by jury. The only remedy which can be afforded in this proceeding is a decree of injunction.

For the reasons given, the decree of the circuit court dismissing the bill must be reversed, with instructions to enter a decree for the United States perpetually enjoining the defendants from maintaining the combination in cast-iron pipe described in the bill, and substantially admitted in the answer, and from doing any business thereunder.

[465] # MOORE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1898)

[85 Fed., 465.]

JURISDICTION OF FEDERAL COURTS—ADMISSION OF TERRITORY AS STATE—STATUTE.—In 1895 the plaintiff in error was indicted, with others, in a district court of the territory of Utah, under section 3 of the act of July 2, 1890 (26 Stat. 209), which declares illegal "every * * * combination * * * in restraint of trade or commerce in any territory." In January, 1896, Utah was admitted as a state, and thereafter the case was transferred to the federal court for the district of Utah, where, after hearing on demurrer to the indictment, the plaintiff in error was tried and convicted. *Held*, on writ of error, that neither under the act of congress authorizing Utah to form a state government (28 Stat. 111, 112), nor the constitution of Utah (article 24, § 7), nor by other legislation, was jurisdiction conferred upon the federal court to proceed with the case.[a]

SAME.—*Held*, further, that the case did not come within the provisions of Rev. St. § 13, regulating the effect of the repeal of statutes, for the admission of Utah as a state did not operate to repeal the act of July 2, 1890, which still applies to the territories of the United States.

In Error to the Circuit Court of the United States for the District of Utah.

R. Harkness, *George Sutherland*, and *Waldemar Van Cott*, for plaintiff in error.

J. W. Judd, United States Attorney, and *W. L. Maginnis*, Assistant United States Attorney.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and RINER, District Judge.

RINER, District Judge.

November 4, 1895, the plaintiff in error, with others, was indicted in the district court within and for the Third judicial district of the territory of Utah, Salt Lake county, for unlawfully engaging in a combination in restraint of trade and commerce in that territory. The indictment charged that the defendants therein named, "on the 22d day of Octo-

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ber in the year of our Lord 1895, in the district and territory aforesaid, and within the jurisdiction of this court, did willfully and unlawfully engage in a combination in restraint of trade and commerce in said territory in this: That the said defendant E. L. Carpenter, being then and there the agent in Salt Lake City, Salt Lake county, territory of Utah, of the Pleasant Valley Coal Company, a corporation engaged in mining coal, and selling the same at wholesale to dealers in coal in said Salt Lake City, and the said defendant F. H. Moore, being then and there the agent of the Union Pacific Coal Company, a corporation engaged in mining coal and selling the same at wholesale to dealers in coal in said Salt Lake City, and each and all of the said defendants other than said Carpenter and said Moore being then and there engaged in the business of buying coal and selling the same at retail in said Salt Lake City, and each and all of said defendants except said Carpenter and said Moore being then and there members of an association designated and known as the Salt Lake [466] Coal Exchange, said Salt Lake Coal Exchange being a voluntary association of nearly all of the dealers in coal at retail in said Salt Lake City, and not a corporation; each and all of the defendants did then and there combine together to prevent any person engaged in the business of buying coal and selling the same at retail in said Salt Lake City, and not a member of said exchange, and any person desiring to engage in such business in said city, and not a member of the said coal exchange, from purchasing coal from said Union Pacific Coal Company and from the said Pleasant Valley Coal Company at as low a price as that for which the same kind of coal was being sold by said corporations to members of said Salt Lake Coal Exchange, and to make the price of coal from such corporations to dealers in coal at retail in said city, and persons desiring to engage in dealing in coal at retail in said city, who are not members of said exchange, so great as to prohibit and prevent them purchasing coal of said corporations, and selling the same at retail in said city, and to unlawfully raise, augment, and increase the price of coal at retail in said Salt Lake City, and to destroy free competition in the sale of coal in said city, and to compel the consumers of coal in said city to pay therefor

the prices fixed by the said coal exchange; that in pursuance of said combination said F. H. Moore, as agent of said Union Pacific Coal Company, did on the 23d day of October, 1895, refuse to sell to one T. P. Lewis, who was then and there desirous of engaging in the business of buying coal and selling the same at retail in said Salt Lake City, and who was not a member of said coal exchange, a carload of what is known as 'Rock Springs coal,' which said Moore, as said agent, was selling to the members of the said coal exchange in car-load lots at three and $^{75}/_{100}$ dollars ($3.75) a ton, except at the price of five ($5) dollars per ton, which was then the retail price of said coal in said city, and refused to sell said coal at all except to the members of said exchange; and in pursuance of said combination the said Carpenter, as agent of said Pleasant Valley Coal Company, in said county, on the said 23d day of October, 1895, refused to sell to said T. P. Lewis, who was then and there desirous of engaging in the business of buying coal and selling the same at retail in said Salt Lake City, and who was not a member of said exchange, a car load of coal, said Carpenter having said coal for sale as said agent, for the reason that said Lewis was not a member of said exchange,—against the peace, and contrary to the form of the statutes of the United States in such case made and provided." December 14, 1895, the defendants were arraigned in the territorial court, and severally pleaded not guilty to this indictment. January 4, 1896, Utah was admitted into the Union as a state upon an equal footing with the original states. President's Proclamation, 29 Stat. 876. Thereafter this case was transferred to the circuit court of the United States for the district of Utah. November 11, 1896, the defendants obtained leave of court (counsel for the United States consenting thereto) to withdraw their pleas of not guilty theretofore entered in the territorial court, and to file a demurrer to the indictment upon the grounds (1) that the indictment charged no offense; (2) that it set out no means by which the alleged combination was to [467] be effected; (3) for the reason that it stated no act or fact to show that the alleged combination was in restraint of trade; (4) that the acts charged as overt acts were not shown

to be in pursuance of any means to be employed; (5) that the prosecution had abated by the admission of the territory of Utah as a state. The demurrer was, as the record shows, sustained to that part of the indictment which charges a combination to raise the price of coal in Salt Lake City, and was overruled as to the remainder of the indictment. Thereupon each of the defendants entered a plea of not guilty, and on the day following—November 12, 1896—the case was tried, the trial resulting in a verdict of guilty as to all of the defendants. The bill of exceptions shows that when the testimony was concluded, and before the argument to the jury began, the defendants requested the court to instruct the jury to return a verdict of not guilty. This request was overruled by the court, and the defendants excepted. Motions in arrest of judgment and for a new trial were severally made and overruled, and on the 19th of November, 1896, the plaintiff in error was sentenced, by the court, to pay to the United States the sum of $200 as a fine, and one-half of the costs of the case, taxed at $88.60. He thereupon sued out this writ of error.

No questions in relation to combinations or conspiracies in restraint of interstate trade or commerce, or trade or commerce between one territory and another territory, or between a territory and a state, or between a state or a territory and a foreign nation, arise in this case. The indictment seeks only to charge the defendants with unlawfully entering into a combination in restraint of trade and commerce in the territory of Utah, and is based upon the following provision of an act of congress, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890:

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States * * * is hereby declared illegal. * * *" 26 U. S. Stat. 209.

While the constitution confers upon congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," and "to regulate commerce with foreign nations and among the several states and with the Indian tribes," it does

not confer upon it the power to regulate trade or commerce within a state, or to legislate in respect thereto; wherefore the provision of the statute above quoted is confined to contracts or combinations in restraint of trade in a territory. The plaintiff in error now insists that the provision of section 3 of the act under which this indictment was found became inoperative in Utah when Utah was admitted into the Union as a state, and that the circuit court for that district had no jurisdiction to proceed in the case. The courts of the United States being courts of limited jurisdiction, with power to take cognizance of matters civil or criminal only as the power so to do is conferred upon them by statute, it becomes important to determine at the outset whether the circuit court had jurisdiction to try the offense with which the plaintiff in error stands charged in this indictment. When Utah was admitted [468] into the Union as a state on an equal footing with the original states, the territorial government within the boundaries of the new state was at an end. Its civil and political powers were transferred to other officers; those of peculiarly internal character to officers of the new state; those which bore any relation to the national system of government, of which the state formed a part, to officers holding commissions under that system, and possessing only the powers derived from their commissions. As one of the states of the Union and in virtue of that character forming one of the districts of the United States, the district of Utah, and the circuit court sitting in that district, would possess no peculiar jurisdiction or authority; none which did not appertain to other districts and the circuit courts having cognizance of matters within those districts. In the case before us the plaintiff in error was tried and convicted, in the circuit court of the United States for the District of Utah, upon an indictment charging him with the violation of an act of congress defining an offense which was an offense only when the agreement or combination complained of related to trade or commerce in a territory. The indictment was returned by a territorial grand jury, and filed in a territorial court during the existence of a territorial form of government. If, therefore, the circuit court possessed power and authority to try this case, it was because of the existence of

legislation continuing the provision of the statute defining the offense set out in the indictment in force after the admission of the state, and specially conferring upon the circuit court for that district jurisdiction in such cases. That there can be no valid judgment pronounced upon conviction in a criminal case, unless the law creating the offense be at the time in existence, is well settled. *The Irresistible*, 7 Wheat. 551; *U. S.* v. *Tynen*, 11 Wall. 95. In *Yeaton* v. *U. S.*, 5 Cranch, 281, Chief Justice Marshall said:

"It has been long settled on general principles that, after the expiration or repeal of a law, no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

By its terms, the provision of the statute under which this indictment was found applies only to the territories of the United States, and, while it may yet be in full force within the territories, it is clear that no prosecution could be maintained under it for entering into a combination or conspiracy in restraint of trade in Utah after the date of her admission as a state. *Permoli* v. *First Municipality*, 3 How. 589. When Utah became one of the states of the Union, this statute ceased to be in force within its boundaries, unless, by appropriate legislation, it was continued in force for the purpose of prosecuting violations thereof committed during the existence of a territorial form of government.

The act of congress authorizing Utah to form a state government, after providing that the state of Utah should constitute one judicial district, to be called the "District of Utah," and providing the time and place for holding the circuit and district courts of the United States therein, and conferring upon the circuit and district courts for that district, and the judges thereof, the same powers and jurisdic- [469] tion, and requiring them to perform the same duties, possessed and required to be performed by the other circuit and district courts and judges of the United States, also provided:

"That the convention herein provided for shall have the power to provide, by ordinance, for the transfer of actions, cases, proceedings, and matters pending in the supreme or district courts of the territory of Utah at the time of the admission of said state into the Union, to such courts as shall be established under the constitution to be thus formed, or to the circuit or district court of the United States for the district of Utah; and no indictment, action, or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the state or United States courts according to the laws thereof, respectively."

"And the laws of the United States shall have the same force and effect within the said state as elsewhere within the United States." 28 Stat. 111, 112.

Under the authority conferred upon the constitutional convention by the enabling act, a schedule annexed to the constitution of the state provided that:

"All actions, causes, proceedings and matters which shall be pending in the district courts of the territory of Utah, at the time of the admission of the state into the Union, whereof the United States circuit and district courts might have had jurisdiction had there been a state government at the time of the commencement thereof, respectively, shall be transferred to the proper United States circuit and district courts, respectively, and all files, records, indictments and proceedings relating thereto, shall be transferred to said United States courts." Const. Utah, art. 24, § 7.

The above provisions of the enabling act and the schedule comprise the legislation relating to the transfer and trial of cases pending in the district courts of the territory at the time Utah was admitted as a state, and for the continuation of the laws of the United States therein after her admission. Clearly, no peculiar jurisdiction or authority is conferred upon the circuit court, for that district, by this legislation; on the contrary, the enabling act would seem to inhibit and exclude the exercise of any extraordinary or peculiar power either by the circuit or district courts within the newly created district. That act provides:

"That the circuit and district courts for the district of Utah, and the judges thereof respectively, shall possess the same powers and jurisdiction and perform the same duties possessed and required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations."

There is no provision of the enabling act, nor any other general or special act of congress, continuing the provision of the act of July 2, now under consideration, in force in Utah after the admission of the state; neither is there any statute which, in terms, provides for the transfer to and the trial of cases arising under that act in the circuit court for that district. This case was transferred to and tried in that court for the reason, doubtless, that it was considered one of the cases which the enabling act declares shall not abate by reason of any change in the courts, but shall be proceeded

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with in the state or United States courts according to the laws thereof; and, as the indictment charged the defendants with violating a law of the United States, that the case came within the provisions of the enabling act, and also within the provision of the schedule annexed to the consti- [470] tution authorizing the transfer of cases whereof the circuit court might have had jurisdiction had there been a state government at the time of the commencement thereof. We do not think the case is included within either of these provisions. There are some acts which congress may by law designate as a crime against the general government or against the operations of government which affect every citizen, whether of a state or territory; such as treason, illegally holding office, violations of the postal laws, counterfeiting, false impersonation in procuring naturalization, presenting false claims against the government, etc. The federal laws defining these and kindred offenses operate upon all citizens of the United States, and that they reside in a state constitutes no exemption from a prosecution for a violation thereof in the courts of the United States, for jurisdiction is expressly conferred by statute upon the federal courts. As applied to criminal laws, it is these laws of the United States that the enabling act declares shall have the same force and effect within the state of Utah as elsewhere within the United States; and it is prosecutions for violations thereof which, under the provisions of that act, are not to abate upon the admission of the state by reason of any change in the courts, but are to be transferred from the territorial district court, a court having jurisdiction in such cases during the existence of a territorial form of government, to the circuit and district courts, courts having jurisdiction in such cases after the admission of the state. That the provisions of the enabling act were so understood and construed by the constitutional convention is evidenced by the fact that in the schedule (annexed to the constitution) providing for the transfer of causes to the federal courts it provides only for those cases "whereof the United States circuit and district courts might have had jurisdiction had there been a state government at the time of the commencement thereof," and this is not such a case. If there had been a state government at the date of this indictment, no indictment could have been returned, for the reason that there would have been no law in force in the state of Utah defining such an offense.

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Neither do we think the present case comes within the provisions of section 13 of the Revised Statutes. That section reads as follows:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

It is clear from the language of the section that it applies only to cases where the statute defining an offense has been repealed. The act of July 2d was not repealed by the enabling act, for it yet applies to the territories of the United States. It ceased to be in force in Utah only because it was superseded by the constitution upon the admission of the state.

Our conclusion is that no power existed by law in the circuit court for the district of Utah which did not appertain to the circuit courts in other districts; that the power and jurisdiction claimed for the circuit court in this case is a peculiar and extraordinary power, and [471] does not belong to it regularly by its constitution; that no such power has been bestowed upon it by any special legislation, and could not, therefore, be legally and properly exercised by it. In the view we have taken of this case it becomes unnecessary to consider the other assignments of error set out in the record. The judgment of the circuit court must be reversed, and the case remanded to that court, with instructions to dismiss the indictment.

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[407] GULF, C. & S. F. RY. CO. ET AL. *v.* MIAMI S. S. CO.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1898.)

[86 Fed., 407.]

CARRIERS—CONNECTING LINES—PREPAYMENT OF FREIGHT.—A common carrier engaged in interstate commerce may at common law, and

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under the interstate commerce law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier.[a]

SAME—THROUGH TRANSPORTATION—JOINT RATES AND BILLING.—Such carrier may enter into a contract with one connecting carrier for through transportation, through joint traffic, through billing, and for the division of through rates, without being obligated to enter into a similar contract with another connecting carrier.

SAME—LAWS OF TEXAS.—Rev. St. Tex. 1895, arts. 4536, 4537, 4539, do not apply to interstate commerce, because the power to regulate such commerce is vested in congress, and has been fully exercised by the enactment of the interstate commerce law.

SAME—ANTI-TRUST LAW.—Under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," the only remedy given to any other party than the government of the United States is a suit for threefold damages, costs, and attorney's fees, and the only party entitled to maintain a bill of injunction for an alleged breach of the act is the United States, by its district attorney, on the authority of the attorney general.

APPEAL from the Circuit Court of the United States for the Eastern District of Texas.

James Hagerman, *T. S. Miller*, *N. A. Stedman*, and *J. W. Terry*, for appellants.

M. C. McLemore, *John Neethe*, and *F. Chas. Hume*, for appellee.

Before PARDEE and MCCORMICK, Circuit Judges, and SWAYNE, District Judge.

MCCORMICK, Circuit Judge.

The bill in this case alleges that:

"The Miami Steamship Company, a corporation duly incorporated under and by virtue of the laws of the state of New York, complaining of the Gulf, Colorado & Santa Fé Railway Company, the International & Great Northern Railroad Company, and the Missouri, Kansas & Texas Railway Company of Texas, in this behalf says: That the Gulf, Colorado & Santa Fé Railway Company is a corporation duly incorporated under and by virtue of the general and special laws of the state of Texas, having its general offices at Galveston, Texas, in said state, and of which L. J. Polk is general manager;

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that it is a component part of, and subsidiary to, the Atchison, Topeka & Santa Fé Railroad Company, and what is commonly known as the Santa Fé System; that it [408] has and maintains traffic relations with connecting lines, and is engaged in the traffic of state and interstate commerce. That the International & Great Northern Railroad Company is a corporation duly incorporated under and by virtue of general and special laws of the state of Texas, and has its general office at Palestine, in the state of Texas, and of which Leroy Trice is general superintendent; that it is a component part of, and subsidiary to, what is known commonly as the Missouri Pacific, or Gould, System, and is engaged in traffic of state and interstate commerce. That the Missouri, Kansas & Texas Railway Company of Texas is a corporation duly incorporated under and by virtue of general and special laws of the state of Texas, and has its general offices at Dallas, Texas, and of which A. A. Allen is general manager; that it is a component part of, and subsidiary to, what is commonly known as the Missouri, Kansas & Texas Railway System; that it has and maintains traffic relations with connecting lines, and is engaged in the traffic of state and interstate commerce. That said three railway companies are the only trunk lines of road running through the state of Texas, and connected by close traffic relations with the systems of railway reaching points beyond the state of Texas and in states and territories north and west of Texas, a market and field from which and to which large quantities of freight are consigned and shipped, and having termini at Galveston, Texas, connecting with the Mallory Line and your orator. That your orator is engaged as a common carrier for hire in the traffic of state and interstate commerce, owning and operating a line of steamships between the ports of New York, in the state of New York, and Galveston, in the state of Texas; and at Galveston, Texas, it connects with the lines of the railway companies hereinbefore named. That its steamships are commodious, safe, and seaworthy, and amply fitted for the purpose of transporting freight between the points named. That in the city of New York it connects with all the lines of railway running into said city, and has in the said port and at the port of Galveston wharves and sheds sufficient to accommodate and protect all freights delivered to it, and has in every respect facilities sufficient to serve the public with dispatch, comfort, and safety. That it has been operating its said line of steamships between said ports since the 15th day of July, 1897, and has done a large business in every respect satisfactory to its patrons. That since said day your orator has received from and delivered to said railroad companies large quantities of freight on its wharf in the city of Galveston, destined to or shipped from points on the several lines of said railroads and their connecting lines, and it has received from and granted to said railroad companies the same rights, privileges, conditions, and exactions as to or by any other line of steamships in similar service as your orator granted or demanded in the interchange of freight. That there is one, and only one, other line of steamships which plies between Galveston and New York, which is owned and operated by the New York & Texas Steamship Company, commonly known and called the Mallory Line, and which hereinafter will be referred to as the Mallory Line. That said line of steamships is engaged in exactly similar service as those of your orator, and said line has at New York and at Galveston wharves and sheds which connect with the several lines of railway running into said cities. That said Mallory Line has been in operation between said ports for a number of years, and for several years prior to the time your orator's line of steamships was put in operation had no competitor for the business between said ports. That the accommodations of said Mallory Line and of your

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orator for the reception and delivery of freight, in unloading and loading vessels, in receiving and delivering freight, are in every respect similar and equal. Their respective wharves connect with the several lines of the respondents in the same and similar manner, and the same and similar accommodations prevail for the reception and delivery of freight, for the loading and unloading of cars. That the cost of loading and unloading cars at the respective wharves is the same, and the respondents have contracts for loading and unloading cars at the respective wharves for the same price. That it has been, and is now, the established custom and usage by and between said railroad companies and the Mallory Line and your orator, in the interchange of freight, for the line over which freight might be routed to advance to the line over which the freight originated the charges attached to such freight up to the time of delivery to the steamship company or railroad company over which it was to be forwarded to destination. [409] That it is, and has been, an established custom and usage between the respondents and the Mallory Line and your orator since it has been in business, with reference to freight originating at New York or beyond, and destined to points in Texas on the lines of railway operated by respondents, for the Mallory Line and your orator to bill such freight through from its point of origin to the point of destination at a through rate previously agreed upon, but on equal, exact, and similar conditions with reference to both steamship lines, and for said railroads to pay to the steamship company delivering the freight at Galveston the freight charges earned by it in transporting the freight from point of origin to Galveston under such agreement, and to receive the freight tendered by such steamship company, and forward same to its destination under such agreement. And it is, and has been, an established custom and usage between the respondents and the Mallory Line and your orator, with reference to freight originating at points on the lines of the several railway companies in Texas destined for New York or to points beyond on lines of railway connected with the Mallory Line and your orator at that point, to bill freight from point of origin to point of destination at a through rate previously agreed upon, and at the same and similar rates and under the same exact and similar conditions, and for the steamship company receiving such freight to pay to the railroad company delivering the freight at Galveston the charges for freights earned by said railroad company in transporting the freight from point of origin to Galveston, Texas, under said agreement, and to receive the freight tendered by the railroad company, and forward the same to New York, if that be the point of destination, or, if beyond, to deliver same to connecting lines reaching said point, under said agreement. This custom and usage is established in all cases, except in the case of perishable goods, when the custom does not apply.

"That there is a combination of railway companies and steamship companies known and designated by the name of the Southwestern Freight Bureau, composed of and by the principal railway systems in the southwestern portion of the United States, of which the respondents the Southern Pacific Company, the Morgan Steamship Company, and the Cromwell Steamship Company, which latter steamship companies operate lines of steamship between the ports of New Orleans, in the state of Louisiana, and New York, and the Mallory Line, are members, organized for the purpose of controlling freight of interstate commerce in that portion of the United States reached by the said railroads and their connections by rail and water. That heretofore, to wit, on or about the 31st day of January, 1898, at a meeting of said freight bureau, called for that purpose in the city of New York, state of New York, at which representatives of the lines herein complained of,—the Mallory, the Morgan, and the Cromwell Steamship Lines, thereunto duly authorized,—were present, said railroads entered into a conspiracy with said steamship companies against your orator, wherein and whereby it was and is attempted to prevent your orator from carrying on its business as a common carrier in interstate commerce. That said railroad companies entered into an agreement with said Mallory Line, the Cromwell Line, and the Morgan Line in substance and in effect as follows: 'That all through rates and divisions via Gulf ports be discontinued from and to domestic ports with steamer lines not members of this association, and all interchange of traffic with such lines be discontinued as far as possible. That in consideration of assistance given the Mallory Line by the adoption of this agreement the Mallory Line is to cancel all existing contracts or special arrangements with the Kansas City, Pittsburg & Gulf on Missouri river business, and hereafter abide by rates and regulations fixed by this association. That all rates less than authorized association basis between Texas points and all territories be withdrawn February 15th, and that prepayment of freight be demanded from the steamer lines not members of this association.' That your orator is the only steamer line running between New York and any of the Gulf ports not a member of the said association. That by the terms of said agreement respondents agreed to accept from and deliver to said lines members of said association freight upon conditions which they would not grant to your orator, or any other competitor in this field, not a member of said freight bureau. That by the terms of said agreement said railroad companies bound themselves to break off all relations with your orator except those coupled with such discriminating conditions as to amount to a practical refusal to transact any business [410] with your orator. That pursuant to said agreement, and in the execution thereof, said railroad companies have served upon your orator notices in substance and effect that on and after February 15, 1898, they will not accept any freight from your orator destined to points on their respective lines, or points reached by their connections, unless the freights on same be prepaid; nor will they accept any freight consigned to your orator except upon same and similar conditions; that they will no longer permit your orator to bill through freight as is and has been heretofore the custom between said railroad companies and the only two lines running into Galveston from New York, but will require and demand of your orator on all freight shipped by its line full local rate from Galveston to point of destination; nor will they accept any freight consigned from New York or to points on the connecting line at that place routed by your orator's line except that full locals be paid to Galveston, and freight rebilled at that point to point of destination. Your orator alleges that these conditions, exactions, and demands will apply only to your orator, and that they will not apply to the Mallory Line, or to any other line running from New York to Gulf ports, members of the said freight bureau. But, on the contrary, it alleges that said lines will continue to act in conjunction with the Mallory Line as a member of said association, as is and has been the custom heretofore, and as hereinbefore alleged and set forth. That by so doing the said International & Great Northern Railroad Company, the Missouri, Kansas & Texas of Texas, and the Gulf, Colorado & Santa Fé threaten and intend to unlawfully and wilifully violate the express provisions of the laws of the United States; and in carrying into effect the threats made your orator will be prevented from engaging and continuing in the traffic of interstate commerce, and now carried on by it. It will be required to accept and transport freight at a price largely below the cost of carriage in order to compete in the same field with the Mallory Line and other steamship lines having connections under

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similar circumstances, members of said association. That such steps on the part of said railroad companies will be, in effect, granting to the Mallory Line and other steamer lines similarly engaged, members of said association, undue and unreasonable preference over your orator, and will subject it to undue and unreasonable prejudice and disadvantage.

"Your orator further alleges that the said railroad companies and the Mallory Line have entered into an agreement and compact by which said railroad companies agree to accept on and after February 15, 1898, freight from the Mallory Line originating at New York, and destined to points on their line in the state of Texas, or to points of connecting roads, on a through rate which is less than the combination of local rates which will be demanded of your orator on and after said date; and they have agreed further that, in the event freight originating outside of New York City, for the carriage of which to New York the Mallory Line or consignors of said freight would be required to pay not more than thirty-five cents per hundred pounds; that the cost of such transportation to New York so required shall be absorbed, and all lines participating in the carriage of such freight from New York shall prorate such cost of carriage to New York with the Mallory Line, and the Mallory Line will be called upon to pay only thirty-five per cent. of such charge. The said agreement affects all freights originating outside of New York City, and imposes upon your orator in its competition for such freight the amount, at least, rebated to the Mallory Line as its pro rata of the arbitrary paid out in getting said freight to New York. That said roads have agreed with said Mallory Line that upon all freights transported by it from New York to Galveston, and from Galveston to New York, destined to points on the lines of the several railways outside of Galveston, shall receive thirty-five per cent. of the through rate, the balance to be prorated upon an agreed basis between the participating railroads. That said railroads will not grant, but, on the contrary, will refuse to grant, to your orator equal rights and privileges with the Mallory Line as above set forth, but exact and demand that all freight routed via your orator's line, whether it originates at New York or beyond, or at points on respondents' lines of railway, shall be required to pay the total of local rates, which would be largely in excess of the amount required and exacted of the Mallory Line or other members of such association, and that all freights routed over your orator's line will have to pay a higher rate than if the same were routed by way of the Mallory Line. That, [411] as hereinbefore alleged, the service, accommodation, connections, and facilities of the Mallory Line and those of your orator are in every sense equal, exact, and similar; and that by the imposition on the part of the railroads herein complained of your orator will be caused to suffer great and irreparable injury, its business prostrated, and probably prevented from continuing in its line of business. That at law there exists no plain, full, complete, and adequate remedy; that your orator believes, and it so charges, that respondents intend to and will enforce said threats and demands on and after February 15, 1898, and thereby divert business and freight from it to the Mallory Line, and prevent it from competing with said line in the transportation of state and interstate commerce.

"Wherefore your orator prays that your honors will grant your most gracious writ of injunction restraining the respondents, and each of them, their agents and servants, from in any way interfering with the business of your orator as it has been heretofore and is now being carried on between the respondents and your orator in the manner and by the means hereinbefore alleged, and restraining them from discriminating against your orator in the making and granting of

through rates, restraining them, and each of them, from carrying out the agreement between them and others in so far as it affects your orator, and commanding them to afford to your orator the same facilities, and to accept freight under the same conditions, as by them extended and granted to the other connecting steamship lines between Galveston and New York, and commanding them to make the same rate of freight on interstate and through business, and to allow your orator the same pro rata of through rates, as is given to the Mallory Line; that upon the final hearing had said injunction be made permanent; and for such other and further and general relief as to your honors may seem meet and proper."

On February 12, 1898, this bill was exhibited to one of the judges of the circuit court for the Eastern district of Texas, who thereupon ordered:

"Upon consideration of the within petition, the same is set down for hearing before me at Galveston, Texas, on February 21, 1898, at 10 o'clock a. m. of said day, at the United States court house, and in the meantime respondents are directed to maintain with complainant the same relations with respect to rates, divisions, and freights as are by them granted to the Mallory Line."

At the time and place appointed the defendants appeared by counsel. The Missouri, Kansas & Texas Railway Company of Texas submitted an answer, which, after certain admissions and denials not necessary to note, proceeded thus:

"This defendant, for full and complete answer to the bill of complainant filed herein, shows: It is engaged in the operation of lines of railway lying wholly in the state of Texas, with a mileage of about nine hundred and seventy-six miles, extending from Galveston, Texas, in a northwesterly direction to the north line of the state of Texas near Denison, in Grayson county, Texas, together with certain branches in the state of Texas, and that it reaches with its own lines many of the most important cities in Texas, such as Houston, Waco, Ft. Worth, Dallas, Denison, Sherman, and others, and connects with all the principal railroads in said state, and that its business consists of the transportation of passengers, freight, mail, and express, and that such business constitutes international, interstate, and state commerce, and that such commerce in the natural course of business moves in all directions over this defendant's lines of railway and its connections. It is to the best interests of this defendant, as well as to the best interests of its connecting lines and the general public which they serve, as the defendant believes and avers, that this commerce be carried at reasonable, open, published, and stable rates, filed with the interstate commerce commission where the commerce is interstate, and with the railroad commission of the state of Texas where the commerce is state. It is likewise to the interest of this defendant, its connections, and the public generally, that it should have a joint through tariff from points on its lines and connections to New York in connection with some steamship line from Galveston; and this defendant shows that recently, and a short time before the filing of the bill [412] herein, it effected an arrangement with the New York & Texas Steamship Company, hereinafter and in the bill referred to as the 'Mallory Line,' by which a through rate has been agreed upon between New York and what is known as 'Atlantic Seaboard Territory' and points on this defendant's lines and its con-

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nections, and in conformity thereto a joint through tariff has been adopted by this defendant and the Mallory Line and others, and filed with the interstate commerce commission, a copy whereof is hereto appended, marked 'Exhibit A,' for convenient reference, and made a part hereof; and that the rates therein agreed upon, published, and established are reasonable and just, and under the provisions of the act of congress to regulate interstate commerce constitute the maximum and the minimum charges which can be made by this defendant and the Mallory Line for the transportation of freight between the points named. This defendant shows that prior to July 15, 1897, when the complainant first entered its ships in the service between Galveston and New York, this defendant, in connection with other railroads of the Southwest, had in force certain joint tariffs from New York to points on its line and those on its connections, by the Gulf ports, but the assent of the steamship companies was never given to such joint tariffs by filing the same with the interstate commerce commission, or by general adoption thereof, and the steamship companies were bound by said through tariffs only when they accepted shipments of freight thereunder. That almost immediately after the complainant entered into the New York and Galveston trade a rate war broke out as to Texas traffic between it and the Mallory Line, which resulted in a notice being given by this defendant to the complainant and the Mallory Line that it would charge them its regular established rates from and to Galveston on Texas traffic; and since such notice was given this defendant has charged on all freight to and from said steamship lines its regularly established rates to and from Galveston; and the Mallory Line and the complainant have at all times allowed such rates to this defendant, and at the time of the filing of the bill of complaint herein no other or different arrangements were in effect between this defendant and the complainant, or between this defendant and the Mallory Line, save and except that this defendant had made a contract arrangement with the Mallory Line for joint through rates and joint billing such as hereinbefore stated and hereinafter set out, and pursuant thereto this defendant and the Mallory Line filed with the interstate commerce commission such joint through tariff as stated. The defendant further avers that the complainant has substantially at all times since it has been engaged in the trade between New York and Galveston allowed to this defendant its established rail rates to and from Galveston on such traffic; and further avers that the defendant has not and does not intend to deny the right to the complainant hereafter of having its commerce carried to and from Galveston at the defendant's regularly established Galveston rates. And defendant further alleges that its regularly established rates heretofore, now, and hereafter to be in effect to and from Galveston have been, are, and will be reasonable, just, and lawful.

"The contract agreement between this defendant and the Mallory Line includes a through joint rate between the points established by the joint tariff hereinabove referred to, through bills of lading, and through billing, and, for the present, a division of the through rate on the basis of allowing the defendant and its connecting lines, as their proportion of the through rate, the established tariff rate from Galveston to the southwestern inland point of origin or destination. The defendant, however, alleges that it is and will be entirely lawful for the defendant and the Mallory Line to make any division of the through rate between themselves, as from time to time they may determine to be just and equitable. The reasons which led the defendant to enter into this contract arrangement with the Mallory Line are, among others: (1) The Mallory Line has been long running, and is now running, and is to continue to run, well-equipped steamships between New York and Galveston, carrying a large commerce, and has a well-established business, and the good will of the shippers of the country, and is competent and reliable, and in every way capable, trustworthy, and responsible. (2) That the arrangement between the defendant and the Mallory Line, whereby they carry upon a joint through rate, published and known to the world, and filed with the interstate commerce commission, can but be beneficial to the public at large, and redound to the mutual advantage and benefit [413] of both parties to the arrangement. (3) The steamships of the Mallory Line engaged and to be engaged in the Galveston and New York business are equal, if not superior, to any steamships in the United States engaged in what is known as the 'Atlantic Coast Service.' (4) The steamships of the Mallory Line are provided with ample facilities for the carriage of both freight and passengers. (5) The Mallory Line is equipped with much better ships than any other line running between Galveston and New York, and makes several days' better time between the two ports than any other ships. (6) The steamships of the Mallory Line plying between Galveston and New York arrive and depart at regular stated times; and in the arrangement which has been made between this defendant and the Mallory Line hereinabove referred to it has been understood and agreed that the necessary number of steamships of the Mallory Line should arrive and depart each week, arriving and leaving upon certain days of the week so far as possible. (7) The Mallory Line afforded the best opportunity and the best facilities for a through business connection with the defendant.

"The defendant further shows that the complainant company has not such a service between New York and Galveston as to make it specially desirable for this defendant to establish a joint through tariff with it, with through bills of lading and through billing. The complainant's steamships are not equal in speed or appliances to those of the Mallory Line. They require eight to ten days to make the trip between Galveston and New York, while the steamships of the Mallory Line make the trip in about six days. The steamships of the complainant are not combined freight and passenger ships, but are built only for freight, though they may be able to carry a few passengers. Since the complainant entered the Galveston and New York trade, its ships have not arrived or departed at regular and stated periods. At first they ran a ship about once a week, but leaving upon no particular day, and for some time past and at present their ships are not running so often, and arrive and depart on no particular day or regular time. This defendant further distinctly avers that it does not intend, by the establishment of the through rate and through billing and through business connections with the Mallory Line, to in any way unduly or unreasonably discriminate against the complainant's line, and states that whatever advantage the Mallory Line may secure over the complainant's line is the result of the contract arrangement between the Mallory Line and the defendant, and that such contract arrangement is reasonable, justifiable, and lawful. The defendant avers that it is, and will be at all times, ready to deliver to or receive from the complainant's line all business which shall be consigned to or from that line, and destined over the line of the defendant or its connections. But the defendant avows the purpose of requiring, so long as it deems proper, the prepayment of freight delivered by the complainant to the defendant, and says that such requirement is and will be no unjust discrimination against complainant, but one that is authorized and justified by law. The defendant states that it is not ready to enter into an arrangement with the complainant for a through joint service such as it has made with the Mallory Line, and submits that it ought not and cannot be

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required to enter into such an arrangement, as under the law the defendant is not bound to carry beyond its own line. The defendant will at all times move with promptness and dispatch to and from complainant all freight which may be tendered at the established rates from Galveston, and accord to the complainant every right which it accords to every other shipper tendering it freight at Galveston. The defendant further shows that the complainant, by the bill, seeks to avail itself of the benefits of a contract arrangement entered into between this defendant and the Mallory Line, which it has no right to do. The defendant shows that the complainant is not subject to the interstate commerce laws, and has not moved, and does not move, its commerce under any tariff filed with the interstate commerce commission; and, not being subjected to the burdens and penalties of the interstate commerce laws, cannot, in this proceeding, avail itself of the benefits thereof by securing the advantage of a joint through rate, which, under the interstate commerce laws, can only be made by the joint assent of the parties. The defendant further shows that the complainant has moved the freight which it carried between Galveston and New York at rates not published, and varying from time to time, and that the rates at all times heretofore charged by the complainant since it has been in the business of carrying between Gal- [414] veston and New York have been such that, when added to the established railroad rates from Galveston over defendant's line and connections, would be less than the through rates established by the arrangement hereinbefore referred to which has been made between the defendant and the Mallory Line to and from New York and a large portion of seaboard territory."

The other defendants each separately submitted its demurrer, on the following grounds, and in identically the same words:

"(1) That the said complainant hath not, in and by its said bill, stated such a case as doth or ought to entitle it to any such relief as is hereby sought and prayed for from or against this defendant. * * * (3) That, if the matters stated do give the complainant any cause of complaint against this defendant, the same is triable and determinable at law, and ought not to be inquired of by this court. (4) That it appears from the bill of complaint that the relief is sought for under and by virtue of an act of congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.' That under the said act the only remedy given to a private party, or any party other than the government of the United States, is that of a suit for threefold damages, costs, and reasonable attorney's fees; and it appears from the said act that the only party entitled to maintain bill for injunction for any alleged breach thereof is the government of the United States, by its district attorney, on the authority of the attorney general. That it further appears that, independently of such statute, the matters set forth in the bill of complaint do not show any cause of action, at law or in equity, as independently of such statute the matters set forth in the said bill do not show any illegal or wrongful combination or conspiracy. And herein this defendant says that it has the legal right to decide what parties it will credit and what parties it will not credit, by refusing to carry freight without prepayment of charges, and has the right to decide what parties it will lend money to by advancing charges and what parties it will refuse to so lend money to. And herein this defendant further says that it is under no legal obligation to transport or enter into any extra terminal arrangement concerning the transportation of freight except on its own terms; and when it does, of its own volition, enter into such extra terminal arrangements for the through carriage of freight, through billing, through bills of lading, etc., it is entitled to select the connection with which it desires to establish such arrangements, and that it has the perfect right to make such arrangements with one connection without making the same or similar arrangements with others. Defendant further says that the bill fails to allege any facts which show that complainant is entitled to have this defendant compelled by process of the court to enter into traffic relations with it."

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On March 2, 1898, the judge of the circuit court passed his decree as follows:

"This cause having been brought on to be heard on the pleadings and affidavits in support of same, and solicitors for both complainant and respondents having been heard, and due deliberation having been had, it is ordered, adjudged, and decreed by the court that the preliminary injunction prayed for in complainant's bill be granted; and the respondents the Gulf, Colorado & Santa Fé Railway Company, the Missouri, Kansas & Texas Railway Company of Texas, and the International & Great Northern Railroad Company, and each of them, their respective agents and servants, are hereby enjoined, until final hearing of this cause, from interfering in any way with the business of the Miami Steamship Company, as it has heretofore and is now being carried on between said railway companies and the Miami Steamship Company, or from discriminating against said Miami Steamship Company in the making and granting of through rates, in the manner and mode of payment of freight and charges, and in the manner of through billing of freight, and from enforcing and carrying into effect the agreement between them and others operating as the Southwestern Freight Bureau, in so far as the same affects the Miami Steamship Company; and you and each of you, your respective agents and servants, are hereby commanded to afford to the Miami Steamship Company the same facilities with reference to the interchange of freight, to accept from and deliver to it freight [415] under the same conditions and terms, as are by you or either of you granted and extended to any other steamship line operating between New York and Galveston; and you are further commanded to make to Miami Steamship Company the same rate of freight on interstate and through business, and to allow to said Miami Steamship Company the same pro rata or division of such through rates as by you or either of you given to any other steamship line operating between New York and Galveston, and especially to the New York & Texas Steamship Company."

The defendants jointly and severally asked to be allowed to appeal, and have jointly and severally assigned errors as follows:

"(1) The court erred in entertaining the bill for injunction, for the reason that it disclosed no equity on its face. (2) Defendants had and have, and each of them had and has, the right to demand prepayment of freight charges when delivered to them or either of them by a connecting carrier, without exacting such prepayment when delivered by another connecting carrier. (3) The defendants had and have,

and each of them had and has, the right to advance freight charges to one connecting carrier from which they or either of them may receive freight for further transportation, without obligation to advance freight charges to another connecting carrier. (4) The defendants had and have, and each of them had and has, the right to enter into a contract with one connecting carrier for the through transportation of freight, for through joint rates, for through billing, and for the division of through rates, without being obligated to make the same contract with another connecting carrier. (5) The bill fails to show any such discrimination as falls within the purview of the third section of the act to regulate commerce. [Specifications 6 to 15, inclusive, omitted.] (16) The act to regulate commerce (and the several amendments thereof) provides its own machinery and its own remedies for the enforcement thereof, which remedies were intended to be exclusive, and no right to injunction is thereby given upon the complaint of any private suitor."

The appellants contend that the several arrangements effected between the Mallory Line and the defendant railway companies do not violate the common law, or the interstate commerce law of the United States, or any statute of the state of Texas. They contend that there is no obligation imposed upon the defendant companies to make any arrangement for through joint shipments, with a joint tariff, through billing, and a waiver of prepayment of freight, with the Lone Star Line because of the fact that they have such arrangements with the Mallory Line. They contend that there is no general usage or custom having the force of law or local custom at Galveston, Tex., which gives to one connecting carrier the right to have the same arrangements as to through shipments on joint tariffs which other carriers may have acquired by contract. They contend that the arrangements existing between the Mallory Line and the defendants are several contract arrangements between it and each of the defendants, and that the same are in no way affected by the fact, if it is a fact, that there was an understanding in advance between the defendant railway companies that they would each make a several arrangement with the Mallory Line. The alleged agreement between the steamer lines and the defendants, so far as it provides "that the Mallory Line is to cancel all existing contracts or special arrangements with the Kansas City, Pittsburg & Gulf on Missouri river business, and hereafter abide by rates and regulations fixed by this association," does not appear, on the face of it, or in the allegations of the bill, to give any ground of grievance to the complainant. The complainant

does not expect to receive any [416] freight from these steamer lines, or desire to furnish any freight to either of them, but, so far as it is related to either, it is a rival of each, competing with each, more or less, for the "Missouri River business." This part of the agreement looks like it would work in the interest of the complainant by throwing to it all of the business of the Kansas City, Pittsburg & Gulf Railroad and any other carriers in the territory from which the complainant solicits traffic who are not members of the Southwestern Freight Bureau. The provision "that all rates less than association basis between Texas points and all territories be withdrawn February 15th" would likewise seem to affect the complainant favorably, whether the complainant's rates are lower or not so low as those authorized by the association basis. If the complainant's rates are lower, this provision would seem to constitute an inducement to traffic to patronize the complainant's line. If its rates are higher, the provision is an abatement of competition to the extent that the association rate is higher than the rate that the other steamship lines have been offering, for it is only "rates less than association basis" that are to be withdrawn. There is then left as the subject of complaint by the appellee the provision "that all through rates and divisions by Gulf ports be discontinued from and to domestic ports with steamer lines not members of this association, and all interchange of traffic with such lines be discontinued as far as possible, and that prepayment of freight be demanded from the steamer lines not members of this association."

It is urged that at common law a common carrier is not bound to carry except on its own line, and, if it contracts to go beyond, it may, in the absence of statutory regulations, determine for itself what agencies it will employ, and its contract is equivalent to an extension of its line for the purpose of the contract. And if it holds itself out as a carrier beyond its line, so that it may be required to carry in that way for all alike, it may nevertheless confine its carrying to the particular route which it chooses to use. It puts itself in no worse position by extending its route with the help of others than it would occupy if the means of transportation employed were all its own. It may select its own agencies

and its own associates for doing its own work. *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185. We listened attentively and with interest to the able oral argument of counsel who appeared for the appellee, and we have diligently examined the printed brief which they submitted, and the numerous authorities cited thereon, but we do not find in all that they have advanced, or in any of the authorities we have examined, anything to weaken the force of the above suggestions and the authority on which the suggestions rest. On a subject so prolific of litigation as the rights, duties, and liabilities of railroad carriers, and the rights of individual consignors and consignees and of connecting carriers doing business with the railway companies, an immense mass of litigation has necessarily arisen, and a large number of adjudged cases from courts of high respectability are reported. Many of these cases are comprehensive in the reach of their authority, and more comprehensive in the compass of their **[417]** dicta. They distribute themselves more or less through all the questions involved in the case now before us, and are hardly susceptible of close alignment with the questions here, or satisfactory review in connection with these questions. They are instructive in their analogies, but the facts are different from those we have now to consider, and we think it best to let our application of their analogies appear rather in the disposition of the questions on which we are called to pass than in any attempted formulation of their doctrine in language which, quoted out of its logical connection, and construed from the standpoint of new cases hereafter arising, might tend to mislead.

Counsel for the appellee cite sections 2, 3, and 7 of the act to regulate commerce of February 4, 1887; also section 2 of the act of March 2, 1889 (amending section 10), to amend the act to regulate commerce. Section 2 of the act of 1887 clearly defines what shall constitute the unjust discrimination which it prohibits, and cannot be made to apply to this case without assuming that the contract existing between each of the defendants and the Mallory Line for the extension of the business of each over that line does not constitute substantially dissimilar circumstances and conditions under

which the defendants are doing business with the Mallory Line from the circumstances and conditions under which the Lone Star Line is claiming the right to do business with the defendants. Such an assumption, we think, is repelled by the authorities which support our conclusion as to the defendants' contract arrangements being valid at common law. To support appellee's claim under the third section of the act to regulate commerce, we should have to hold that the defendant carriers could not contract with the Mallory Line for extending their business over that line without at the same time making a similar contract with any other party who is shown to be able and offering to do the same carrying with equal safety, dispatch, and responsibility, and that to decline to let such stranger carrier into their contract, or to make an equivalent contract with it, is to give an undue and unreasonable preference and advantage to the line contracted with and to subject the stranger to an undue and unreasonable prejudice or disadvantage in respect to the traffic it desires to carry. If it should not be so held, the contract arrangements which the defendant carriers have with the Mallory Line do not constitute the facilities for the interchange of traffic, or that discrimination in rates and charges between connecting lines to which the second paragraph of section 3 applies. The last clause of the second paragraph of section 3 provides that that paragraph shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. It is provided in section 6 that every common carrier subject to the provisions of the act shall file with the commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of the act to which the carrier may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such **[418]** continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with the commission. These provisions do not expressly authorize the separate carriers to contract with reference to

through routes and joint tariffs because the carriers had that authority. But these provisions do necessarily imply the recognition that that authority did exist, and that it could be exercised after the passage of the act in like manner as it was known to have been exercised for long periods before the passage of the act, and to be in general use at the time of its passage. The act does not expressly authorize the separate carriers to establish rates, fares, and charges on their respective lines, but it recognizes that such carriers have that right, in like manner as it recognizes that two or more connecting carriers have the right to contract for through routing and a joint rate, subject in each case to the leading limitations embraced in the first four sections of the act. The fact that these parties were left free to contract in reference to this subject necessarily includes a freedom to decline to contract in case they cannot agree upon the terms, or in case they consider it to their interest not to contract on any terms. This legislation was had, as all useful legislation is had, in reference to the existing conditions and the manifest tendencies of the subject embraced. It was at that time matter of common knowledge, and minutely within the knowledge of the committees of congress which had this subject in charge, that freight and passengers were being carried through all the states from one extremity of the Union to the other, over continuous lines or routes, operated by more than one carrier, on tariffs of rates and fares and charges regulated as to their amount, the time and place of their receipt, the pro rata division thereof by the respective carriers, the accounting for, paying, and distribution of the same by and to the respective carriers according to their contract agreement or understanding, express or implied. The committees of congress, especially certain members who were most active in promoting this legislation, had knowledge of the English acts on the same subject, and studied profoundly the different clauses, and even the phraseology, of those acts, and their practical application to the business of transportation in England, and the decisions of the commission there established and of the courts in construing those acts. And we are greatly aided in construing our act by observing what provisions of the English act it adopts, what provisions it

modifies, and how they are modified, and what provisions are omitted. The English act of 1873, amendatory of the act of 1854, authorized the commission by it established to establish through routes, and to fix through rates between connecting lines, and provided that the facilities to be afforded shall include the due and reasonable forwarding and delivering by any railway company and canal company, at the request of any other such company, of through traffic to and from the railway or canal or any other such company, at through rates, tolls, or fares, but required the commissioners, in the apportionment of such through rates, to take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or making of the route, or any part of the route, as well as any special charges which **[419]** any company may have been entitled to make in respect thereof. This provision is wholly omitted from our act. The interstate commerce commission was early impressed with the view that there were cases in this country where through routes and reduced through rates, which would facilitate the movement of traffic, and thereby benefit the public, are prevented from being made by the unreasonable refusal of carriers to unite in granting such facilities; and, being impressed with the view that the statute was apparently designed to require connecting carriers to join in the formation of through routes at lower aggregate rates than a combination of their locals, have repeatedly called the attention of congress to the fact that it had failed to provide the machinery necessary to accomplish that purpose. As the commission, in one of their latest opinions, say, the correction of this defect requires the exercise of some public authority which can investigate the circumstances of each case, allow the parties to a proposed through rate an opportunity to be heard, and fairly determine the matter—including, if need be, the aggregate rate and divisions thereof—with due regard to the interest of the several carriers as well as the public. Such a scheme for establishing compulsory through rates should be surrounded by proper safeguards, and its operation limited by proper restrictions. *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co., supra; Interstate Commerce Commission* v. *Balti-*

more & O. R. Co., 145 U. S. 263, 12 Sup. Ct. 844; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700; *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666; *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 18 Sup. Ct. 45; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 Fed. 626 et seq.; *Railroad Co.* v. *Platt* (decided by the Interstate Commerce Commission June 26, 1897).

As we view the complainant's bill and construe sections 2 and 3 of the act to regulate commerce, in connection with the contract or arrangement shown to exist between the defendant carriers and the Mallory Line, section 7 of the act and section 10 as amended have no bearing on the case made. We think it clear from our construction of the text of the interstate commerce act and its amendments, and the reasoning and authority of the few cases just cited, and the numerous other cases in line with them, more or less pertinent to our inquiry, that the case attempted to be made in the appellee's bill of complaint to the circuit court cannot be maintained under the interstate commerce act. The bill shows that for many years prior to July 15, 1897, there had been no competition with the Mallory Line in the transportation of traffic by steam vessels from Galveston to New York; that the complainant's own line began business on the 15th of July, 1897, or seven months, less three days, before the exhibition of its bill. The custom and usage that obtained with reference to this interstate and foreign traffic, if any existed and was observed by the defendant carriers before July 15, 1897, was necessarily restricted to receiving and delivering freight from and to the Mallory Line (as they are continuing to do), and not of delivering or receiving to or from other lines, or to or from all lines, because none other than the Mallory Line theretofore existed. **[420]** It can hardly be claimed that the usage which has obtained with the complainant's line has acquired the force of local custom. Where a local custom does exist in reference to matters about which parties contract, and they refer expressly to the custom of the port or place, or make no express reference to it, such custom will be considered in construing such contracts. But it is beyond the power of a local custom to compel parties to

contract, or to impose its terms on their dealings, against their expressed will, or against the duly-expressed will of either of them.

Counsel for appellee also cite articles 4536, 4537, and 4539 of the Revised Statutes of Texas of 1895. It is shown by the bill that all the traffic which the complainant is engaged in handling is interstate or foreign commerce. Such commerce is subject to exclusive regulation by the national government. This power to regulate such commerce is vested in congress, and is not a dormant power, but has been put into full exercise by the act of February 4, 1887. Hence the articles of the Texas statutes cited can have no application to such commerce as that which the complainant is engaged in conducting. There is nothing in the language of the Texas statute that indicates a purpose upon the part of the legislature that the articles quoted should apply to interstate or foreign commerce.

The appellee contends that the defendant railway companies entered into such a combination, conspiracy, and agreement as is prohibited by the act to protect trade and commerce against unlawful monopoly, approved July 2, 1890, for the purpose and with the intention of monopolizing the traffic of interstate commerce between New York and Galveston, in restraint of such commerce, and for the purpose of preventing complainant from carrying on its business of common carrier in such traffic. Counsel cite sections 1, 2, 4, and 7 of the act named. Sections 1 and 2 are strictly penal. So far as section 4 confers any new jurisdiction upon the circuit courts of the United States to prevent and restrain violations of this act, such new jurisdiction, if any is conferred, appears to be limited in its exercise to suits on behalf of the government instituted by the district attorneys of the United States in their respective districts, and under the direction of the attorney general. *Blindell* v. *Hagan*, 54 Fed. 40; *Hagan* v. *Blindell*, 13 U. S. App. 354, 6 C. C. A. 86, 56 Fed. 696. Section 7 provides that any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the act may sue therefor in any circuit court of the United States in the district in which the

defendant resides or is to be found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. In the case of *Blindell* v. *Hagan*, *supra*, it was said by the learned judge of the circuit court that this act makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violation. But it gives no new right to bring a suit in equity, and a careful study of the act leads to the conclusion that suits in equity or injunction **[421]** suits by other than the government of the United States are not authorized by it. However, as the citizenship of the parties was such that the United States court had jurisdiction, the learned judge retained the case, and awarded the preliminary injunction prayed for, because the nature of the alleged injury was such that it would be difficult to establish in a suit at law the damage to the plaintiff, and because to entertain it would prevent a multiplicity of suits. In the same case on appeal this court said:

"We concur in the conclusion reached by the learned judge who decided the case below, as expressed in his opinion, and which is made a part of the record, that the jurisdiction is maintainable on general principles of equitable jurisdiction, and a careful examination of the case satisfies us that under all the facts before it there was no error in the court awarding a preliminary injunction."

In *U. S.* v. *Debs*, 64 Fed. 724, the circuit court, to sustain its jurisdiction, relied mainly on the act of July 2, 1890. When the case came in review before the supreme court in *Re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, that court entered into no examination of the act of July 2, 1890, preferring to rest its judgment on the broader ground of the general jurisdiction of a court of equity to prevent injury in such cases. The supreme court was careful to observe that it must not be understood from its putting its judgment on the broader ground that it dissented from the conclusion of the circuit court in reference to the scope of the act. The provisions of the act in question apply to railroads, and render illegal all agreements made by them which are in restraint of trade or commerce. *U. S.* v. *Association*, 166 U. S. 290, 17 Sup. Ct. 540. We do not doubt the general jurisdiction of the circuit

court as a court of equity to afford preventive relief in a proper case against threatened injury about to result to an individual from any unlawful agreement, combination, or conspiracy in restraint of trade. Does the complainant present a proper case for affording such preventive relief? It asks for a preliminary injunction restraining the respondents from interfering with its business as it has been heretofore and is now being carried on between the respondents and the complainant in manner and means in the bill alleged, and restraining them from discriminating against the complainant in making and granting through rates, and restraining them from carrying out the agreement between them and others in so far as it affects the complainant, commanding them to afford to complainant the same facilities, and accept freight under the same conditions, as by them extended and granted to the other connecting steamship lines, etc. Although the language "restraining them" is used in this prayer, it is manifest from the nature of the case and all the allegations in the bill that the preliminary injunction sought for and obtained by the appellee is wholly mandatory in its nature and effect. The bill does not claim that the complainant has any contract arrangement with the defendant railroad carriers which those carriers are about to breach. It does not charge that the carriers are obstructing the complainant's traffic in any particular by violence or other affirmative action so as in any way to hinder the prompt, safe, and **[422]** convenient interchange of traffic between its line and the respondents' lines, or to hinder the prompt dispatch thereof to its respective destination, at the reasonable rates therefor, which the respondents demand and receive from all persons not connected with them by their contract arrangement for through routing, billing, and rating. It therefore is manifest that the circuit court has no power to grant the relief asked, unless it has power to command that the respondents shall contract with the complainant for such through routing, billing, and rating; and, not only so, but shall contract with the complainant therefor on the same terms that they have contracted with the Mallory Line. All the reasons which have prevailed with congress to with-

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hold this power from the interstate commerce commission, and many additional reasons with strongest force, forbid that the numerous circuit courts should, in advance of legislative action, take jurisdiction, and by mandatory injunction compel such through routing, billing, and rating.

We conclude that the several arrangements effected between the Mallory Line and the defendant railway companies are not violative of the common law; that the case attempted to be made in the appellee's bill of complaint in the circuit court cannot be maintained under the interstate commerce act; that the statutes of Texas relied upon do not and cannot apply to interstate commerce; and that the bill does not present such a case as the circuit court has jurisdiction to relieve by mandatory injunction, either under the anti-trust act or under its general jurisdiction as a court of equity. From these conclusions it results that the decree of the circuit court must be reversed. It is therefore ordered that the order of the circuit court granting an injunction pendente lite be, and the same is hereby, reversed, and the injunction dissolved, and this cause is remanded, with instructions to thereinafter proceed in accordance with the views expressed in this opinion, and as equity may require.

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[439] CARTER-CRUME CO. *v.* PEURRUNG.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

[86 Fed., 439.]

REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE.—If there is any substantial evidence upon which the jury could reasonably have based their verdict, it will not be disturbed on appeal, though there may have been a motion for a verdict or a motion for a new trial which was overruled.[a]

SAME—CONTRACT IN RESTRAINT OF TRADE—WAIVER OF DEFENSE.—While the court may possibly reverse a judgment involving the enforcement of a contract contravening public policy in the absence of an objection on that ground in the trial court, it will only do so when such illegality appears as matter of law upon the face of the pleadings, the face of the contract, or from the admitted facts.

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CONTRACTS IN RESTRAINT OF TRADE.—A contract with an independent manufacturer for the entire product of his plant is not in itself a contract in illegal restraint of trade.

SAME.—If an independent manufacturer contracts to sell his entire product, without knowledge of similar contracts made by the buyer with other manufacturers, and without any knowledge of the fact that such contract was intended by the buyer as one step in a general scheme for monopolizing the trade in that article and controlling prices, such independent manufacturer cannot be held to have conspired against the freedom of commerce, or to have made a contract in illegal restraint of trade.

APPEAL AND ERROR—JURISDICTION OF FEDERAL COURTS—OBJECTION NOT RAISED BELOW.—The objection that the suit was not brought in the district of the residence of either party does not affect the general jurisdiction of the court, and cannot be raised for the first time on appeal.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Oscar M. Gottschal, for plaintiff in error.

Charles W. Baker, for defendant in error.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

LURTON, Circuit Judge.

This is an action at law. The suit was brought upon a written contract made August 14, 1894, between Peurrung Bros. & Co., a firm then engaged in the business of jobbing wooden ware in Cincinnati, Ohio, composed of Joseph P. and Charles J. Peurrung, and the Carter-Crume Company, a corporation of West Virginia. By this contract, for consideration therein recited, which will be hereafter referred to, the Carter-Crume Company became obliged to pay to Peurrung Bros. & Co. $250 on the 15th of each month for the next ensuing 3 years, 6 months, and 15 days, unless the contract should be sooner terminated under a provision contained therein. The installments which became due prior to September 15, 1895, were duly paid. The suit was for installments thereafter falling due, which had not been paid. The petition alleged that the firm of Peurrung Bros. & Co. had

been dissolved, and the interest of Charles J. Peurrung in the contract had **[440]** been assigned to the plaintiff, Joseph P. Peurrung, who therefore sued in his own name, as he might under the law of Ohio. There was a judgment in favor of the plaintiff for the amount due on the first day of the trial term. The errors relied upon to reverse this judgment as presented by the brief and argument of counsel will be considered in the order in which they have been argued.

1. It is said that the evidence did not show that the plaintiff was the sole owner of the claim in suit; that for this reason the court erred in not instructing for the plaintiff in error as requested at the close of the evidence for the defendant in error; and that for the same reason it was error to refuse a new trial at the close of all the evidence. It is only by the strongest stretch of liberality that we can discover that there was a request for a direction at the close of the evidence for the plaintiff below. But that motion was waived by the subsequent introduction of evidence, and was not renewed at the close of all the evidence. *Railway Co.* v. *Lowry*, 43 U. S. App. 408, 20 C. C. A. 596, and 74 Fed. 463. There was evidence tending to show that Charles J. Peurrung, in a settlement of the partnership affairs with his brother, Joseph P. Peurrung, assigned this contract, and all due or to become due thereunder, to the said Joseph P. Peurrung. The witness to this was Charles J. Peurrung himself. That this assignment occurred before this suit was brought is also fairly made out. The circuit judge instructed the jury that the plaintiff must show, in order to recover, that he was the real owner of this claim; and that, if the assignment was fictitious, or unproven, the case of the plaintiff must fail. It is not for this court to weigh the evidence. That is the province of the jury, and, where there is any substantial evidence upon which a jury could reasonably find, this court will not disturb the verdict, although there may have been a motion for a verdict, or a motion for a new trial, which was overruled. This is too long and well settled to need other authority than *Railway Co.* v. *Lowry*, cited heretofore.

2. But it is said that the contract in question is one in restraint of trade, and therefore void. This defense is here

made for the first time. No suggestion as to its illegality is found in the pleadings. No reference thereto occurs in the charge, nor was any exception taken to any instruction given or refused. If it be true that this contract is one which, for reasons of public policy, is void, the defense in the court below would not be waived by failure to plead properly. It was said in *Coppell* v. *Hall*, reported in 7 Wall. 542, and repeated in *Oscanyan* v. *Arms Co.*, 103 U. S. 261–268, that:

"In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, 'Ex dolo malo non oritur actio,' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it **[441]** destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

But the general rule is that a defense not presented to the court below cannot be considered on writ of error from a superior court. *Edwards* v. *Elliott*, 21 Wall. 532; *Wilson* v. *McNamee*, 102 U. S. 572; *Clark* v. *Fredericks*, 105 U. S. 4; *Drexel* v. *True*, 20 C. C. A. 265, 74 Fed. 12. Objections going to the jurisdiction are an exception to this rule, because made so by Act March 3, 1875, § 5.

Possibly, it would be the duty of this court to reverse and remand for dismissal a suit brought here on writ of error which appeared to involve the enforcement of an obligation contrary to good morals or in contravention of public policy, although no such objection had been made in the court below. But such action by an appellate court, as a tribunal for the review of the action of trial courts, would not be justifiable unless such illegality should appear as matter of law from the pleadings, the face of the contract in suit, or from the confessed facts of the case; otherwise the right to introduce evidence in rebuttal and of trial by jury, if the suit be one at law, would be cut off. The plaintiff below did not rely upon any contract which was in itself illegal or void as in contravention of public policy. Counsel for plaintiff in

error say that the Carter-Crume Company were engaged in an illegal effort to suppress competition, and put up prices in the wooden butter-dish trade, and that as one step in this scheme they bought from Peurrung Bros. & Co. their contract with Tower & Matthews. Manifestly, Perrung Bros. & Co. had been guilty of no conspiracy against the public in contracting for the entire output of the small factory of Tower & Matthews. Neither was it an illegal restraint of trade for the Carter-Crume Company to contract for the same product, if their trade demanded it. The prior contract with Peurrung Bros. & Co. alone stood in the way. They therefore bargained with them to release Tower & Matthews, and to supply them for a definite time with the same ware, at the market price, less a fixed trade discount. At the same time they contracted with Tower & Matthews for the entire product of their factory. These two contracts were concurrent in time, and were subject to be determined on same notice. There were some features about this last contract which indicate an intention to close the Tower & Matthews factory after the delivery of a certain quantity of ware for the term of the lease, if circumstances should make it desirable. William E. Crume, of the Carter-Crume Company, in the effort to make out a defense of misrepresentation as to the extent of the trade of Peurrung Bros. & Co. in such goods as one inducement to the contract, did say that his company were, by the contracts with Peurrung Bros. & Co. and Tower & Matthews, endeavoring to hold up the prices of such goods, and that Peurrung Bros. & Co. had been selling such ware at a less price than the Carter-Crume Company. The same witness also said that they at that time had other such contracts,—whether with factories or dealers he did not say. There is no evidence that Peurrung Bros. [442] & Co. were aware of any others contracts, or of the purpose of the Carter-Crume Company to control prices, or that they had any purpose of aiding and abetting that company in any such scheme. They did know of the contract with Tower & Matthews. But that of itself was not a contract in general restraint of trade. If one contracts with a manufacturer for his entire product, it will, of course, restrain the producer from selling to others. But

such a contract, taken by itself, is ordinarily harmless. The public are not affected. Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire product to one buyer, who would thereby be enabled to monopolize the market. But, if each independent producer contract to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade. The transaction with Peurrung Bros. & Co. was, on its face, legitimate, and it cannot be impeached simply by evidence that the Carter-Crume Company understood and intended it as one step in a general illegal scheme for monopolizing the trade in wooden butter dishes, and controlling prices. The principle, if we admit that the purpose of the Carter-Crume Company was illegitimate, is that which is applied to so-called wagering contracts. The proof must show that the illegal purpose was mutual. *Roundtree* v. *Smith*, 108 U. S. 269, 2 Sup. Ct. 630; *Irwin* v. *Williar*, 110 U. S. 499, 4 Sup. Ct. 160; *Bibb* v. *Allen*, 149 U. S. 481, 13 Sup. Ct. 950. This defense, not being one which appears either upon the face of the contract in suit or from the admitted purposes of both parties, cannot be urged as an objection here, the objection not having been made in the court below.

3. The next and last ground urged for a reversal is that this suit was not brought in the district of the residence of either the plaintiff or the defendant. This objection was fatal to the jurisdiction if it had been taken in time. The plaintiff was a citizen of Indiana, and the defendant a corporation of West Virginia. Diversity of citizenship, therefore, existed, and the case was one of which the court could take jurisdiction. The act of congress which prescribes the particular district in which a defendant may be sued is not one affecting the general jurisdiction of the court. The exemption from being sued out of the district of the domicile of either of the parties was a privilege which the Carter-Crume Company could and did waive by pleading to the

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merits. *Railway Co.* v. *McBride*, 141 U. S. 127, 130, 132, 11 Sup. Ct. 982; *Railroad Co.* v. *Cox*, 145 U. S. 593, 603, 12 Sup. Ct. 905; *Trust Co.* v. *McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286. The judgment is accordingly affirmed.

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[671] THE CHARLES E. WISWALL.

THE CHARLES E. WISWALL *v.* SCOTT ET AL.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

[86 Fed., 671.]

MONOPOLIES—INTERSTATE COMMERCE.—A combination or trust between the owners of tugs operating entirely within the confines of a state is not a combination in restraint of trade or commerce among the several states or with foreign nations, so as to come within the condemnation of the statutes of the United States, although most of the owners held coasting licenses.[a]

SAME—TOWAGE CHARGES.—One who requests and accepts the services of a tug for towage purposes cannot escape paying the reasonable value of the services rendered, on the ground that the owners of the tugs were members of an unlawful combination to raise prices. 74 Fed. 802, affirmed. [See p. 608.]

This cause comes here upon appeal from a decree of the district court, Northern district of New York, in favor of the libelants, twelve in number, who were severally owners of fourteen propellers or steam tugs which had rendered towage service to the dredge and her scows.

The suit was originally begun by the present libelants, and by eight others, who owned, respectively, nine additional steam tugs or propellers; but, it appearing that no services had been rendered by these last-mentioned nine vessels, the libel was amended accordingly, at final hearing. The court found that the remaining libelants were entitled to recover the value of the services rendered by their respective tugs, and referred it to a commissioner to ascertain, determine, and report the values of the services of the respective vessels over and above all payments on account thereof which may be established by the evidence; such values and the amounts of such payments to be determined upon the evidence already taken, and such additional evidence as may be produced and given by the respective parties before such commissioner. Abundant oppor- **[672]** tunity was given to all parties by the commissioner to take additional evidence, but none was offered. The commissioner thereafter reported the value of the services of the vessels over and above

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all payments, separately as to each vessel. He did not separately state the value of the services of each tug, and the amount of the payment thereon, but, inasmuch as it appears conclusively that $310 was paid, it would seem that he found the total value of the services to be $1,269.16. The value asserted in the amended libel was $1,300. Claimant filed exceptions to the report, and, the report and exceptions coming on to be heard, the decree now appealed from was entered.

Worthington Frothingham, for appellant.

Isaac Lawson, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts).

The record is long and somewhat involved, and the commissioner's report has not set forth his findings with sufficient detail to be of much assistance to the court in determining just what he did find and upon what proof. This appeal may be best disposed of by taking up the assignments of error seriatim.

1. It is assigned as error that the libelants in the original libel and in the amended libel were a combination in the form a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states and with foreign nations; that libelants were engaged in an attempt to monopolize such trade or commerce; and that all the work alleged to have been done by them collectively or individually was under a contract or combination in such form, and that such contract or combination was void, and the libelants cannot maintain this suit either collectively or individually. We do not find any satisfactory evidence that these boats were "engaged in trade or commerce among the several states or with foreign nations." Most of them held coasting licenses, but there is not a scintilla of evidence to show that they ever did anything except to tow canal boats, barges, and such craft on the waters of the Hudson River above Poughkeepsie, and entirely within the limits of the state of New York. And it seems wholly unnecessary to inquire whether their owners had entered into any unlawful combination under the laws of the state. Finding that the rates of compensation for the services of themselves, their crews and their tugs, were becoming so low as to be unremunerative, uncertain,

and irregular, they agreed with each other to charge for all services rendered by each vessel such sums as might be fixed by a tariff which they adopted. They called themselves the "Hudson River Tug-Boat Association," had a so-called superintendent to allot work among them, adopted a system of fines, etc., but they never became a legal entity either as a corporation, a joint-stock association, or a partnership. They made collectively no contract with the claimant, nor were they capable of making such contract. Each piece of towage service rendered was a transaction between the boat towing and the boat towed, with which the other boat owners in the association had nothing to do. Indeed, the libel (original and amended) is obnoxious to the objection of an improper joinder of libelants. Each should have brought a separate libel; **[673]** but since this objection was apparently not taken below, and the only result would be to increase the costs to be paid by the defeated party, it need not now be considered. The contracts upon which recovery was had were not with the so-called combination, but severally, with the several tugs rendering the service; the amount of compensation asked and found is the fair and reasonable value of such service; and the existence of the "combination" is no bar to its recovery. The defendant's proposition is that a person who has given work, labor, and services to another, upon that other's employment, may not recover their fair and reasonable value if, during the time that he rendered such services, he had been engaged with other men in like employment with himself in a combination to charge for such services as any of them might render according to some scale agreed upon by them. We know of no principle of law which calls for the adoption of such a rule, and are referred to no authorities which support it. The cases cited on appellant's brief are not applicable. The only contract considered in *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, was the contract between the members of the combination. The action in *Bank* v. *Owens*, 2 Pet. 538, was brought on the usurious note by the bank that exacted the usury; and the same is true of *Bank* v. *Lamb*, 26 Barb. 596. In *Leonard* v. *Poole*, 114 N. Y. 377, 21 N. E. 707, the court refused to take an accounting between two parties to an illegal transaction. In *Association* v. *Houck* (Tex. Sup.) 30 S. W. 869, it appeared that defendants Houck and Dieter had entered into an unlawful combination with other dealers in beer, which secured control of the trade. Plaintiff, by contract with defendants, bound itself to sell to the latter, and to no other dealer in the city of El Paso,—a contract which gave the combination a monopoly of the sale in the city of El Paso of the product of plaintiff's brewery, and materially assisted the parties to the illegal contract in carrying out their object of controlling the market for the sale of beer in that city. The court held that if the plaintiff, when it made its contract with Houck and Dieter, knew of the existence of the combination, it was not an innocent seller, and could not recover, since its contract "is calculated materially to aid the purchasers in effecting their unlawful design." In *Peck* v. *Burr*, 10 N. Y. 294, it was held that, where a contract is void because of its illegality, there can be no recovery for services rendered under it upon a quantum meruit. But there is nothing illegal about the several contracts sued upon here, which are to render towage services in consideration of the payment of the reasonable value of such services. In *Arnot* v. *Coal Co.*, 68 N. Y. 558, it was held that "the agreement of the B. C. Co. (of which plaintiff was an assignee) not to sell to others, it knowing that the object of defendant was to create a monopoly, and that this was one of the means of averting competition, made it a party to the illegal scheme of defendant." This is very far from supporting the proposition that had the Pittston & Elmira Coal Company sold 1,000 tons of the coal thus purchased to a local dealer in New York City, at fair market rates, it could not recover. **[674]** On the other hand, the principle is well recognized by the authorities that a promise remotely connected with an illegal act, and founded on a new consideration, is not tainted with the illegality, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. One illustration given in *Armstrong* v. *Toler*, 11 Wheat. 258, is this:

"The man who imports goods for another, by means of a violation of the laws of his country, is disqualified from founding any action upon such illegal transaction for the value or freight of the goods. * * * But, after the act is accomplished, no new contract ought to

be affected by it. It ought not to vitiate the contract of the retail merchant who buys these goods from the importer."

The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If he cannot open his case, without showing that he has broken the law, a court will not assist him. But if he does not claim through the medium of the illegal transaction, but upon a new contract bottomed on independent consideration, he may recover. *Swan* v. *Scott*, 11 Serg. & R. 155; *Armstrong* v. *Toler*, 11 Wheat. 258; *McBlair* v. *Gibbes*, 17 How. 236. In the case at bar libelants clearly did not require the aid of the alleged illegal transaction to establish their case.

2. It is further assigned as error that "there was on the trial no sufficient proofs of the value of the services alleged to have been performed by the libelants or either of them, and no proof excepting of such value as was made and established by the libelants themselves while engaged in such combination," etc. The record shows that as to each item of charge there was evidence that the service rendered was worth the price charged, and, as much of the work done by the different scows was similar in character and quantity, many of the items of charge are supported by the evidence of several witnesses. The witnesses stated that, in testifying to the value of the services, they did not give consideration to the schedule of prices adopted by the association. The mere fact that in some instances the sum testified to as the fair and reasonable value of a particular service and the price for such service named in the schedule were identical is not controlling. It is not inconceivable that men may combine together to ask a perfectly fair price for their work. Co-operation does not necessarily imply extortion. We have not seen nor heard the witnesses, but the commissioner, who had that opportunity, reached the conclusion that their estimate of value was more nearly correct than that of the single witness called by claimant. As the record discloses evidence to support his finding upon this disputed question of fact, the decree should not be reversed on the ground assigned. Appellant's brief refers to an instance where the tug Andrews charged

five dollars for towing the dredge from Troy to West Troy, when the regular charge was two dollars, the additional three dollars being charged for the reason that Wiswall (the owner of the dredge) had previously towed with a boat outside of the association. There **[675]** is no persuasiveness, however, to any such evidence, in view of the fact that the owner of the Andrews is not included among the libelants; that no claim on behalf of that tug is made; and that whatever charges are made, testified to, and allowed for towing from Troy to West Troy and vice versa are at the rate of two dollars only.

3. It is further assigned as error that judgment was rendered against the sureties for this claimant in the original libel wherein the Hudson River Tug-Boat Association was libelant, and that such sureties were discharged by the proceeding allowing the libel to be amended and the libelants to proceed therein individually. It appears, however, that the Hudson River Tug-Boat Association was not the libelant in the original libel. Twenty different persons were individually libelants, of whom eight have been removed by amendment, having no claims. In other words, the suit began with twenty individual libelants, and ended with twelve of them, the obligation of the sureties being to answer the decree of the court. The assignment of error is unsound.

4. The last assignment of error (the sixth) is the general one that judgment should have been given for claimants instead of for libelants. It has been disposed of with the other assignments.

The decree of the district court is affirmed, with interest and costs.

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[825] DENNEHY ET AL. *v.* McNULTA.

(Circuit Court of Appeals, Seventh Circuit. May 2, 1898.)

[86 Fed., 825.]

CONTRACTS—ILLEGAL CONDITION AS CONSIDERATION—EFFECT OF NONPERFORMANCE.—Rebate vouchers issued by a distilling company to customers, by which it promised to refund a certain sum per gallon on their purchases at the end of six months, on condition of their purchasing exclusively from the company during that time, cannot

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be enforced, either at law or in equity, where the condition has not been performed, though such condition be illegal, as in restraint of trade; there being no other consideration for the promise. 23 C. C. A. 415, 77 Fed. 700, affirmed.[a]

MONOPOLIES—ILLEGAL COMBINATION TO CONTROL BUSINESS—LEGALITY OF CONTRACTS.—One purchasing liquors from an illegal combination of distillers, which controls the market and prices, though impelled thereto by business needs and policy, enters into the contract voluntarily, and cannot retain the goods, and recover the price paid, or any part of it, either on the grounnd that the combination was illegal, or the price excessive. 23 C. C. A. 415, 77 Fed. 700, affirmed.[b]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The appellants filed claims for allowance against the funds in court in the consolidated causes against the Distilling & Cattle-Feeding Company, of which sufficient description appears in the case of *Distilling Co.* v. *McNulta* (decided by this court Jan. 4, 1897) 46 U. S. App. 578, 23 C. C. A. 415, and 77 Fed. 700.

[826] (1) The claims of Dennehy & Co. were presented by petition in their name, and consisted of 91 written instruments, called rebate certificates or vouchers, issued by the Distilling & Cattle-Feeding Company to Charles Dennehy & Co., aggregating the sum of $5,238.23. The instruments are of various dates, numbers, and amounts, and in form as follows, with appropriate insertions in the blank spaces, respectively:

"Peoria, Ill., ———, 189–. No. ———

"Subject to the conditions named herein, and for the purpose of securing the continuous patronage of the within-named purchaser, the successors and assigns of the same, for its products, the ——— Distilling & Cattle-Feeding Co., six months from the date of this purchase voucher, will pay to Charles Dennehy & Co., of Chicago, purchaser, ——— dollars ($———), being a rebate of seven cents per proof gallon on ——— proof gallons of the Distilling and Cattle-Feeding Company's product purchased this day. This voucher will be valid and payable only upon condition that the above-named purchaser, the successors and assigns of the same, from the date of this voucher to the time of its payment, shall have bought their supply of such kinds of goods as are produced by the Distilling and Cattle-Feeding Company, and all compounds thereof, exclusively of one or more of the dealers named on the back thereof, until further notified, and shall also have subscribed to the certificate on the back hereof.

"Distilling and Cattle-Feeding Co.,
"By J. B. Greenhut, President.

"Not transferable nor negotiable.

"When due, forward to the German-American National Bank of Peoria, Ill., where this voucher is payable without exchange or other charge."

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[a] Decision in 77 Fed., 900, not reprinted. Nothing in it relating to anti-trust law, restraint of trade, or illegal combination.

[b] Syllabus copyrighted, 1898, by West Publishing Co.

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Printed upon the back is the following indorsement: "It is hereby certified that from the date of this voucher to the maturity thereof the within-named purchaser, and the successors and assigns of the same, have purchased all of their supply of such kind of goods, and their compounds, as are produced by the Distilling and Cattle-Feeding Co., exclusively from one or more of the dealers named hereon." Appended thereto is a list of 61 dealers or distillers referred to, variously located throughout the United States.

(2) The petition of Moses Salomon sets up that he is the assignee of sundry judgments rendered in justices' courts against the Distilling & Cattle-Feeding Company, and also the holder of vouchers on which said judgments were rendered; but it appeared, and was undisputed, that appeals from the judgments were perfected and pending, whereby the judgments became ineffective; and thereupon the petitioner introduced 47 certificates or vouchers issued to Stein Bros., of various dates, numbers, and amounts, aggregating the sum of $3,604.64, and similar in form and tenor to the instrument above described, except that in a portion thereof the rebate was named at "five cents per proof gallon," instead of seven cents, as recited in the sample form, and the words, "Not transferable nor negotiable," do not appear, from the record, to have been printed or stamped thereon.

It is not claimed that the payees or holders in either case complied in any respect with the conditions named in the voucher. On the contrary, it appears, and is conceded, that there was neither compliance not attempt to perform the condition. It further appears that no inerest is in fact asserted by either of the payees named in the vouchers; but that (1) the Dennehy & Co. vouchers were indorsed in blank, without recourse, by that corporation, delivered to the United States Distilling Company, and were subsequently delivered to one G. E. Jones, for whose benefit, as finally divulged, the claim was filed in the name of the original payees; and (2) that the vouchers issued to Stein Bros. were by them indorsed payable to the order of one Joseph Wolf, without recourse, and by the latter indorsed in blank, and delivered to the petitioner, Salomon, an attorney at law, under an arrangement that Salomon should bear all expenses, and receive one-half of any amount realized.

The hearing upon the claims was before a special master, who reported to the circuit court "the testimony and evidence, with his conclusions thereon." Aside from the matters above recited, voluminous testimony was introduced on behalf of the claimants, directed to showing that the Distilling & Cattle-Feeding Company, as organized and conducted, was a combination of a large percentage [827] of the distillers of the country,—asserted to be 85 per cent. thereof,—constituting an illegal trust, monopolizing and controlling the product of the country in that line to the extent of nearly 90 per cent; that the system of rebate vouchers in evidence was entered into and designed to carry out and secure the purposes of the monopoly; that, through this control of the major share of distillery products, it was deemed a business necessity on the part of Dennehy & Co., Stein Bros., and other dealers throughout the country, to make all their purchases in that line from the distributors of the combination; or, as stated in the argument of their counsel, it became "impracticable and detrimental to their trade to buy liquors elsewhere," in the face of the monopoly; but it also appears that an independent and accessible supply existed in fact. The conclusions of the special master were against the allowance of the claims in both cases. Exceptions filed by each claimant were subsequently heard and overruled in the circuit court, the report of the special master in each case was confirmed, and final decree entered accordingly. The opinion thereon, by Showalter, Circuit Judge, is reported in 77 Fed. 265.

Opinion of the Court.

Moses Salomon, for appellants.

Levy Mayer, for appellees.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after stating the case as above, delivered the opinion of the court.

Passing technical objections to consider this controversy upon the merits, it is manifest that no liability is chargeable against the Distilling & Cattle-Feeding Company, except upon one or the other of the following propositions: (1) That the conditions contained in the vouchers may either be ignored or set aside for illegality, and the promise thus segregated may be enforced without performance of the conditions; or (2) that in the original transactions money was paid to this corporation under circumstances from which the law raises an implied promise of repayment, within the doctrine of money had and received, which, ex æquo et bono, belongs to the party by whom it was so paid. Under either head, the mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal,—a status apparently held in *Distilling & Cattle-Feeding Co.* v. *People*, 156 Ill. 448, 41 N. E. 188,—cannot serve, ipso facto, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations or rights. *National Distilling Co.* v. *Cream City Importing Co.*, 86 Wis. 352, 355, 56 N. W. 864.

1. Can a cause of action be predicated upon the written agreement? In substance, the instrument promises that, "subject to the conditions named," and "for the purpose of securing the continuous patronage" of the purchaser as payee thereof, the Distilling & Cattle-Feeding Company will, in six months after date, pay to the purchaser the amount named, "being a rebate of seven [or five] cents per proof gallon" on a purchase that day made, and to be "valid and payable only on condition" that the purchaser named, his successors and assigns, from date of the voucher to the time of payment, "shall have bought their supply of such

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goods as are produced" by the promisor corporation "exclusively from one or more of the dealers named on the back," and "shall also have subscribed to the certificate on the back." The terms are une- [828] quivocal that the promise was not to bind the corporation unless the promisee performed the acts stated. In other words, the obligations of the contract are dependent upon a condition precedent; and there can be no default by the promisor without performance of the condition, unless waived or excused by acts or conduct on the part of the promisor. Under the contract in question, compliance with the conditions was neither obstructed on the one side, nor attempted on the other, and it is manifest that no right of action at law has accrued in favor of the promisees. In view of this status, the appellants contend that the claims are entitled to equitable consideration, because (1) they are presented in the course of a proceeding in equity; and (2) this condition is affixed to the contract as a means by which to carry out the illegal purposes of a monopoly operating in restraint of trade, and for that reason a court of equity should either disregard the condition, or strike it out. But assuming, for the argument, that both premises are well taken, no relief can then be granted for enforcement of the contract, as no consideration is left to support the promise. The condition is the sole consideration for the promise, and, if that is illegal, the promise falls with it. Even if the consideration were invalid only in part, the same result would follow, the promise being indivisible. Bish. Cont. §§ 74, 487; 3 Am. & Eng. Enc. Law, 886; Greenh. Pub. Pol. rule 24. No element of the contract as actually made between the parties remains to be enforced. A court of equity cannot make a new contract for them, nor can it destroy the substance of the one which they have entered into, and at the same time preserve the contract obligation. Recovery upon the vouchers in question, with the conditions unfulfilled, would have that effect, and must be denied in equity as well as in law. *Klein* v. *Insurance Co.*, 104 U. S. 88, 91.

2. The second and final proposition calls for the application of the equitable doctrine on which assumpsit may be maintained as for money had and received, and the right to this remedy must be found in the original transactions and

circumstances under which the payments were made to the Distilling & Cattle-Feeding Company. These were, on their face, simple contracts of bargain and sale, and the only payments referred to were made upon distinct purchases of supplies at stipulated prices. These goods were legitimate subjects of trade, and there was no illegality in the nature of the contract of purchase. There is no pretense that the purchaser was either deceived or mistaken. On the contrary, his purchase, so far as appears, was in exact compliance both with his expectations and his bargain. It is not asserted that fraud entered directly into any of these transactions; nor is there impeachment for any cause, except upon the hypothesis for which the appellants contend, by way of collateral attack namely: (1) That an unlawful combination enabled the seller to control and arbitrarily fix prices upon nine-tenths of the distillery products of the country; (2) that the exigencies of business on the part of the purchasers constrained them to deal with this combination; (3) that the amount named in the vouchers as rebate was beyond the fair price, and a distinct addition to the price which was imposed and withheld to secure continuance of the trade. And upon the line of testimony introduced as tending in some measure to show this state **[829]** of facts the appellants rest their right to recover the alleged excess in the prices paid, as money paid under constraint or duress. Without considering whether the testimony referred to was either admissible under the issues, or of the effect alleged, and conceding, for the purposes of the case, the truth of each of the above propositions of fact, there can be no recovery of the money so paid, for the reason that no actual duress is shown, and no element exists to make the payment involuntary or compulsory. *Radich* v. *Hutchins*, 95 U. S. 210, 213; *Lonergan* v. *Buford*, 148 U. S. 581, 590, 13 Sup. Ct. 684; 6 Am. & Eng. Enc. Law, 57, tit. "Duress," and cases cited. In *Radich* v. *Hutchins, supra*, it is said:

"To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, . . . there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the court of appeals of Maryland, the doctrine established by the authorities is that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' *Mayor, etc.*, v. *Lefferman*, 4 Gill, 425; *Brumagim* v. *Tillinghast*, 18 Cal. 265; *Mays* v. *Cincinnati*, 1 Ohio St. 268."

In the case at bar neither the persons nor the property of the purchasers were within the physical control of the sellers when the contracts of purchase were entered into, or when the payments were made thereupon, and in the eye of the law the transactions were voluntary. At the utmost, the circumstances here assumed show an urgent need for the goods to keep up their stock and continue in trade, and to that end a business necessity to make their purchases from the illegal combination, because it so far controlled the market that they had reason to fear disastrous results if supplies were sought elsewhere. However urgent this need may have seemed for preservation of business interests, it cannot operate to change the payment made upon such purchases from the voluntary character impressed by the contract into the involuntary payment which may be reclaimed. *Emery* v. *City of Lowell*, 127 Mass. 138, 140; *Custin* v. *City of Viroqua*, 67 Wis. 314, 320, 30 N. W. 515, and cases cited; 6 Am. & Eng. Enc. Law, 71. As the purchaser elected to take the goods upon the terms fixed, and with all the circumstances in mind, his rights must be measured by the contract, and not by the motives which influenced either party to enter into it. If the seller took advantage of his necessities, and made the price excessive, it would be subversive of the well-established rules which govern contract rights to receive testimony of such circumstances, to so modify the terms agreed upon, and allow recovery of the excess in price. In the case of an injurious combination of the nature asserted here, the remedy is by well-recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination was illegal, or that its prices were unreasonable. We are of opinion that no foundation is established for either set of claims, and the decree thereupon is affirmed.

[659] SOUTHERN INDIANA EXP. CO. *v.* UNITED STATES EXP. CO. ET AL.[a]

(Circuit Court, D. Indiana. August 4, 1898.)

[88 Fed., 659.]

CARRIERS OF GOODS—DUTIES OF CONNECTING LINES INTER SE.—The rules of the common law do not require a carrier to receive goods for carriage, either from a consignor or a connecting carrier, without prepayment of its charges if demanded, nor to advance the charges of a connecting carrier from which it receives goods in the course of transportation; nor can it be required to extend such credit or make such advances to one connecting carrier because it does so to another.[b]

[660] SAME—EXPRESS COMPANIES—INTERSTATE COMMERCE ACT.—The interstate commerce act does not apply to independent express companies not operating railway lines.

MONOPOLIES—ANTI-TRUST LAW—REMEDIES.—The anti-trust law of July 2, 1890, does not authorize a court of equity to entertain a bill by a private party to enforce its provisions, his remedy being by an action at law for damages.

CARRIERS—EXPRESS COMPANIES—INDIANA STATUTE.—The statute of Indiana prescribing the duties of railroads with reference to intersecting lines (2 Burns' Rev. St. 1894, § 5153; Rev. St. 1881, § 3903) has no application to express companies.

SAME—CUSTOM—SUFFICIENCY OF ALLEGATION.—In a bill against three express companies, an allegation of a custom between defendants to receive goods from each other for transportation without prepayment of charges, and to advance back charges to each other, is not an allegation of a general custom of the business, which would bind defendants to pursue the same method with other companies.

This was a bill by the Southern Indiana Express Company against the United States Express Company and others. Heard on demurrer to bill.

Joseph H. Shea and *Francis M. Trissall*, for complainant.

Baker & Daniels, for defendants.

BAKER, District Judge.

This bill is filed by the Southern Indiana Express Company, a corporation organized and existing under the laws

[a] Affirmed by Circuit Court of Appeals, Seventh Circuit (92 Fed., 1022). Memorandum decision. See p. 993.

[b] Syllabus copyrighted, 1898, by West Publishing Co.

of the state of Indiana, against the United States Express Company, the American Express Company, the Adams Express Company, and certain individual defendants, alleged to be officers and stockholders in said companies. The express companies are alleged to be joint-stock associations organized under the law of the state of New York, which is as follows:

"Any joint-stock company or association consisting of seven or more shareholders or persons may sue and be sued in the name of the president or treasurer for the time being of such joint-stock company or association; and all suits and proceedings so prosecuted by or against such joint-stock company or association, and the service of all process or papers in such suits and proceedings on the president or treasurer, for the time being, of such joint-stock company or association, shall have the same force and effect as regards the joint rights, property and effects of such joint-stock company or association, as if such suits and proceedings were prosecuted in the names of all the shareholders and associates in the manner now provided by law."

The bill alleges that the defendant companies have been for many years engaged in the express business, and in carrying articles of trade and commerce over railroads under contracts with them, and have been declared by the law of this and other states to be common carriers, subject to all the liabilities, and bound to perform all the duties, of such common carriers; that the complainant entered into a contract with the Southern Indiana Railway Company, a railway located wholly within this state, to carry on an express business over said railway for five years from and after June 30, 1898; that the defendant companies carry on an express business over railroads which connect with the Southern Indiana Railway, and that the express business originating on the line of railway over which the complainant carries on its business cannot be transported to its destination without pass- [661] ing over one or more of the lines of railway over which some one of the defendant companies carries on its business; that the usage, long established, over the Southern Indiana Railway by the defendants, as well as long, continuously, universally, and uninterruptedly established by them over the lines of railway on which they carry on their business, was to receive and deliver to each other packages for points beyond their own routes, so that a package for a distant point is transferred from one express company to another as often as required to reach its destination, and is taken by one

continuous and unbroken carriage, and, to facilitate promptness and simplicity in transfers from one company to another, the receiving company pays to the tendering company all charges which have accrued for carriage to the point of tender, known as "accrued charges" or "advance charges," so that the company having advanced all the accrued charges receives from the consignee and retains the whole amount of charges to the point of destination; that another of such established customs and usages is to receive and forward packages from each others' lines to consignees at points of destination over the lines of the others without requiring the prepayment of charges from the consignor or the company to which the package is delivered to be forwarded; that another of the customs and usages established is the fixing and publication of tariff charges for carrying packages from and to all points, which tariffs are divided pro rata between each of the companies handling the package. The bill then proceeds to aver that these usages and methods of doing business were safe, reasonable, and essential to the quick and simple transfer of packages, and to the transaction of the express business, and that any company denied the facilities thus afforded would be unable to compete in the same business with another company which could avail itself of such usages, and could not do a general express business so as adequately to accomodate the public. The bill then proceeds to allege that the defendant companies refuse, when articles of trade and commerce carried by the complain[an]t are tendered to the defendants, to pay the accrued charges, or to receive and transport to their destination any such articles without the prepayment of the charges for such transfers. The prayer of the bill is that the defendants may be enjoined and restrained from refusing to receive any and all parcels offered or delivered to them by complainant for transportation and delivery to consignees, and from demanding prepayment of their charges for such transportation, and from retaining and withholding from the complainant all sums of money known as accrued charges for express matter delivered to them by the complainant, and from refusing to or retaining from the complainant the reasonable pro rata part of the

charges and compensation complainant may earn upon express business originating off its line.

The grounds upon which these claims for injunctive relief are predicated are: (1) That such is the duty of common carriers at common law; (2) that such is their duty under the interstate commerce act; (3) that such is the requirement of the anti-trust law; (4) that such duty is imposed upon them by the custom and usage set up in the bill.

The defendant companies have demurred to the bill and the amendment thereto, on the ground that the court is without jurisdiction, **[662]** and also because the bill and the amendment are without equity, on the facts stated.

Waiving, without deciding, the question of jurisdiction, the court is of opinion that the bill cannot be maintained on any one of the above-stated grounds.

1. There is no principle of the common law requiring a common carrier receiving articles of trade and commerce from a connecting line to advance or assume the payment of the charges accrued thereon for the transportation of such articles from the point of origin to the connecting line. If it does thus pay or assume such accrued charges, it can retain a lien upon the property transported for their payment as well as for the payment of the charges due to itself for such transportation. An express company, like any other common carrier, has a right to demand that its charges for transportation shall be paid in advance, and is under no obligation to receive goods for transportation unless such charges are paid if demanded. Nor is such express company under any obligation to pay to the tendering company the charges due to it for its services in transporting such articles of trade and commerce from the point of origin to the point of tender. It is true that the general practice is to collect the charges upon delivery of the goods to the consignee, and, when goods are received without payment in advance being demanded, it becomes the duty of the carrier to transport them to their destination, or to deliver them to the next receiving carrier. Receiving the goods for transportation without any demand for prepayment of charges constitutes a waiver of such right. The carrier holds a lien upon the

goods for payment of charges, and, in case of a delivery of them to the consignee before payment, it can hold him responsible therefor. The same rule applies whether the articles of trade and commerce are received from the original consignor or from a connecting carrier. An express company, in the absence of contract, is under no obligation to receive and transport for the original consignor, or to continue the transportation for a connecting carrier, without the prepayment of its charges if demanded. The furnishing of equal facilities, without discrimination, does not require a common carrier to advance money to all other carriers on the same terms, nor to give credit for the carriage of articles of trade and commerce to all carriers because it extends credit for such services to others. *Oregon Short-Line & U. N. Ry. Co.* v. *Northern Pac. R. Co.*, 9 C. C. A. 409, 61 Fed. 158; Id., 51 Fed. 465; *Little Rock & M. R. Co.* v. *St. Louis S. W. Ry. Co.*, 11 C. C. A. 417, 63 Fed. 775; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559.

2. The interstate commerce act has, so far as express companies not operating railway lines are concerned, wrought no change of the common law in this regard. At an early day the question was raised whether express companies were subject to the provisions of the interstate commerce act, and, after full argument and deliberate consideration, the interstate commerce commission unanimously decided that the act did not apply to express companies properly so termed; that is to say, to independent organizations that carried on an express or parcel business in the usual manner, and which did not operate railway lines. *In re Express Companies*, 1 Interst. Commerce Com. R. 349. **[663]** This case was decided on December 28, 1887. The commission shortly thereafter called the attention of congress to their ruling, and suggested such an amendment of the law as would place express companies within their jurisdiction; but, although more than 10 years have elapsed, congress has taken no action on the subject. The same conclusion was reached in *U. S.* v. *Morsman*, 42 Fed. 448. After a careful consideration of the question, I see no reason to doubt the correctness of the

conclusions reached in these cases. Under the averments of the bill, it is manifest that neither of the express companies is affected by the interstate commerce act.

3. The anti-trust law of July 2, 1890, has wrought no such change in the law as will enable the court to enforce its provisions in favor of a private party by a bill in equity. Under this act, the only remedy given to any other party than the government of the United States is an action at law for threefold damages, with costs and attorney's fees, and the only party entitled to maintain a bill in equity for injunctive relief for an alleged violation of its provisions is the United States by its district attorney, on the authorization of the attorney general. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407, and cases there cited.

Nor does section 5153, 2 Burns' Rev. St. 1894 (section 3903, Rev. St. 1881), aid the complainnt's contention. The sixth paragraph of that section is as follows:

> "Every such corporation shall possess the general powers and be subject to the liabilities and restrictions expressed in the special powers following: * * * To cross, intersect, join and unite its railroad with any other railroad before constructed at any other point on its route and upon the grounds of such other railway company, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersection and connections and grant the facilities aforesaid."

This paragraph plainly is not applicable to express compaines which, like these defendants, do not own, control, or operate a railroad line, but which simply contract for space on railroad trains for the transportation of articles of trade and commerce committed to their care. Besides, the connections and facilities referred to are manifestly the physical connections essential to constitute the two railroads connecting lines. Such is the view of the supreme court of this state. *Lake Shore & M. S. Ry. Co.* v. *Cincinnati, W. & M. Ry. Co.*, 116 Ind. 578, 19 N. E. 440; *Chicago, St. L. & P. R. Co.* v. *Cincinnati, W. & M. Ry. Co.*, 126 Ind. 513, 26 N. E. 204. The same view of a very similar provision of the constitution of Colorado was taken by the supreme court of

the United States in *Atchison, T. & S. F. Ry. Co.* v. *Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185.

4. There is not shown by the averments of the bill and the amendment to be any such custom or usage as would justify the court in granting the relief prayed for. The right of the complainant to such relief depends upon its showing the existence of a custom or usage having the force of law in the express business of the country. It is not enough to allege and prove a custom or usage among one or more express companies to pay accrued charges by the receiving company, [**664**] or to transport without prepayment of charges to the point of destination. Before a custom or usage can acquire the force of law, it must appear that it is general and uniform in the business to be affected by it, and that such custom or usage has been peaceably acquiesced in without dispute for a long period of time. The custom or usage set out in the bill is not shown to be of this character. It is certainly beyond the power of the defendants, by any custom or usage established between themselves, to compel all other express companies in this country to submit to the customs and usages which they have adopted. Nor because the defendants consent to pay accrued charges between themselves, and to continue the carriage of articles of trade and commerce to their destination without prepayment, can they be required to do the same for all others. While the method of doing business alleged to exist between the three defendant express companies is certainly highly advantageous to the prompt and speedy transportation of parcels and packages, the law cannot compel them to continue this method of doing business, even between themselves, much less as between themselves and others with whom heretofore they have had no business relations. Whether such a duty can be imposed by legislative enactment we need not consider, for no such exercise of power has as yet been attempted.

In the opinion of the court, the demurrer must be sustained, and, as no amendment can make a better case, the bill and the amendment will be dismissed, at complainant's costs.

[1020] UNITED STATES *v.* JOINT TRAFFIC ASS'N.

(Circuit Court of Appeals, Second Circuit. March 19, 1897.) No. 92.

[89 Fed., 1020.]

Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. Charles Howland Russell, Allen McCulloh, Ashbel Green, Frank Loomis, and Carter & Ledyard, for appellee. No opinion. Affirmed. See 76 Fed. 895 [(p. 615), also 171 U. S. 505].

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[505] UNITED STATES *v.* JOINT TRAFFIC ASSOCIATION.[a]

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 84. Argued February 24, 25, 1898.—Decided October 24, 1898.

[171 U. S., 505.]

Thirty-one railroad companies, engaged in transportation between Chicago and the Atlantic coast, formed themselves into an association known as the Joint Traffic Association, by which they agreed that the association should have jurisdiction over competitive traffic, except as noted, passing through the western termini of the trunk lines and such other points as might be thereafter designated, and to fix the rates, fares and charges therefor, and from time to time change the same. No party to the agreement was to be permitted to deviate from or change those rates, fares or charges, and its action in that respect was not to affect rates disapproved, except to the extent of its interest herein over is own road. It was further agreed that the powers so conferred upon the managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act, and that the managers should coöperate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, charges, etc. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which declined or failed to observe the established rates. Assessments were authorized in order to pay expenses, and the agreement was to take effect January

[a] Bill to enjoin the execution of an agreement claimed to be in violation of the interstate commerce act dismissed by Circuit Court for the Southern District of New York (76 Fed., 895). See p. 615. Decree affirmed by Circuit Court of Appeals, Second Circuit (89 Fed., 1020), memorandum decision. See above.

Syllabus.

1, 1896, and to continue in existence for five years. The bill, filed on behalf of the United States, sought a judgment declaring that agreement void. *Held*,

(1) That upon comparing this agreement with the one set forth in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, the similarity between them suggests that a similar result should be reached in the two cases, as the point now taken was urged in that case, and was then intentionally and necessarily decided;

(2) That so far as the establishment of rates and fares is concerned there is no substantial difference between this agreement and the one set forth in the *Trans-Missouri case;*

(3) That Congress, with regard to the interstate commerce, and in the course of regulating it in the case of railroad corporations, has the power to say that no contract or combination shall be legal, which shall restrain trade and commerce, by shutting out the operation of the general law of competition.[a]

[43 L. ed., 259.] [b]

[The right of a railroad company in a joint-traffic association to deviate from the rates prescribed, provided it acts on a resolution of its board of directors and serves a copy thereof on the managers of the association, who, upon its receipt, are required to "act promptly for the protection of the parties hereto, does not relieve the association from condemnation as an illegal restraint of competition, as the privilege of deviating from the rates would be exercised upon pain of a war of competition against it by the whole association.]

[Congress has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad companies to establish and maintain interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable.]

[Congress has power to forbid any agreement or combination among or between competing railroad companies for interstate commerce, by means of which competition was prevented.]

[The constitutional freedom of contract as to the use and management of property does not include the right of railroad companies to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition, even if their rates and charges are reasonable.]

[a] The foregoing syllabus and the abstracts of arguments copyrighted, 1898, by Banks & Bros.

[b] The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 43, p. 259. Copyrighted, 1899, by The Lawyers' Co-Operative Publishing Co.

Statement of the Case.

[The statute under review is a legitimate exercise of the power of Congress over interstate commerce, and a valid regulation thereof.]

[An agreement of railroad companies which directly and effectually prevents competition is, under the statute, in restraint of trade, notwithstanding the possibility that a restraint of trade might also follow unrestricted competition, which might destroy weaker roads and give the survivor power to raise rates.]

THE bill was filed in this case in the Circuit Court of the United States for the Southern District of New York for the purpose of obtaining an adjudication that an agreement **[506]** entered into between some thirty-one different railroad companies was illegal, and enjoining its further execution.

These railroad companies formed most (but not all) of the lines engaged in the business of railroad transportation between Chicago and the Atlantic coast, and the object of the agreement, as expressed in its preamble, was to form an association of railroad companies "to aid in fulfilling the purpose of the Interstate Commerce act, to coöperate with each other and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic, to prevent unjust discrimination and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service." To accomplish these purposes the railroad companies adopted articles of association, by which they agreed that the affairs of the association should be administered by several different boards, and that it should have jurisdiction over all competitive traffic (with certain exceptions therein noted) which passed through the western termini of the trunk lines (naming them), and such other points as might be thereafter designated by the managers. The duly published schedules of rates, fares and charges, and the rules applicable thereto, which were in force at the time of the execution of the agreement and authorized by the different companies and filed with the Interstate Commerce Commission, were reaffirmed by the companies composing the association. From time to time the managers were to recommend such changes in the rates, fares, charges and rules as might be reasonable and just and necessary for governing the traffic

Statement of the Case.

covered by the agreement and for protecting the interests of the parties to the agreement, and a failure to observe such recommendations by any of the parties to the agreement was to be deemed a violation of the agreement. No company which was a party to it was permitted in any way to deviate from or to change the rates, fares, charges or rules set forth in the agreement or recommended by the managers, except by a resolution of the board of directors of the company, and its action was not to affect the rates, etc., disapproved, except to the ex- [507] tent of its interest therein over its own road. A copy of such resolution of the board of any company authorizing a change of rates or fares, etc., was to be immediately forwarded by the company making the same to the managers of the association, and the change was not to become effective until thirty days after the receipt of such resolution by the managers. Upon the receipt of such resolution the managers were "to act promptly upon the same for the protection of the parties hereto." It was further stated in the agreement that "the powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall coöperate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder."

One provision of the agreement was to the effect that the managers were charged with the duty of securing to each company which was a party to the agreement equitable proportions of the competitive traffic covered by the agreement, so far as it could be legally done. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which might decline or fail to observe the rates, etc., established under it, and the interests of parties injuriously affected by such action of the managers were to be accorded reasonable protection in so far as the managers could reasonably do so. When in the judgment of the managers it was necessary to the purposes of the agreement, they might determine the divisions of rates and fares between connecting companies who were parties to the agreement and connections not parties thereto, keeping in view uniformity and the equities involved.

Statement of the Case.

Joint freight and passenger agencies might be organized by the managers, and, if established, were to be so arranged as to give proper representation to each company party to the agreement. Soliciting or contracting passenger or freight agencies were not to be maintained by the companies, except [508] with the approval of the managers, and no one that the managers decided to be objectionable was to be employed or continued in an agency. The officials and employés of any of the companies could be examined, and an investigation made when, in the judgment of the managers, their information or any complaint might so warrant. Any violation of the agreement was to be followed by a forfeiture of the offending company in a sum to be determined by the managers, which should not exceed five thousand dollars, or if the gross receipts of the transaction which violated the agreement should exceed five thousand dollars, the offending party should, in the discretion of the managers, forfeit a sum not exceeding such gross receipts. The sums thus collected were to go to the payment of the expenses of the association, except that the offending company should not participate in the application of its own forfeiture.

The agreement also provided for assessments upon the companies in order to pay the expenses of the association, and also for the appointment of commissioners and arbitrators who were to decide matters coming before them. No one retiring from the agreement before the time fixed for its final completion, except by the unanimous consent of the parties, should be entitled to any refund from the residue of the deposits remaining at the close of the agreement.

It was to take effect January 1, 1896, and to continue in existence five years, after which any company could retire upon giving ninety days' written notice of its desire to do so.

The bill filed by the Government contained allegations showing that all the defendant railroad companies were common carriers duly incorporated by the several States through which they passed, and that they were engaged as such car-

Statement of the Case.

riers in the transportation of freight and passengers, separately or in connection with each other, in trade and commerce continuously carried on among the several States of the Union and between the several States and the Territories thereof. The bill also charged that the defendants, unlawfully intending to restrain commerce among the several States and to prevent competition among the railroads named, in respect to all their [509] interstate commerce, entered into the agreement referred to above, and it charged that the agreement was an unlawful one, and a combination and conspiracy, and that it was entered into in order to terminate all competition among the parties to it for freight and passenger traffic, and that the agreement unlawfully restrained trade and commerce among the several States and Teritories of the United States, and unlawfully attempted to monopolize a part of such interstate trade and commerce. The bill ended with the allegation that the companies were preparing to put into full operation all the provisions of the agreement, and the relief sought was a judgment declaring the agreement void and enjoining the parties from operating their roads under the same. The defendant, the Joint Traffic Association, filed an answer (the other defendants substantially adopting it), which admitted the making of the contract, but denied its invalidity or that it is or was intended to be an unlawful contract, combination or conspiracy to restrain trade or commerce, or that it was an attempt to monopolize the same, or that it was intended to restrain or prevent legitimate competition among the railroads which were parties to the agreement. The answer, in brief, denied all allegations of unlawful acts or of an unlawful intent, unless the making of the agreement itself was an unlawful act. The answer then set forth in quite lengthy terms a general history of the condition of the railroad traffic among the various railroads which were parties to the agreement at the time it was entered into, and alleged the necessity of some such agreement in order to the harmonious operation of the different roads, and that it was necessary as well to the public as to the railroads themselves.

The case came on for hearing on bill and answer, and the Circuit Court, after a hearing, dismissed the bill, and upon

Argument for Appellants.

appeal its decree was affirmed by the Circuit Court of Appeals for the Second Circuit, and the Government has appealed here.

Mr. Solicitor General for appellants.

The agreement violates the anti-trust law, because it creates an association of competing trunk line systems, to which is [510] given jurisdiction over competitive interstate traffic, with power, through a central authority, aided by a skilful scheme of restrictions, regulations and penalties, to establish and maintain rates and fares on such traffic and prevent competition, thus constituting a contract in restraint of trade or commerce among the several States, as defined by this court in the *Trans-Missouri case*, 166 U. S. 290.

That case was elaborately argued and carefully considered. A petition for a rehearing was presented and denied. The decision has been accepted and acted upon by the Departments of the Government, and by the courts, both state and Federal, as definitively settling the meaning and scope of the anti-trust law when applied to traffic associations among competing interstate railway systems. The decision was not only a just, but an eminently salutary one. I shall not concede that the principles it laid down remain questionable. I shall not admit that it is necessary for me, by argument, to fortify the position taken by this court in that case. The anti-trust law, as there construed, is the law of the land.

The wisdom of Congress in prohibiting *all* agreements in restraint of trade among interstate railway systems is even more manifest now than when the *Trans-Missouri case* was decided. At the time of the argument of the *Trans-Missouri case*, it was still to some extent a mooted question whether the Interstate Commerce Commission was empowered to determine what are fair and reasonable rates, and to enforce such rates. This question is no longer open. *Interstate Commerce Commission* v. *N. O. & Tex. Pac. Railway*, 167 U. S. 479; *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S. 144.

If it be urged that any illegality in the agreement is cured by section 3 of article 7, providing that "the powers conferred upon the managers shall be so construed and exercised

as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto; and the managers shall coöperate with the Interstate Commerce Commission to secure stability and uni-
[511] formity in the rates, fares, charges and rules established hereunder."

An injunction to construe and exercise powers conferred so as to permit no violation of law, is an admission that the powers may be so construed and exercised as to violate law. If the anti-trust law prohibited only those contracts in unreasonable restraint of trade or commerce there might be saving force in this section. But the anti-trust law prohibits *all* contracts in restraint of trade or commerce. Whether the rates be reasonable or unreasonable, an agreement providing for their establishment and maintenance by an association of interstate railways, is prohibited. The managers can exercise none of the essential powers conferred by the agreement without violating the law. In the matter of the essential powers, it is not a question of method or degree; the powers cannot be exercised, because they are in themselves illegal. The association itself is illegal. It is formed for the purpose of controlling certain competitive traffic. The central authority—the managers—is given the power to establish and maintain rates on that traffic. Take away from the association the power to establish and maintain rates, and it immediately falls to pieces. It ceases to have a *raison d'être.*

The authority of the Government to maintain this suit is sustained in *United States* v. *Freight Association*, 166 U. S. 290, 343, citing *in re Debs*, 158 U. S. 564; *Cincinnati, New Orleans, &c. Railway* v. *Interstate Commerce Commission*, 162 U. S. 184; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197.

Mr. James C. Carter (with whom was *Mr. Lewis Cass Ledyard* on the brief), for the Joint Traffic Association, appellee.

There are certain observations in relation to the Anti-Trust act which are properly to be made before proceeding to the argument.

There is no doubt that prior to and at the time of the pas-
[512] sage of this law there were, as there still are, certain tendencies in the industrial world which drew widespread attention and excited, in some minds, much alarm. Many industries were seen, or supposed, to be under the control of great aggregations of capital, either in the hands of individuals united under some form of agreement, partnership or other, or contributed as the capital of corporate bodies. Some of the most conspicuous were called by the vague name of "trusts," and this term came to be employed, in a general way, to designate all of them. For obvious reasons, and quite aside from the question whether their objects and effects are mischievous or beneficial, such combinations of capital are not popular, and the designation "trust" came to be a rather reproachful one.

Undoubtedly it may be possible for a large aggregated capital to wield a greater power in many ways than would be possible for the same amount distributed among many separate owners or managers, and the suspicion was entertained that such power was employed in controlling markets, and perhaps in controlling legislation, and it was also thought to be an instrumentality by which the unequal distribution of wealth was fostered and increased. The disfavor thus excited was, as was natural, turned to political account. Those opposed to a protective tariff charged upon its advocates that they were favoring and stimulating trusts, and the latter felt the need of repelling the charge by doing something to show that they were the declared enemies of trusts.

Under such circumstances it was quite natural that schemes of legislation aimed against these supposed public enemies should be started, and any opposition to them would naturally draw upon the authors of it the reproach that they were the friends and, perhaps, the paid defenders, of these powerful interests.

While, therefore, all, or nearly all, professed themselves in favor of repressive legislation, the question what legislation could be contrived was a difficult one and suggested some difficult questions. How was a "trust" to be legally defined so that a prohibition of it should not include a prohibition of **[513]** the exercise of the clearest constitutional

rights? Congress, surely, could not prevent the creation of corporations under state laws, or limit the capacity of forming partnerships, or in any manner interfere with the internal business of States. And was it certain that these so called trusts were, in every instance, necessarily mischievous? Indeed, sensible legislators for the most part understood very clearly that the things complained of were but the necessary incidents and consequences of the progress of industry and civilization and could not be arrested without checking the advance of the nation and crippling it in the fierce competitions with other nations, and that any useful effort to remedy the supposed evils must be directed against the abuses of the power of aggregated capital and not at the aggregations themselves. Under these circumstances Congress proceeded very cautiously and enacted the only measure which seemed possible without passing the plainest constitutional limits. It did not attempt to define "trusts," or limit aggregations of capital in any form. The general charge was that these combinations were in some form monopolies, and in restraint of trade, but Congress did not in the remotest degree attempt to define what a monopoly or restraint of trade was. It was, however, perfectly safe to declare that if these combinations did in any case create monopolies, or restraints upon trade, they should be prohibited from so doing in the future; and this is what Congress did and all it did, by passing the act in question. It prohibited contracts and combinations to create monopolies or restrain trade, and left it to the courts, without a word of direction or instruction, to determine what contracts did create monopolies or restrain trade, and what did not.

It cannot be said that Congress has done an unwise or imprudent thing, and that if calamity occurs the fault lies at its door. It has prohibited nothing but contracts and combinations to create restraints of trade and monopolies. These, when properly defined, are, beyond question, public mischiefs and ought to be prohibited. If any useful thing becomes stricken down by the law, it must be the result of some erroneous interpretation.

[514] The first question we design to consider is whether the agreement vloiates any of the provisions of the act re-

ferred to. To this end it is of much importance to have in mind the particular nature of the subject with which this act deals, and how that subject has heretofore been treated in law and legislation.

It is immediately obvious that Congress conceived itself to be dealing with acts supposed to be productive of injury to the public, and of injury to such an extent as to justify repressive legislation.

We next observe that it is not contracts only of a certain character which are condemned, but that they are coupled together with certain other acts, presumably of a similar nature or tendency, namely, combinations or conspiracies in restraint of trade, and monopolies, or combinations or conspiracies to monopolize. Contracts, therefore, are dealt with, not so much as contracts, but as one form of acts relating to trade and commerce assumed to be injurious in their tendency and effect.

That contracts of a certain class may be opposed to a sound public policy has been recognized in the law from a very early period. The grounds or reasons of policy upon which they are held void or illegal are very numerous and varied, but a class embracing numerous instances is formed of such as are supposed to have an injurious effect upon trade or commerce; between these, however, there is quite a marked distinction observable in the way in which they are treated in the law. One description embraces simply ordinary business transactions, where parties make agreements with each other for supposed mutual profit and advantage, a breach of which would result in pecuniary loss or damage to the one or the other, and a demand for redress. In such cases the parties expect and intend to enforce the contract, and look to the ordinary legal remedies as the means of enforcing it. Contracts whereby a business is sold and the seller covenants that he will not thereafter carry it on, or where a man takes an apprentice with an agreement that he will not set himself up in opposition to his master in trade, supply familiar instances of this character.

[515] Inasmuch as such contracts would not be entered into unless it was believed that the law would afford redress in case of a breach of them, the repressive purposes of the

law, where they are supposed to be opposed to public policy, are, in general, fully satisfied by declaring them void and denying redress, and this is usually the extent of the notice which the law takes of them. There is no occasion for criminal legislation, both for the reason that there is not present, ordinarily, any criminal purpose, and if there were, repression is sufficiently accomplished without a resort to it. The doctrine respecting contracts of this character belongs therefore to the law of contracts, and the treatises on that law usually embrace a chapter devoted to it.

But there is another and much smaller description of contracts supposed to be injurious to trade of quite a different character. They are not, properly speaking, business transactions. They do not involve the sale, leasing or exchange of property, or the hire of services; nor does a breach of them usually result in distinct and ascertainable pecuniary loss. They are not, indeed, entered into by parties in different interests, as in the case of buyer and seller, one of which expects to gain something from the other, but by parties in the same interest having in view an object for the common good of all; nor do the parties to them generally look to, or rely upon, any legal remedies to secure obedience to them. They spring out of circumstances which impress the parties to them with the belief that they have a common interest, or that it is expedient to create a common interest among them, and seek to control or regulate the conduct of each other in relation to business. Instances of this description of agreement are found where laborers, or employers, unite, in the form of agreement, to regulate hours of labor, or prices, or where merchants, or tradesmen, combine to transact their business in certain prescribed ways, or to establish uniform prices for their goods, or to suppress, or regulate, competition among themselves; or where a class of producers or dealers combine together to control a product, or a business, with a view of imposing upon others their own terms as to prices, or other incidents of the business.

[516] The marked distinction between these cases and the ordinary business transactions first spoken of is, that in the latter there is a difference of interest, sometimes regarded as

a hostility of interest between the parties, each seeking to gain the utmost from the other; whereas, in the former, the parties are in the same interest, each seeking the same end. The term " contract " does not well express this sort of agreement. It is a uniting together for a common purpose—a combination—or, when thought to be of an objectionable character, a conspiracy. Such unions always suppose agreement, but it need not be in writing; where it is in writing it is often called an agreement, or contract; but, in giving it this name we should not lose sight of its real character. In reality it is simply an act, and innocent, or guilty, according as the law may be inclined to regard it.

It is manifest that where the law does regard it as mischievous, and to such a degree as to call for repression, it is not enough to simply declare it illegal. The practice may, nevertheless, be persisted in, and as it does not rely for its efficacy upon legal remedies, the mere withholding of such remedies may be ineffectual. The action, therefore, which law usually takes in respect to such so called contracts is in the form of prohibition and penalty, and the subject belongs not to the law of contracts, but to the criminal law, where it is usually dealt with under the head of conspiracy.

We do not mean by the above observations that there may not be instances which partake, to a greater or less degree, of the qualities of both the classes above mentioned; but the distinction between them is so constant and pervading that it will be at once recognized.

As a conclusion to what is said we desire to point out that the legal doctrine and policy to which this Anti-Trust act belongs, is manifestly the one last described. The circumstance that contracts are grouped together with combinations and conspiracies and made the subject of criminal treatment, shows this very plainly.

The ineptitude of some of the language of this legislation is quite apparent. Undoubtedly the object of Congress was to **[517]** reach that class of supposed mischiefs which flow from combinations. But the great bulk of the cases, probably nine tenths, in which courts have felt called upon to say anything about contracts in restraint of trade, has been the

business transactions first alluded to in which an agreement has been entered into, not to exercise a particular calling, as where the keeper of a well-patronized tavern sells out his establishment and good will, and covenants not to further carry on the business. Such agreements at the common law have been held valid or void according to the supposed reasonableness of the covenant; but, surely even when void, there was nothing about them calling for the intervention of the criminal law. And yet this statute bunches the valid and the void all together, and makes them all criminal, when probably there was not the remotest intention to make any of them criminal.

These observations, of course, fully admit that the particular agreement or combination against which this action is aimed, would be, assuming that the act covers contracts between railroad companies, obnoxious to the penalty imposed by the act, provided it were, in fact, in restraint of trade or commerce between the States. That it is, in fact, in restraint of trade or commerce must be shown before this action can be maintained, and this is the proper subject for discussion in this action. This question is broadly open and unaffected by any decision of this court, and we expect to be able to show that the agreement is not only not in restraint of trade and commerce, but highly beneficial to both; that Congress has never declared, or intended to declare, it criminal, and that it is deserving, not of judicial condemnation, but of judicial encouragement and approval.

Unless the act is subject to the interpretation hereinafter maintained, it is open to grave objection on constitutional grounds, which will be dealt with by other counsel.

Having presented this preliminary matter, *Mr. Carter* argued the following points.

I. The court has no jurisdiction to entertain this suit, unless it can be found in the provisions of some statute.

The bill sets forth simply the commission of a misdemeanor, **[518]** and an intention on the part of the defendants to repeat the offence. No principle of the public remedial law of America or England is more fundamental than that the ordinary administration of criminal justice by the ordinary courts of common law, is sufficient for the repression of

crime, and exclusive adhesion to it necessary for the protection of the citizen.

II. The Anti-Trust act contained provisions purporting to create a jurisdiction in equity to give relief by way of injunction; and, perhaps, the decision made by this court in the suit of the *United States* v. *The Trans-Missouri Freight Association*, should be regarded as a determination that the Attorney General was at liberty in case of any violation of the provisions of the act to file a bill for an injunction, although it would seem necessary, upon familiar principles, to make out a case for equitable interposition, in order to justify an appeal to the equitable jurisdiction thus created. But so far as it is sought to maintain the present action on the basis of an alleged violation of the provisions of the Interstate Commerce act, no support can be derived from the decision above referred to. No such jurisdiction in equity is given by that act. And by implication, at least, it is withheld; for in certain cases specially mentioned in sections 6 and 13, jurisdiction is expressly given to courts of equity to grant injunctions. If it is not given in other cases it must be taken to be for the reason that it was not intended. "*Expressio unius est exclusio alterius.*"

III. A clear understanding should be had at the outset, of the meaning of the terms with which we are dealing. The class of contracts condemned by the Anti-Trust act is defined by the effect they have upon trade or commerce. They are such, and such only, as have the effect of restraining trade or commerce. The actual effect which the contracts have upon trade or commerce is the material consideration which determines whether or not they are included within the class.

This may seem self-evident, and indeed is so. But the possible suggestion might be made that there is a class of contracts, called, or named, "contracts in restraint of trade," and that the statute relates to these irrespective of their real and true effect. There is no foundation for such a suggestion. There **[519]** is no class of contracts known to the law by the name of contracts in restraint of trade irrespective of their actual effect upon trade. Whenever, heretofore, the point has been made in the case of a particular contract whether it was in restraint of trade, it has been determined

by an inquiry as to its actual effect upon trade. No suggestion would have been indulged that it was valid or void according as it might, or might not, be called or styled a contract in restraint of trade.

Moreover we are dealing with the criminal law, which never classes acts and makes them punishable under arbitrary names, without regard to their supposed effects, as being actually mischevious or otherwise. This would be putting innocence on a par with guilt.

IV. There seems to be no room for doubt concerning the meaning of the term "in restraint of trade or commerce." To restrain is to hold back, to check, to prevent, and thus to diminish. It is injury to trade or commerce which the act is aimed to prevent. Unless, therefore, a contract injures and thus diminishes, or tends to diminish, trade or commerce, it cannot be deemed as in restraint of trade or commerce.

V. The agreement under which The Joint Traffic Association was formed, and the carrying out of which is sought to be enjoined, is not a contract in restraint of trade or commerce within the meaning of the act of July 2, 1890.

[Over one hundred pages of appellant's brief are taken up with the discussion of this point. The following synopsis of its reasoning was filed by counsel.]

The bulk of the whole discussion, so far as respects the Anti-Trust act, is contained under this Fifth Point, and the line of argument pursued is substantially as follows: (1) That no restraint is directly, or in terms, imposed upon trade or commerce; that all the members of the association will, as the agreement assumes, continue in business, doing the utmost they can, and in competition with each other; that whatever restraint is imposed by it is imposed simply upon a single feature of this competition; that, competition and trade not being identical with each other, a restraint upon competition is not necessarily a restraint upon trade. It is admitted, how- **[520]** ever, that a restraint upon competition may be a restraint upon trade; but it is asserted that whether it is so or not, in any particular case, depends upon the nature and effect of the restraint imposed in such case.

(2) The argument thus reaches one of the main subjects of discussion, namely, what the effects of competition in trade

are; when they are good, and when, if ever, they are bad; and how such restraints have been regarded in public economy, law and legislation. This subject is treated at first generally, without reference to the particular effects of competition in the business of railroad transportation.

(3) It is then pointed out that the particular field of discussion in the case has been, by what precedes, fully disclosed, namely, the effects of restraints upon competition as restraining, or not restraining, trade and commerce, and a particular proposition, substantially equivalent to the main one, is stated as follows:

"The agreement in question, as a whole, and, particularly, so much of it as affects competition, is in the highest degree promotive of trade and commerce." The discussion on this head pursues the following course:

(*a*) It begins with a statement of "the origin, development and present condition in this country of the business of railway transportation," and shows that by the deliberate policy of all our governments, state and National, business has been, from the first, subjected to the severest involuntary competition, and it points out the ruinous results to which such competition leads when it takes place on rates, and aims to show that such results can be arrested, or mitigated, only by allowing the competing parties to displace the strife by some form of agreement. (*b*) This discussion is proceeded with by pointing out what the main requisites of a good railway service are, and how they are affected by railway competition in rates. It aims to show that such competition, by making uniformity in rates impossible, makes it impossible to secure any of these essential requisites, and that they can be secured only by some form of concerted agreement between the parties.

[521] (4) The subject of agreements between railway companies and coöperative traffic associations being thus reached, a sketch is made of their origin and development down to the time of the passage of the Interstate Commerce law, and it is shown that the most efficacious form of agreement down to that time had been found to be that of pooling.

(5) The Interstate Commerce law and its effects are then discussed, and it is shown that one of its main objects was to

bring about, so far as Federal legislation could accomplish it, uniformity in rates, and thus put an end to the practice of discrimination, and attention is called to the incidental feature of the law which prohibited pooling agreements. It is then shown that the effect of that law was to increase and aggravate the very evils which it was designed to remove. Pooling being prohibited, the most effective method for securing uniformity in rates could no longer be employed, and ruinous competition, with every form of discrimination, followed, and to these evils was added the unendurable aggravation that the practices which the law could not prevent, were, nevertheless, converted into crimes.

(6) It is then shown that the necessity was universally felt for some form of concerted action which would put an end to these deplorable conditions and that the present agreement was the result of an earnest effort in this direction.

(7) An analysis of the agreement is then made, and it is pointed out that it is not aimed against competition in general, but assumes that such competition will still continue actively and earnestly on every point except that of rates.

Its precise effect upon competition in rates is dealt with, and it is shown that while its object is to secure uniformity in rates by inducing competing companies to consent to such uniformity, it does not purport to require it or compel it. That it does not really, or in any proper sense, seek to restrain competition at all, but aims to render competition open, honest and lawful, so that the business of railway transportation may be conducted in conformity with the requirements of the Interstate Commerce law, and without the daily commission of crime. It shows that, to this end, it is necessary that each railroad **[522]** company should first establish its rates and should adhere to them for a reasonable period, which is fixed at thirty days, in order if it intends a change that it may give reasonable notice of its intention in time to enable the competing parties to meet it, and to shape their own conduct accordingly; that this is absolutely the only restraint upon competition effected by the agreement, and being only slight and temporary, and necessary in order to enable competition to be open and lawful, cannot be regarded as a restraint upon trade. It admits that one of its main objects

is to secure what the Interstate Commerce law sought to secure, uniformity in rates, but its method of effecting that result is, not by a compulsory agreement, but by taking away the motives to ruinous, secret and unlawful competition in rates. It also points out the many other beneficial provisions of the agreement by which it is sought to make the railroad transportation of the country regular, orderly, safe and effective.

(8) It further seeks to emphasize the beneficial purposes of the agreement by showing that every great industry in which the coöperation of many different proprietors and agencies is required, necessarily calls for a system of regulation which must be supplied either by the action of government, or, in the absence of such action, by the voluntary action of those who are engaged in it, and it pronounces the association as "an institution for the regulation of transportation business in those respects in which the State, either from lack of jurisdiction, or because it deems that the regulation could be best devised and administered by the railroad systems themselves, has choosen not to regulate it."

(9) Throughout this part of the argument the central proposition is that of the absolute necessity for some agency by which uniformity in rates may be brought about, and a uniformity not only in the case of merchandise shipped from the same point to the same terminus, but also in the case of merchandise shipped from, or to, any points in any way competing. So long as competition in rates exists different men and different places will necessarily be put up, or pulled down, enriched or ruined, as one railroad company may think it to be **[523]** for its interest to make lower rates than another, and without regard to comparative skill, industry or other natural advantages which furnish the true and only field for useful competition. Railway transportation is a public function, and absolute neutrality in relation to the multitudinous competitions of life is an essential condition of its just discharge. This neutrality can be secured only by uniformity in rates. If this is not secured by Government it must be brought about by some private agency. It cannot be secured by governmental action, because the Government has committed the business to private hands.

The Interstate Commerce law had this uniformity for its prime object; and went to the limit of Congressional power in the effort to accomplish it. The prime object of the present agreement is to supplement the effort, not by compulsorily restricting competition, but by taking away the motives to it. It is asked whether it is possible to regard an organization formed to effect an object which the law and public policy unite in viewing as essential, but which Congress cannot by law reach, as a restraint upon trade? It is believed that when this single subject is considered in all its various relations, it is, of itself alone, decisive of the whole controversy.

(10) The important matter of the classification of freight is taken up and considered, and it is shown that the great end of uniformity in rates cannot be attained without a system of classification; that classification is only a part, although a necessary part, of rate making; that its only object and purpose is to make uniformity in rates possible; that it has never been attempted, except as part of an effort to bring about such uniformity, and can never be perfected, or even preserved, except upon the condition of such uniformity.

(11) The general usefulness of the organization formed by the association is dwelt upon by calling attention to the multitude and variety of subjects upon which it is daily engaged, and especially to its constant occupation with the question, how any particular rates which may happen to have been established, or which may be proposed to be established, affect different places and different merchants or manufacturers en- **[524]** gaged in the same business, and who are in competition with each other, whether they may be a few miles or hundreds of miles apart. It is asserted that the association becomes the practical arbitrator in cases where the Interstate Commerce law cannot operate between competing merchants and manufacturers, and between competing places, as to what rates even-handed justice to all requires; that from the nature of the case and the interest of the railroads themselves, no rules can be adopted for decision of such questions except those of justice and equality, and that it is practically impossible that it should be made a medium of monopoly, or for the exaction of anything more than reasonable charges; and that

this is proved by a reference to the course of railroad charges during the whole period, embracing many years, in which such agreements have existed, the fact being that they have continually declined from the rate of about three cents a ton or mile to less than one cent a ton or mile, a rate lower than that of railway transportation in any other quarter of the world.

(12) The argument then refers to the matters of fact which were involved or assumed in the foregoing discussion, and justifies whatever assumptions have been made in the following ways: (*a*) That, by the very nature of the case, they are matters which must necessarily be true, because they are the results of the operation of the familiar and well-known laws relating to industrial pursuits. (*b*) Because they have that notoriety which requires a court to take judicial notice of them. (*c*) Because they are fully established by averments in the answer admitted by the appellant in setting down the cause for hearing upon bill and answer. (*d*) By the declarations, repeated in multiplied forms, of the Interstate Commerce Commission, the great public agency which has such supervision and control over the business of railway transportation as Congress can assert. Copious extracts from these declarations are set forth.

(13) These extracts and other proofs thus referred to are again declared to stamp this association as one instance, of which industrial life furnishes a multitude, where industrial **[525]** interests of great magnitude are subjected to private regulation, and for the reason that the State recognizes, and always has recognized, the fact that such regulation is far more effective over a large range of subjects than any which the State itself could devise and enforce. This statement is confirmed and illustrated by reference to many different instances. (*a*) To the multitudinous associations among workmen and employés of various descriptions, all based upon agreements far more in restraint of competition than any contained in this instrument. (*b*) Similar unions among the employers of labor. (*c*) To the numerous Commercial, Stock and Produce Exchanges and Boards of Trade, all of which prescribe rates of commission and for compensation for various services, and forbid any departure from them,

and are far more restrictive of competition than any provision in the agreement in question.

(14) The question is submitted whether trade is in any way restrained by the agreements between laborers and employés, or those between the employers of labor, and it is answered by saying that the final and general results, notwithstanding occasional abuses, are greatly to increase the efficiency of labor and the amount of work done, and to elevate the character of the laboring classes. The same question is asked in respect to Commercial Exchanges and Boards of Trade, whether they restrain the business with which they are conducted, whether there is less buying or selling of goods in consequence of commissions or other charges being fixed at particular sums. It is answered by saying that, as every one knows, these are all agencies by which the number and magnitude of business transactions is enormously increased.

The same question is put in relation to the operation of the present agreement, or of any agreement tending to secure uniformity in railroad rates and the stability, certainty and safety of railway transportation; and it is asked whether, in consequence of such agreements, the business of railway transportation or the exchange of commodities is in any particular diminished, and whether it is not, on the contrary, prodigiously extended and enlarged.

[526] (15) Under general subdivision V the conclusion to which the foregoing line of argument leads is drawn in these words: "That the agreement which this action seeks to condemn is not by reason of any restraint effected by it upon competition, or otherwise, a contract in restraint of trade or commerce, but is on the contrary highly needful to, and promotive of, both."

Its necessity to beneficial purposes, as thus established, is then separately pointed out by way of summing up: (*a*) Its necessity to stability in rates. (*b*) Its necessity to uniformity in rates and to prevent unjust discrimination. (*c*) Its necessity to secure the general benefits of harmonious coöperation in classification and interchange of traffic. (*d*) Its necessity as a supplement to the Interstate Commerce act, and in order to make the objects of that act attainable. (*e*) Its necessity for the prevention of crime, for its punishment when committed, and for the prevention of perjury, committed in order to conceal crime.

VI. If the Anti-Trust act is interpreted as forbidding agreements, such as the one under discussion, one of three alternatives must necessarily follow. (1) That all railroad transportation be abandoned; or, (2) The consolidation of all competing railroads under a single ownership, either governmental or private; or, (3) That all competing railroad business must be carried on in constant and daily violation of criminal law. Of these alternatives neither the first or the second can be contemplated as possible. Railroad transportation cannot be abandoned, and no governmental ownership can, under present, or any probably near future conditions, be brought about. We have no sovereign government possessing the requisite powers. It is the third alternative which must follow.

VII. These positions are fully supported by the weight of authority.

VIII. The agreement is in no manner in violation of the provisions of the second section of the act. It creates no monopoly, nor is it an attempt, or conspiracy to monopolize.

IX. In the attempt, made by the bill, to array every possible objection to the agreement, there is an evident purpose to **[527]** suggest that its eighth article, in connection with other subsidiary provisions, constitutes pooling, and therefore is a violation of section 5 of the Interstate Commerce act. There is no foundation for such a charge. The agreement in no manner violates any provision of the Interstate Commerce law.

Mr. E. J. Phelps for the New York Central and Hudson River Railroad Company, appellee.

I. As the case is set down for hearing on bill and answers, no fact alleged in the bill can be taken as true if denied in the answers, and every fact alleged in the answers must be taken to be true if responsive to the bill. The facts on which the case stands are therefore to be found exclusively in the answers, either in the admissions or in the responsive averments which they contain.

II. The denials in the answers completely negative all the charges of illegal intent on the part of the defendants which are contained in the bill, unless they are found to result necessarily from the terms of the agreement itself.

III. Whether the agreement by its terms violates the Federal law, depends entirely on the inquiry whether it conflicts with any statute of the United States. The bill is not based upon any statute, but proceeds apparently upon common law grounds. No statute is referred to, or charged to have been violated.

IV. The only statutes of the United States that are claimed to be infringed by the terms of the agreement, are the Interstate Commerce act, of February 4, 1887, amended by acts of March 2, 1889, February 10, 1891, and February 8, 1895, and the Anti-Trust act of July 2, 1890.

V. The agreement violates no provision of the Interstate Commerce act. The only provision in that act that is claimed to be infringed, is contained in § 5, which prohibits "pooling." "Pooling" means a division of the money earnings of traffic, which this article does not contemplate.

VI. Even assuming that this clause in the agreement can be construed into a violation of the 5th section of the Interstate Commerce act, this suit would not be maintainable, be- **[528]** cause it is unauthorized by that act, and precluded by its express provisions. This court has no power to grant an injunction, either interlocutory or upon final decree, at the suit of the United States Government, against the commission of a crime, where no other grounds for the injunction exist except that the act sought to be enjoined is an offence; unless such power is specially conferred by statute. No such power is granted.

VII. The Anti-Trust act of July 2, 1890, does not apply to the business of railway transportation. It will be claimed that the decision of this court in the case of the *Trans-Missouri Association*, 166 U. S. 290, is decisive upon this point, as well as upon the further question whether the agreement here under consideration is a violation of the provisions of the Anti-Trust act. It will be found on comparison that very material differences exist between the agreement shown in that case, and the case that is presented here. So that the

decision there is by no means controlling in the present case. These points of difference are clearly pointed out in the brief of Mr. Edmunds, and need not be restated. But we conceive it not to be improper, so far as it may be necessary, respectfully to ask of the court a reconsideration of the conclusions reached by the majority of the judges in that decision, which overrules the judgment of six United States Circuit and District Judges who sat in the different stages of that case and this.

The argument in opposition to it has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it, nor is it necessary to repeat it.

VIII. Assuming for the purposes of the argument, that the Anti-Trust law does apply to railway traffic contracts, no provision of that law is violated by the agreement now under consideration.

The prohibitions of the act are two: 1. Against contracts, combinations or conspiracies in restraint of trade or commerce. 2. The monopoly of, or the attempt or combination to monopolize any part of the trade or commerce of the States, or with foreign nations.

[529] The agreement in this case is not "in restraint of trade or commerce." The theory of the bill appears to be that the agreement comes within this description, because it tends to restrict competition, and because any agreement that restrains competition is "in restraint of trade." Both these assumptions are erroneous, the one in fact, the other in law. The agreement does not restrain competition to any such appreciable extent as would justify an injunction, except that competition which is unlawful because it is secret.

Assuming, against the fact, that a certain restriction of competition is the necessary result of this agreement if it is allowed to proceed, it plainly appears by its terms to be only such restriction of competition as is necessary to secure "just and reasonable rates."

By the Interstate Commerce act all rates are required to be "reasonable and just." Every unjust and unreasonable charge is made unlawful. Schedules of rates, as has been pointed out, are required to be published and kept open to

public inspection, and to be filed with the Commissioners; and not to be changed without due notice to the public and the Commissioners. Ample remedies, criminal and civil, are provided for the violation of these requirements, the enforcement of which is made the duty of the Commissioners, and the companies are also made subject to the state laws regulating rates.

The precise question, therefore, under this clause of the Anti-Trust act, is whether a contract that produces a result which the Interstate Commerce act in terms authorizes and provides for, and helps to repress a practice which that act forbids, is for that reason a contract for the unlawful restraint of trade. Or, in other words, whether it can be made unlawful by a forced construction of the general provisions of one statute of the United States, for a carrier company to provide by a traffic contract for the maintenance of those "just and reasonable rates" which another statute of the United States not only authorizes, but creates elaborate means for making permanent, and for preventing the secret changes of rates which the Interstate Commerce act prohibits.

It is the statutes themselves that have prescribed a defini-
[530] tion of this clause of the Anti-Trust act, so far as it applies to railway traffic contracts, if it is held to apply to them at all, whatever its meaning as to other contracts may be.

That the just and reasonable rates of transportation which the Interstate Commerce act contemplates and provides for, are rates that are just and reasonable to the carriers as well as to the carried, cannot be open to doubt. The very words "just and reasonable" employed in that act, necessarily imply that meaning. They are words of comparison and relation, and unless the rights of both parties to a contract are considered, there can be no comparison. It would be preposterous to call a price just and reasonable, that was not so to one side as well as to the other. This is the construction which this court have given to the Interstate Commerce act in this very particular.

The validity of the agreement here in question must be determined, therefore, not merely upon the language of the Anti-Trust act taken by itself, but by that language consid-

ered in connection with the other statute of the United States which (if this applies) is *in pari materia*, and which deals with the subject so much more exhaustively, and in words so plain that there can be no ambiguity raised in respect to them. Granting that the Anti-Trust act in terms makes all contracts unlawful that are in anywise "in restriction of trade," however reasonable and necessary they may be, is that to be understood to invalidate a railway contract made to secure that, and only that, which the Interstate Commerce act as construed by this court recognizes as the right of railway companies to receive, and provides means to secure? It will hardly be claimed that the elaborate provisions of the Interstate Commerce act on the subject of reasonable rates are repealed by the Anti-Trust act. If both are to stand, as applicable to this case, they must be read together, the same as if their provisions were contained (so far as they refer to the same subject) in separate sections of the same act.

Quite aside from the provisions of the Interstate Commerce act, giving to the companies the right to just and reasonable rates, and to use proper means to maintain them, the same
[531] result is reached under the principles of the common law. The term "restraint of trade" employed in the Anti-Trust statute has a common law definition. And as the act furnishes no other, that, upon the general rules of construction, must be taken to be intended. To make the agreement an infringement of this statute, it must, therefore, be one that would be void at common law. It is respectfully submitted on this point that in the construction of statutes the rule is absolutely without exception, that where a word or phrase employed has a well-settled common law definition distinct from its literal meaning, that is assumed to be the meaning intended, unless a different definition is prescribed in the statute. Even the Constitution of the United States, a political document of an entirely unique character, has been from the outset subjected by this court to this rule of construction.

Even if it should be held that the language of the Anti-Trust act forbids any contract in restraint of trade, however just, reasonable and necessary, the agreement here in question would not fall within the prohibition, because it does

not tend to restrain trade or commerce, but rather to promote them.

A restraint upon excessive and unwholesome competition is not a restraint upon trade, but is necessary to its maintenance.

This view is so fully presented and discussed in the brief of Messrs. Carter and Ledyard, that further argument in support of it is not requisite.

There is no ground whatever for asserting that the agreement infringes the provision of the Anti-Trust act against monopolies.

The definition of the word "monopoly," both in its legal and its ordinary signification, is the concentration of a business or employment in the hands of one, or at most, of a few. That is the plain meaning of it as employed in the act. No feature of the agreement, in any view that can be taken of it, approaches this definition.

So far from tending toward the concentration of railroad transportation in fewer hands, it does not in any possible event withdraw it from a single road now in existence, nor throw the least obstacle in the way of the construction of others.

[532] Its effect will be, if it is successful, not to diminish, but to increase transportation facilities, by preserving roads that might otherwise be driven from the field.

IX. If the construction of the Anti-Trust act which was adopted by the court in the *Trans-Missouri case* is to stand, it is respectfully insisted that the act, so far as thus interpreted and applied, is in violation of the provisions of the Constitution of the United States, since it deprives the defendants in error of their liberty and their property without due process of law, and deprives them likewise of the equal protection of the laws.

This point was not made on the argument of the *Trans-Missouri case*, because no such construction of the act was anticipated by counsel. Nor was it considered by the court, since it is an unvarying rule that no objection to the constitutionality of a law will be considered, unless raised by the party affected.

The question thus presented is not whether the act in general, or in its application to the many other cases to which it is obviously addressed, is unconstitutional, but whether the agreement here under consideration is one that may be prohibited by legislation, without infringing the freedom of contract and the right of property, which the Constitution declares and protects.

In the *Trans-Missouri case*, where the contract under consideration was similar to the one here in controversy, though far more open to the objections here urged, it was conceded, both in the majority and the minority opinions of the court, that its substantive character and purpose were such as the answers in the case aver and set forth. It was for this reason believed by the minority of the judges that it could not have been the intention of Congress that such a contract should be made a penal offence. But it was held by the majority that the language of the act admitted of no other construction. Though it was conceded in the opinion of the court that the arguments against that conclusion "bear with much force upon the policy of an act which should prevent a general agreement of rates among competing railroad companies, to the extent simply [533] of maintaining those rates which were reasonable and fair." And in the opinion of the minority of the court by Mr. Justice White, he remarks, after stating the general features of the contract, "I content myself with giving this mere outline of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of the court rests upon that hypothesis."

The accuracy of the statement we have made above, of the legal effect upon this case of the Anti-Trust act, as so construed, is thus both established and conceded, and the question distinctly arises, whether legislation having such a result is within the power of Congress.

That the operation of the act as thus interpreted does in fact, by prohibiting the contract here in question, deprive the defendants (whether rightfully or not) of both liberty and property to a very grave and perhaps ruinous extent, is not open to question. A just freedom of contract in lawful business is one of the most important rights reserved to the citi-

zen under the general term of "liberty," for all human industry depends upon such freedom for its fair reward.

The use of property is an essential part of it, and when abridged the property itself is taken. Its use is abridged when the owner is precluded from any contract that is necessary or desirable in order to secure to him a just compensation for its employment. And when any class in the community is so precluded, it is to that extent "deprived of the equal protection of the laws." These are elementary propositions in constitutional law, and have been often asserted by this court.

In recapitulation of the points above presented upon the question of the constitutionality of the Anti-Trust act, if it is held applicable to the agreement in this case, we respectfully insist: (1) That the act deprives the defendants of both liberty and property, by forbidding a contract just and reasonable in itself, essential to the use of their property and the prosecution of their business, and never before held or claimed to be unlawful or wrong, and by which they only agree to do what they have a right to do. That no such contract can be prohibited by law without a violation of the **[534]** constitutional provision, whatever advantage to the public in keeping down rates of transportation may be expected to result from it. And that in attempting such a prohibition, the case contemplated by the Constitution is distinctly presented, in which the legislature deems that a public benefit is to be effected by depriving the citizen of his liberty or property without due process of law.

(2) That even if such a deprivation could be justified in any case, the public good in this case does not in any sense require it, because (*a*) Those intended to be benefited are not the public, but only one class of the public who are seeking a business advantage over another and much larger class, which is equally entitled to protection. (*b*) Even if such class is held to constitute the public, it is not entitled to the suppression of all restriction upon competition. Because such a suppression would be a plain and oppressive violation of the equal rights of the other class, inasmuch as it would compel the latter to serve the former by labor and property without just compensation. (*c*) The legislation in question

is not necessary, even if it is admissible. The complete suppression of all the restriction upon competition to which the public has a right to object, is already effectually provided for by full and careful Congressional legislation, in which no defect or insufficiency can be pointed out; so that the further suppression now proposed only extends to those restrictions, just and reasonable in themselves, to which the public have not a right to object. And even without that or any legislation, it would be utterly impossible under existing facts, notorious and undisputed, for railway companies to restrict competition to a degree that would result in any injury to the public. (*d*) That if all restrictions upon competition were prohibited, the result, instead of a public advantage, would be a public calamity, and would injure rather than benefit the very class in whose behalf it is contended for.

(3) That even if it were admitted that further legislation against restrictions upon competition was both constitutional and necessary, the provisions of this act, in forbidding all such restrictions, are not justly adapted to the only end that is **[535]** admissible on public policy. If this one is of that character it must fail, but if not, it cannot be made unlawful because it is unnecessary. Few special contracts would be necessary if all parties concerned in the transactions to which they refer would always do right.

Mr. George F. Edmunds for the Pennsylvania Railroad Company, appellee.

Before the agreement in question was made, the rates of each road had been independently and fairly established by itself, and duly filed with the Interstate Commerce Commission; and these rates were in truth just, reasonable, and in conformity with law in every respect, and were in full operation.

This is admitted by pleadings.

This being true, these rates could not have been either raised or lowered, under then existing conditions, without injustice to patrons or else injustice to those interested in the roads, including the people along their lines, as well as through shippers.

To have changed any of them would have been against

justice and reason, disobeying the first commandment of the commerce law.

In this state of things the agreement was made. The preamble contains five distinct declarations, as follows:

(1) To aid in fulfilling the purposes of the Interstate Commerce act; to coöperate

(2) with each other and adjacent transportation associations to establish and maintain

(3) reasonable and just rates, fares, rules and regulations on state and interstate traffic; to

(4) prevent unjust discrimination, and to secure the reduction and concentration of agencies

(5) and the introduction of economies in the conduct of the freight and passenger service.

Every one of these declarations is admitted to have been true in all respects; and it is admitted that there was no other **[536]** purpose, and no secret or covert design in respect of the subject. The preamble thus became, certainly as between the parties to it, the constitutional guide in the interpretation of the body of the contract.

The parties next declare that they "make this agreement for the purpose of carrying out the objects above named."

The first six articles of the contract provide for organization and administration, in respect of which no criticism has been suggested, except as to section 5 of Article V in connection with the Solicitor General's contention in regard to Article VII.

Article VII is the first one that is assailed in respect of its fundamental character. It is the fundamental one in regard to rates. If it violates law, it is bad, and must not be put in execution. If it provides for the fullest obedience to law and promotes trade, it must be upheld.

The first section provides:

"SECTION 1. The duly published schedules of rates, fares and charges and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate) are hereby reaffirmed by the companies composing the association, and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares and charges, and the rules applicable thereto."

This section is the immediate and affirmative act of the association. Its essence is that all parties agree to abide by the preëxisting just, reasonable and lawful rates then on file with the Interstate Commerce Commission. It has not been contended by the learned Solicitor General that this section is contrary to law. It is submitted with confidence that no such contention can be made, and that if the association agreement had stopped there, the agreement would have been simply one to stand by just and reasonable rates independently fixed, on file with the Interstate Commerce Commission, which would be agreeing to do the very thing that the plain **[537]** words of the statute commanded should be done. The commerce law does not demand competition; it only demands justice, reason and equality. Every one of its clauses is devoted directly to these ends; and the competition that produces departure from the reason and justice and equality that the act requires violates the essential principle upon which it is founded.

I take it to be plain that if these thirty-one defendants had united in an engagement to truly and faithfully adhere to and carry out in their respective conduct all the requirements of the commerce law, and had agreed to the imposition of penalties for infraction, it would be manifest that they had not contracted to restrain trade, either in a general or a partial sense, or any sense whatever. In the instance of this first provision of the agreement, they have engaged to do that very thing and that very thing only in the form of specific language referring to a specific and existing just, reasonable and lawful state of things which they were then acting upon.

The second section of Article VII is the one upon which the principal assault of my learned brother on the other side is made. He maintains that the language used in describing the powers and duties of the managers is intended to be evasive and to conceal its real purpose, and to make the managers the absolute masters, subject to an appeal to the board of control (being the presidents of all the roads), of the changing and fixing of future rates. The first answer to this is that the pleadings distinctly admit that there was no evasive intention, or other unjust purpose, in any part

of the arrangement. It is, therefore, not just to maintain what the record admits to be untrue.

But whatever construction or implication may exist in respect of the language of this section, it is sufficient to say that the very next section of the same article declares that—

"The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall co- [538] operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder."

Here is, in words as clear and specific as the English language is capable of, a distinct jurisdictional limitation upon the powers of the managers, as described in the preceding section, and in terms the clause provides that the powers conferred upon the managers shall be so construed and exercised as not to permit the violation of the Interstate Commerce act, or any other law, and so forth; and it commands the managers to coöperate to these ends with the Interstate Commerce Commission.

When the managers come to act, then, under these powers, how do they start? They start with a system of rates established, not by the agreement, but before it was made, and confirmed by the agreement, which were confessedly in conformity with and in promotion of the Commerce act, and which were absolutely just and reasonable. The managers are to have authority to recommend such changes in those rates and fares as, by the very words of the second section, may be reasonable and just and necessary for governing the traffic and protecting the interests of the parties. Reasonableness and justice is the first and fundamental condition of their starting to act at all, and it is declared that they shall not act otherwise than in conformity with the requirements I have already mentioned contained in the Commerce act. Can this be an authority to restrain trade under any definition of the word "restraint"? The only restraint is a restraint against a violation of law by the managers in agreeing upon unreasonable and unjust rates against the requirements of the Commerce act. If we assume that the

restraint of trade mentioned in the Trust act may be a restraint of innocent and just proceeding, can any one maintain that it makes illegal an agreement not to violate law, but to obey it?

It was obvious when this agreement was made that rates then existing and being in all particulars reasonable and equal, might, in the course of changes in production, trade, and under other conditions over which the railways could have no control, [539] become unjust, unreasonable and inapplicable to the new conditions, and that in such case both public and private interests would require that readjustments should be made in order to bring the rates into conformity with what reason, justice and law should require under such conditions. It was to provide for this that sections 2 and 3 of the seventh article were inserted. As I have said, they were inserted in such clear language that it would be impossible for the managers to agree upon any rates in lieu of the just one then existing, that were not, in the same sense and to the same extent, just, reasonable and for the public interest, as those then existing. The managers must act in that way and to that end, or else they were forbidden by the very terms of the agreement to act at all.

If the managers, contrary to their authority, should have agreed upon a new rate which any one of the independent roads thought to be wrong in itself as being unreasonable and not in conformity with the requirements of the article and of law, that company, or any number of companies affected, could lawfully and justly (as would be its bounden duty) refuse to conform to the rate of the managers. But it is asked, would not the road thus refusing be subjected to the fines and forfeitures provided in another part of the agreement, and would not it be turned out of the association? I answer emphatically, no. If any such thing were attempted under the circumstances named, the company could defend itself in a court of justice against any such wrongful exaction, and could compel the managers and its associate roads to obey the contract, and to give it its just equality of treatment that it was before entitled to. The Commerce act itself in terms requires the same reasonable and just conduct by railways towards

each other as it does in their treatment of their customers and the public. I most earnestly maintain, therefore, that the whole and every part of Article VII is perfectly valid under any possible construction of the language of the Trust act, as well as in perfect conformity with and in aid of the Commerce act.

I may as well here compare the provisions of Article VII, which contains the great leading feature of the whole agree- **[540]** ment, with the agreement in the *Trans-Missouri case*. The difference is broad and fundamental. In this case, as I have shown, the rates agreed to be adhered to in the first section of Article VII had already been independently established, were, in fact, reasonable and just, were on file and inferentially approved by the Interstate Commerce Commission, and they had been assailed by nobody, and the whole trade of the country affected was proceeding under them with advantage to the shippers, to the people along the lines of the roads, to the railways themselves, and to the general interests of the country. It was an engagement to stand by that state of things and for the express purpose of continuing that happy state of things—exactly those that the law requires—that this engagement was made. Turn now to the Trans-Missouri agreement on the same part of the subject. That agreement did not propose or profess to stand by any then existing rates, it did not indicate that the rates then existing were just or reasonable, but it proposed to put into the hands of its managers the power to establish *de novo* reasonable rates, etc.; and, in the very words of the agreement, for the purpose of mutual protection, and for nothing else.

The Trans-Missouri agreement imposed no restriction upon the discretion of its rate-making board; it did not impose and did not, evidently, intend to impose the distinct barriers of the law between the powers of its rate board and the people and any one of the roads concerned. It did not profess to look to any other interest than the exclusive interest of the parties themselves; and it will be seen, on a careful study of it, that it was construed and constructed for the sole purpose of keeping up and increasing rates, instead of for the purpose (as in the Joint Traffic agreement) of keeping them just and in con-

formity with law, whether by reduction, increase or other re-adjustment.

Other essential differences are stated in my brief which I need not take the time of the court to enlarge upon.

These differences are illustrated by what the pleadings in the two cases show. In our case, the practical operation of the agreement has been to continue the same competition that **[541]** existed before. This is admitted. It has been to continue the same just and reasonable rates previously established, and to give a coöperative and advantageous service upon equal terms to everybody and of equal benefit to the whole public. The bill in the *Trans-Missouri case* alleged—there being, it will be remembered, no previously established rates that were agreed upon—that the parties had refused to establish and give their customers just rates. The answer did not meet the charge, but evaded it in the manner that the court will see stated in my brief. The practical construction by parties to contracts in their operations under them has always been considered an important element in determining the true character and meaning of the contract. What I have now stated shows the operating difference between the two contracts.

The next principal contention of my learned brother is that Article VIII of the agreement violates the Trust act by restraining trade.

The words of the article are as follows:

"ARTICLE VIII.

"PROPORTIONS OF COMPETITIVE TRAFFIC.

"The Managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement so far as can be legally done."

This article provides that the managers shall endeavor so far, and so far only, as obedience to law—that is to say, conformity with the Commerce act and conformity with the Trust act—would permit, to secure equitable proportions of the competitive traffic to each one of the companies. It is a sufficient answer to my brother's contention to say that the very terms of the article do not require or invite or allow the managers to act under it at all otherwise than as the law shall

permit. If, therefore, the Trust act condemns the effort referred to, then not to make the effort. If the Interstate Commerce act, either in terms or spirit, is adverse to such an effort the managers are not authorized to take a step. Does it violate the law to merely authorize an agent to do something in **[542]** the course of business so far, and so far only, as the law will permit?

But I contend that it was in conformity with law that each company should have an equitable proportion of the traffic. What does equitable mean? It means that which right and justice and the public interest require. What did justice and public policy require? And what does it still require in respect of the nine great lines connecting the western lakes and the valley of the Mississippi and the whole continent beyond with the Atlantic seaboard? Was it not just and necessary to public interest that each one of these roads, passing through great extents of country, and having along them populations and interests to whose welfare the existence of each one of these roads was necessary, should be considered with reference to the through traffic which should come from beyond? The question answers itself. It is obvious, then, that just so far as each road should be enabled to carry the through traffic that naturally belonged to it, by just so far the people along the whole length of its line would be benefited by increasing the income of the line and thereby contributing to its support and to its ability to make lower rates to all its people from one end of the line to the other. This provision of the eighth article then, I submit, was wholesome, lawful and necessary, and it was the very thing that one of the clauses in the Commerce act and the spirit of all its provisions required.

I may be allowed to say a word in respect of the objection that no one of the roads could change its rates without giving thirty days' notice, and therefore that this was a restraint of trade, in one sense or another. It will be seen on examining the agreement that each road had the absolute right, under the agreement and pursuant to its provisions, to change its own rates, and still continue a member of the association. This being so, it seems to me impossible to contend that any part of the agreement was any sort of restraint, unless it can

be established that the thirty days' notice was too long. It is a matter of history that when the Commerce act was passed there was inserted in it the requirement that no rate should be raised except on ten days' notice, and none should **[543]** be lowered except on three days' notice, publicly displayed. What was the principle of this? It was that justice and fair play to customers and to the public and to all persons directly or indirectly interested in transportation required that sufficient and timely knowledge of changes in rates which, as we know, affect in a greater or less degree all commercial and productive transactions, should be had by every person and community interested. I suppose I may properly state it as a public fact, now known to everybody engaged in business, that the time fixed in the Commerce act for notice was much too short, and that unjust inequalities have arisen, again and again, from changes in rates by particular roads on such short notice that favored customers and favored localities, etc., would get advantages over others, in violation of the spirit and substance of the Commerce act. It was for the purpose, then, and with the effect of producing the widest fair play and equality among all persons, all roads and all communities, that this period of thirty days instead of ten was agreed upon. It was obviously right, and being right, it should not be condemned, unless the rigor of a law that cannot be otherwise construed and applied compels it.

I submit with sincere confidence, as it regards the provision I have just spoken of, as well as it regards all the other provisions of the contract, that, instead of being even a partial restraint of trade, they are all provisions of constraint in support of and in promotion of trade. Trade is a general word, and its operations, like all other operations that require cooperating and associating forces and arrangement, are advanced by, and indeed, cannot be carried on truly and honestly for public interests without checks and regulations, some of which may restrain and regulate the behavior of a particular element in the whole operation, and by doing so do not restrain but advance and promote the whole; just as, to take the simplest of illustrations that occurs to me, in mechanics, the safety valve of a locomotive, with its counterweight, regulates and restrains, or gives off, the accumulating steam in

the boiler, in the first place conserving it, restraining it from escape, and in the second place, enabling it to escape. But all [544] this does not restrain the operations of the locomotive; it is necessary to its best and safest performance of duty. A hundred illustrations might be given.

My brother on the other side suggests that the clause in the agreement providing for abolishing soliciting agencies is a restraint of the trade. I have stated in my printed points my answer to this. I may add, however, that soliciting trade or ceasing to solicit trade is not trade itself, and does not belong to it, even as an incident. Wherever it is practised, it is practised apart from any act of trade; it precedes it, and sometimes leads up to it, and sometimes repels it. It was perfectly competent, therefore, and certainly wise, for these roads to agree to abolish such agencies, and to join, so far as it might be convenient to do for the information of the public, in having agencies at various important points to assist shippers and manufacturers in the most rapid and economical transmission of their productions. The plan, therefore, substituted for the old practice is one far more advantageous to the public who wish for honest and equal dealing than the old practice. But I submit that whatever character may be imputed to soliciting business, it does not fall within the authority of Congress to regulate it at all. While it is going on the business solicited has not reached the point of being interstate commerce, and cannot reach it until its movement has commenced, or is about to commence, definitely from one State to another.

I refrain from making any observations on the constitutional question arising if the Trust act is to be construed as forbidding innocent contracts promotive of public policy, which I have insisted upon in my printed points, for the reason that in the division of our subjects of discussion this matter is left entirely to my brother Mr. Phelps.

In respect of the meaning of the words of the Trust act, I beg to ask your Honors' careful attention to the suggestions I have ventured to make in my printed points. I need not enlarge upon them, and have only to call your attention, first, to the grammatical construction of the first section, and, second, to the citations I have made from law writers, showing a distinct and separate classification of the two phrases, [545] "restraint of trade in general" and "partial restraint of trade." If these writers are correct (as nobody doubts, I think, they are), and the two phrases were known and treated in the law at the time of the passage of the act as separate things, the one obnoxious and the other just and wholesome, then I respectfully and earnestly insist that the universal rule of construction requires that the words in the act shall be assigned to the first class, and not carried over into the second.

Mr. Solicitor General, for the United States, in conclusion.

I. It is claimed that because nothing has been done under the agreement, no irreparable injury has been or can be shown, and therefore no injunction lies. But the Anti-Trust law makes the agreement illegal and vests the court with jurisdiction to prevent violations of the act. The carrying out of an illegal contract will result in irreparable injury to the public, and this sufficiently appears from the provision of the law declaring the illegality and authorizing injunction proceedings.

II. It is insisted that an agreement in restraint of trade must restrain trade—that is, reduce or diminish it; that *trade* must be injured.

An agreement in restraint of trade may or may not diminish or reduce trade. The injury sought to be averted by prohibiting such agreements is the injury to the public. The stifling of competition, the creation of a monopoly, may increase the trade in the product controlled, but nevertheless to the injury of the public. To stifle competition is to create a monopoly and place the public at the mercy of the monopoly. The benefits resulting from cheaper products through monopolies have never been held by courts or legislatures as sufficient to overbalance the evils to the Government and people from the creation of monopolies. It is a question of method rather than result. Trusts and monopolies are forbidden in order to preserve competition, and thereby, as far as possible, freedom of action in industrial and commercial life.

III. It is said that competition is not trade, but a mere

incident of trade; that what prevents competition does not [546] necessarily injure trade; on the contrary, to restrict competition may benefit trade, that the whole world is now groaning under competition; that the hard rule of the survival of the fittest bears heavily upon the mass of the people: that there is a spirit of unrest, of dissatisfaction, and that to avoid the effects of ruinous competition among employers and employés combination is the rule.

It may be conceded that the law of the survival of the fittest is a hard one; that the necessity of competition under existing conditions presses heavily upon the weak. But, after all, competition is not only the life of trade, but the underlying basis of our social and industrial life. There may be a better way, but we have not yet found it. Competition goes along with freedom, with independent action. This country was founded on the principles of liberty and equality. It sought to secure to every citizen an equal chance under the law. That is all the people have demanded or do demand—a fair show in the race of life. Undoubtedly there is unrest, dissatisfaction, tendencies to anarchy and socialism, but these result not from competition, but the throttling of competition by trusts and combinations, which seek to control production and transportation and dominate both workingmen and consumers. Against these the individual citizen protests. He does not demand *no* competition, but *fair* competition. Combinations of workingmen accompany aggregations of capital. Thus the masses are arrayed against the classes. If combinations of capital were prevented, if competition among employers of labor were enforced, the independent demand for labor from competing sources would tend to fair wages, such as prices might warrant.

IV. It is insisted that this agreement among railroads to prevent competition is not only innocent, but wise and salutary, because in the case of railroads competition is ruinous; that if competition reduces rates below the point of profit for any line, it must ultimately be bankrupted, for it cannot stop running nor can the capital invested in it be withdrawn.

But this argument applies to all great modern industries, in manufacture as well as transportation. Capital fixed in a [547] valuable plant cannot be withdrawn, nor can labor

skilled in one industry be readily shifted to another. Both manufacturers and workingmen are subject to the contingencies of competition. The establishment of a new plant with modern improvements may destroy some old one, in which both have virtually risked their all. There are sections where a number of years ago it was profitable to make iron out of local ores. Millions of dollars were invested in furnaces. Workingmen skilled in iron-making settled there, and with their earnings bought property and built homes. Subsequently, in other sections more accessible to the markets, with cheaper ores, modern furnaces were erected and cheaper iron began to be made. The old furnaces could not meet the competition of the new. They had to be abandoned. Was it possible to withdraw the capital invested in them? Not at all. It was lost. The workingmen, too, suffered. They were thrown out of work, ran up debts, lost their homes.

Why are not men who put their capital or skill into a manufacturing plant just as much entitled to protection against ruinous competition as those who put their money or skill in a transportation plant? Why should the railroads be singled out from all the great interests of this country, and alone be authorized to combine and prevent competition and keep up prices?

Competition drives the weak to the wall, the fittest survive, but the greatest good to the greatest number results. The opening of new mines, the construction of new plants, the establishment of industries with improved methods of production and greater natural advantages, lower the cost of production of the commodity to the benefit of the public, but the person or corporation or region which cannot lower its cost of production to meet the new competition must suffer. Under competition the most improved plant, the best trained labor, the most economical management, the wisest business sagacity and foresight, is not only encouraged but demanded for success.

The best railroad, the one constructed and equipped and managed in the best way, will get the bulk of the competitive [548] business, and it ought to. It can afford to carry the traffic at lower rates than the poorer roads, and it ought to be allowed to, in the public interest. The poorer roads can get

the business by putting themselves in shape to do the business. Roads equally fitted to do the work will naturally divide the competitive business in equitable proportions. Competition for traffic by improved service and lower rates will result, naturally, not in ruining the roads, but in building them up. Under competition, the best road fixes the rate; under combination, the poorest road. Is it just to make the public pay rates from Chicago to the East fixed by the poorest system protected by the Joint Traffic agreement?

V. It is contended there is no restraint on trade, because the railways still exist with all their facilities for transportation, ready and willing to serve the public, and with no inducement for service weakened; that competition in every desirable aspect remains, the railroads being permitted to compete, but compelled to do it openly, under the provision that a deviation from the association rate cannot be made except by resolution of the board of a member and after thirty days' notice to the managers.

It is true the railways exist with their original facilities, but the inducement for improvement by cheaper methods of transportation is weakened, the motive for competition removed, the means of competition destroyed, and competition itself absolutely forbidden. The natural result of preventing competition is to keep up rates. An excess in rates over what would obtain under competition amounts in effect to a tax on the things transported. This operates as a burden upon commerce, and a restraint of trade.

If a State should levy a tax on goods transported through it, this court would hold such an act unconstitutional, because it laid a burden upon interstate commerce. Moreover, to increase rates and maintain them at a point above what would obtain under competition decreases the business of railroads but enhances the cost of it, and thus restrains trade or commerce. Lower rates mean more traffic, both freight and passenger. Higher rates means less traffic. It may be to the **[549]** interest of the railroads to increase the rates and lessen the traffic. The profits may be as much or more, but it is done at the expense of the public and to the restraint of trade.

VI. It is insisted that rates must be stable, not subject to change; that a manufacturer cannot safely make goods nor a

dealer buy them unless he knows the rates for transporting them to market, and may rely upon these rates continuing; therefore agreements for maintaining rates at a fixed point should be encouraged.

It is obvious that the manufacturer or dealer must not only take into account the rates he will have to pay to market, but the rates his competitors from every quarter, by land and water, will have to pay. It is impracticable to attain a cast-iron uniformity of this kind, and neither the Interstate Commerce law nor the Joint Traffic agreement attempts it. Moreover, the agreement does not assume to prevent a change of rates. It virtually takes the power to change from the companies, but gives it to the managers of the association. For natural it substitutes arbitrary change. The protest against any change in rates is a protest against progress. The history of railroads shows a constant tendency towards cheaper rates. This has resulted from improvements forced by competition. The interest of the public lies not in maintaining but in reducing rates, and to effect such reduction competition is essential.

VII. Uniformity in rates is declared to be essential, and it is urged that the provisions of the Interstate Commerce law favoring uniformity cannot be enforced except by suppressing competition through this agreement; and, to illustrate the need of uniformity, it is said that without it an industry in Michigan equidistant from market with a similar industry in Indiana might be wiped out of existence by reduced rates in favor of the Indiana industry.

But neither the Interstate Commerce act nor this agreement would prevent the alleged injustice suggested. The case instanced involves a reduction in rates on local traffic, and the agreement only applies to competitive traffic. There is nothing in the agreement to prevent any member of the **[550]** association from changing the rates from local points; the jurisdiction of the association is restricted to competitive traffic.

The uniformity demanded by the Interstate Commerce act is uniformity in the treatment by *each* railroad of *its own* patrons. The second section prohibits a common carrier

from charging one person more than another for the same service; it does not prohibit a carrier from charging one person more or less than another railroad charges another person for an equal distance. The third section forbids a common carrier to give any undue preference or advantage to any person or locality over any other. But this only applies to the action of a railroad toward the people or the places served by *it*. And so, too, with reference to the long and short haul provisions in the fourth section.

The Interstate Commerce law declares that all charges must be reasonable and just. It provides no means for securing this desideratum except competition. The only method of stifling competition when the law was passed was the pooling agreement, and this was forbidden. Competition between railroads was preserved, and to secure the benefits of competition to all patrons of each road it was provided that the competition should be open and above board, so that the people might be advised of the existing rates, and each railroad was required to treat its patrons with uniformity, without discrimination and without preferences.

The object of the law was to secure the benefits of competition to all, and not permit a road to charge those shippers for whose patronage it does not have to compete excessive rates, while secretly granting lower rates to those shippers for whose patronage it has to compete. The competition was to be restricted to where it belongs; between the railroads and not between the shippers. If a railroad can afford to carry the freight of one shipper for a certain rate, it can afford to carry for the same rate like freight under similar conditions for every other shipper.

VIII. It is contended that uniform rates should be maintained on the trunk lines in order to keep the weaker roads in **[551]** operation for the benefit of the sections through which they run.

As I have pointed out, the agreement does not apply to local traffic. As to it, each road has a monopoly, with power to fix its own rates. The agreement applies only to competitive traffic between great centres. The argument, then, amounts to this, that the rates on through traffic are to be kept up in order to preserve the weak roads as going concerns for the benefit of the sections through which they run. What is this but to tax the many for the benefit of the few? It is not the function of Government to neutralize the advantages of locality. The people pay for these and are entitled to them. If I settle in a flourishing region on a good line, I pay for the privilege in the cost of the land, in taxes, etc. If I settle in an undeveloped region on a poor road, I pay little for either the privilege or the land, and must expect to help bear the cost of development.

IX. It is said that the Interstate Commerce act was passed to suppress competition and secure uniformity in rates.

It was not passed to suppress competition, but to preserve it and secure its benefits to all. Competition between independent lines was preserved and uniformity enforced to secure the benefit of this competition to all. Each carrier was required to treat its patrons with uniform fairness, without preference and without discrimination. The only effective arrangement used at that time by the trunk lines to stifle competition was the pooling agreement, and this was prohibited. It was recognized that competition would keep the rates reasonable, and the long and short haul provision was intended to secure to all points on each road the benefit of such competition. Unjust discrimination and undue preferences by a railroad among its patrons were prohibited. Thus the benefits of open competition were insured to all. The policy was—among the patrons of each road uniformity, but between the roads open competition.

X. The point is made that railways are public highways, and the furnishing of railway transportation a governmental function; therefore the Government should eliminate the ad- **[552]** vantage of locality by enforcing absolute uniformity in rates, or permit the railroads to do it by preventing competition and maintaining arbitrary rates.

It may be conceded that the furnishing of railroad transportation is a public function, and therefore the Government may regulate it. Government, state and Federal, has done this, by forbidding the consolidation of competing lines, by prohibiting pooling contracts, and by making illegal all agreements in restraint of trade.

The absolute uniformity demanded is neither practicable

nor desirable. Absolute uniformity, extending to every rate, from every point, on every railroad, means absolute consolidation of control and absolutely arbitrary rates, and this is absolutely inconsistent with competition. It admits of no competition. The desirable uniformity is that which goes along with competition, and supplements it, and secures its benefits to all shippers, without distinction. Each railroad should be required to treat its patrons—persons and places—with fairness and equality, without preference or discrimination. It should not be required, however, to treat its shippers no better than other lines treat theirs. On the contrary, it should be induced to treat its shippers the very best it can, and thereby make it incumbent upon competing lines to treat their shippers as well. It should be induced to do this not only in rates but in service. The rigid, cast-iron, arbitrary rule of absolute uniformity as between railroads, contended for by Mr. Carter, would logically prevent all competition, whether in rates or service.

If the railroads are not to be permitted to combine and prevent ruinous competition, and establish and maintain reasonable rates by arbitrary methods, then, it is said, they must either abandon transportation, or consolidate, or persistently violate the law.

There is a virtual consolidation of these roads now under the agreement. The public is not interested in consolidation except as it affects competition. The constitution and laws of many States prohibit the consolidation of railroads, but only of *competing* railroads. Lines which do not compete may con- **[553]** solidate, and the public thus gains the benefit of broader and more economical administration. Railroads which compete may not consolidate, because it prevents competition and keeps up rates.

Public policy has demanded the prohibition of the consolidation of competing lines; for the same reason Congress enacted the antipooling section of the Interstate Commerce act. The pooling of freights and the division of earnings is not bad in itself. It is bad, because used to stifle competition. Equally bad is the Joint Traffic agreement before the court, which operates as effectively as any pooling arrangement ever devised. The people have not stopped to inquire

whether consolidation would result of necessity in unreasonable rates; neither have they stopped to inquire whether pooling would result necessarily in unreasonable rates. It is the tendency, not the absolute result, which has operated to prohibit consolidation, to prohibit pooling, to prohibit contracts in restraint of trade.

The railroads say that if they are not permitted to prevent competition they will compete and in doing so violate the Interstate Commerce law; that they should be permitted to combine for the purpose of preventing violations of law, even if in doing so competition be prevented.

But to prevent competition is in itself to violate the law. Better the chance to violate one law than the certainty of violating another. Better the motive to violate one law than the mandate to violate another. If the ability the railroads employ to circumvent the law were used to observe it, neither this agreement nor the arguments in support of it would be before the court. The railroads promise to obey one law if the court will permit them to violate another. Would they keep the compact, if made? Respect for law based solely on self-interest is delusive and evanescent.

XI. An attempt is made to distinguish this case from the *Trans-Missouri case* by saying that here the association simply adopted the admitted fair and reasonable rates then in force and filed with the Interstate Commerce Commission by the companies; while in the *Trans-Missouri case* the association was given power to fix rates. But in the Trans-Missouri **[554]** agreement the association was only given power to fix reasonable rates, and the fact that the rates fixed by the association during its existence were fair and reasonable was admitted.

In the *Trans-Missouri case*, the association had been dissolved. The only question was the legal effect of the authority conferred by the agreement. If there were no power under the Joint Traffic agreement to change rates, nevertheless the power to maintain rates arbitrarily would involve authority to keep them up after progress and invention should render them excessive and unreasonable. But, in point of fact, as pointed out, the Joint Traffic agreement vests in the association, through the managers, with appeal to the

board of control, the authority to change rates. This authority is more coercive than that conferred by the Trans-Missouri agreement.

Under the Trans-Missouri agreement five days' written notice prior to each monthly meeting was required to be given the chairman of any proposed reduction in rates. At each monthly meeting the association voted on all changes proposed. All parties were bound by the decision of the association "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association. . . . Should any member insist upon a reduction of rates against the views of the majority, and if in the judgment of said majority the rates so made affect seriously the rates upon through traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates to take effect upon the same day." Moreover, each member of the Trans-Missouri association might, at its peril, make a rate without previous notice to meet the competition of outside lines, giving the chairman notice of its action, so the good faith of the transaction might be passed upon by the association at its next meeting.

Thus, under the Trans-Missouri agreement each member might, at its peril, make a rate to meet outside competition, and each member might, upon giving ten days' notice, make an independent rate, notwithstanding the action of the association. But under the Joint Traffic agreement no company can [555] deviate from the rates as fixed by the managers, except by a resolution of its board of directors, and thirty days after a copy of such resolution is filed with the managers. This absolutely prevents competition, and the intention to prevent competition is plain from the provision that "the managers, upon receipt of such notice, shall act promptly upon the same for the protection of the parties hereto."

Mr. Carter, in his argument, explained the operation of this clause. Thirty days' notice of the intention of any company, by resolution of its board, to deviate from the rates fixed by the association, through its managers, was required in order that the association might have time to

determine its course of action. If it could meet the rate proposed by the deviating member, it would do so. If it could not, it would take steps, in Mr. Carter's language, "to exterminate" the recalcitrant company. In no other way, according to Mr. Carter, could ruinous competition be prevented and the interests of all members of the association protected.

XII. It may be conceded that the public along each line is interested in the line getting its fair share of the through traffic and earnings; and this it will get under competition. The local public is not entitled, however, to an arbitrary share of the through traffic and earnings. It has a right to no more than the advantages of the line attract. To give it more is to take what belongs to another line and another section. A prosperous section, with an intelligent, progressive population, makes a good railroad, and a good railroad attracts through traffic; and it is not just or right to take this traffic away and give it to a poor road in order to do for it what the public along its line ought to do.

XIII. The provisions of the Interstate Commerce law preventing discrimination and undue preferences have been discussed; they can be enforced without suppressing competition. The tenth article of the Joint Traffic agreement provides that "the managers shall decide and enforce the course which shall be pursued with connecting companies not parties to this agreement which fail or decline to observe the rates, fares and rules established under this agreement," and it is [556] contended that this provision is necessary to prevent discrimination against one company and in favor of another by connecting lines; but a reading of the third section of the Interstate Commerce act shows that the mischief suggested is fully provided for in its concluding paragraph, which provides that every common carrier shall afford equal facilities for the interchange of traffic and for receiving and forwarding freight or passengers from connecting lines, "and shall not discriminate in their rates and charges between such connecting lines."

XIV. It is insisted that if Congress had intended the Anti-Trust law to prohibit every contract in restraint of trade, whether partial or general, reasonable or unreasonable, it

would have used the language "every contract in *any* restraint of trade," etc., "is hereby declared to be illegal."

It seems to me, and I submit to the court, that the expression "every contract in restraint of trade" is quite as comprehensive as "every contract in any restraint of trade," and much better language. With due respect to the learned counsel, it might be suggested that if his criticism of the language used be a valid one, why may not the next commentator on this section forcefully insist that Congress should have said "every contract in *any and every* restraint of trade is hereby declared to be illegal"?

XV. The reply to Mr. Phelps' attack upon the constitutionality of the Anti-Trust law as construed by this court in the *Trans-Missouri case*, is to be found in the argument of Mr. Carter that railways are public highways, and in the furnishing of public transportation perform in a sense a governmental function. The right of the Government to regulate contracts between carriers and shippers and to place proper restrictions upon contracts among carriers themselves, in order to protect the interests of the public, as affected by these instrumentalities of commerce, has not heretofore been seriously questioned. The States regulate the construction, maintenance, and operation of railroads, prescribing and enforcing maximum rates, preventing the consolidation of competing lines, and securing to the public the benefit of competition.

The doctrine laid down in the case of *Munn* v. *Illinois*, 94 **[557]** U. S. 113, applies. When a man devotes his property to a public use, to that extent he grants the public an interest in that use. The same policy which supports the prohibition against consolidation, and the fifth section of the Interstate Commerce law forbidding the pooling of freights or the division of earnings, is the justification for the declaration that all contracts in restraint of trade shall be deemed illegal. The result of the consolidation, the pooling or the combination in restraint of trade, is beside the question. Congress is entitled to pass judgment upon the tendency of a contract in restraint of trade. If it deems such a contract reprehensible, injurious in its tendencies, it may prohibit

it, whether the act will result in a particular case in the establishment of reasonable or unreasonable rates.

XVI. *As to the remedy in the case of an unreasonably low rate.* Judge Cooley, in a well-considered opinion, *In re Chicago, St. Paul & Kansas City Railway*, 2 Int. Com. Com. 231, approved by this court in *Interstate Commerce Commission* v. *Cincinnati, N. O. & Texas Pacific Railway*, 167 U. S. 479, 511, held that under the Interstate Commerce law the commission has no power to determine that a rate is unreasonably low and to order the carrier to refrain from charging such rate on such ground.

XVII. *As to the remedy in the case of an unreasonably high rate.*

The common law requires that rates shall be reasonable and fair. So does the Interstate Commerce law. But this is a mere declaration, and there is no adequate remedy to enforce the right. The commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it. The shipper is therefore left to recover the excess in rate paid. I know of no case where the excess charged over a reasonable rate on interstate commerce has been recovered back. The amount involved in any particular transaction would be small; it would require years to carry the case through the courts, and no individual shipper would invite the ill will of a powerful railroad by beginning such a contest.

[558] Moreover, the man who actually pays the freight is not the man who suffers from the unreasonable charge. Take the case of grain. The farmer sells to the commission merchant. If the rates are excessive, he gets so much less for his grain or the purchaser from the commission merchant pays so much more for it. The commission merchant who pays the freight has no real interest in the charge. Of course this is not always true, but it does apply with respect to the great shipments handled by middlemen.

Finally, it is questionable under the Interstate Commerce act whether a suit to recover back an excess paid above a reasonable rate can be maintained, if the rate charged was that fixed in the schedule filed with the commission and published under the Interstate Commerce law.

Mr. James A. Logan and *Mr. John G. Johnson* filed a brief on behalf of the Pennsylvania Railroad Company and eight other railroad companies, appellees.

Mr. Robert W. de Forest and *Mr. David Willcox* filed a brief on behalf of the Central Railroad Company of New Jersey, appellee.

MR. JUSTICE PECKHAM, after stating the case, delivered the opinion of the court.

This case has been most ably argued by counsel both for the Government and the railroad companies. The suit is brought to obtain a decree declaring null and void the agreement mentioned in the bill. Upon comparing that agreement with the one set forth in the case of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, the great similarity between them suggests that a similar result should be reached in the two cases. The respondents, however, object to this, and give several reasons why this case should not be controlled by the other. It is, among other things, said that one of the questions sought to be raised in this case might have been but was not made in the other; that the point therein decided, after holding that the statute applied to rail- **[559]** road companies as common carriers, was simply that all contracts, whether in reasonable as well as in unreasonable restraint of trade, were included in the terms of the act, and the question whether the contract then under review was in fact in restraint of trade in any degree whatever was neither made nor decided, while it is plainly raised in this.

Again, it is asserted that there are differences between the provisions contained in the two agreements, of such a material and fundamental nature that the decision in the case referred to ought to form no precedent for the decision of the case now before the court.

It is also objected that the statute, if construed as it has been construed in the *Trans-Missouri case*, is unconstitutional, in that it unduly interferes with the liberty of the individual and takes away from him the right to make contracts regarding his own affairs, which is guaranteed to him by the Fifth Amendment to the Constitution, which provides

that "no person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." This objection was not advanced in the arguments in the other case.

Finally, a reconsideration of the questions decided in the former case is very strongly pressed upon our attention, because, as is stated, the decision in that case is quite plainly erroneous, and the consequences of such error are far reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the Anti-Trust statute has been received by the public with surprise and alarm.

We will refer to these propositions in the order in which they have been named.

As to the first, we think the report of the *Trans-Missouri case* clearly shows not only that the point now taken was there urged upon the attention of the court, but it was then intentionally and necessarily decided. The whole foundation of the case on the part of the Government was the allegation that the agreement there set forth was a contract or combination in restraint of trade, and unlawful on that account. If **[560]** the agreement did not in fact restrain trade, the Government had no case.

If it did not in any degree restrain trade, it was immaterial whether the statute embraced all contracts in restraint of trade, or only such as were in unreasonable restraint thereof. There was no admission or concession in that case that the agreement did in fact restrain trade to a reasonable degree. Hence, it was necessary to determine the fact as to the character of the agreement before the case was made out on the part of the Government.

The great stress of the argument on both sides was undoubtedly upon the question as to the proper construction of the statute, for that seemed to admit of the most doubt, but the other question was before the court, was plainly raised, and was necessarily decided. The opinion shows this to be true. At page 341 of the report the opinion contains the following language:

"The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust act applies to

railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

* * * * *

"Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local.

"To that end the association is formed and a body created which is to adopt rates which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is [561] to put a restraint upon trade or commerce as described in the act. For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it."

The bill of the complainants in that case, while alleging an illegal and unlawful intent on the part of the railroad companies in entering into the agreement, also alleged that by means of the agreement the trade, traffic and commerce in the region of country affected by the agreement had been and were monopolized and restrained, hindered, injured and retarded. These allegations were denied by defendants.

There was thus a clear issue made by the pleadings as to the character of the agreement, whether it was or was not one in restraint of trade.

The extract from the opinion of the court above given shows that the issue so made was not ignored, nor was it assumed as a concession that the agreement did restrain trade to a reasonable extent. The statement in the opinion is quite plain, and it inevitably leads to the conclusion that the question of fact as to the necessary tendency of the agreement was distinctly presented to the mind of the court, and was consciously, purposely and necessarily decided. It cannot, therefore, be correctly stated that the opinion only dealt with the question of the construction of the act, and that it was assumed that the agreement did to some reasonable extent restrain trade. In discussing the question as to the proper construction of the act, the court did not touch upon the other

aspect of the case, in regard to the nature of the agreement itself, but when the question of construction was finished, the opinion shows that the question as to the nature of the agreement was then entered upon and discussed as a fact necessary to be decided in the case, and that it in fact was decided. An unlawful intent in entering into the agreement was held im- [562] material, but only for the reason that the agreement did in fact and by its terms restrain trade.

Second. We have assumed that the agreements in the two cases were substantially alike. This the respondents by no means admit, and they assert that there are such material and substantial differences in the provisions of the two instruments as to necessitate a different result in this case from that arrived at in the other.

The expressed purpose of the agreement in this case is, among other things, "to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic." The companies agree that the schedule of rates and fares already duly published and in force and authorized by the companies, parties to the agreement, and filed, as to interstate traffic, with the Interstate Commerce Commission, shall be reaffirmed, and copies of all such schedules are to be filed, with the managers constituted under the agreement, within ten days after it becomes effective. The managers may from time to time recommend changes in the rates, etc., and a failure to observe the recommendations is deemed a violation of the agreement. No company can deviate from these rates except under a resolution of its board of directors, and such resolution can only take effect thirty days after service of a copy thereof on the managers, who, upon receipt thereof, "shall act promptly for the protection of the parties hereto." For a violation of the agreement the offending company forfeits to the association a sum to be determined by the managers thereof, not exceeding five thousand dollars, or more upon the contingency named in the rule.

So far as the establishment of rates and fares is concerned, we do not see any substantial difference between this agreement and the one set forth in the *Trans-Missouri case.* In that case the rates were established by the agreement, and any company violating the schedule of rates as established

under the agreement was liable to a penalty. A company could withdraw from the association on giving thirty days' notice, but while it continued a member it was bound to charge the rates fixed, under a penalty for not doing so. In [563] this case the companies are bound to charge the rates fixed upon originally in the agreement or subsequently recommended by the board of managers, and the failure to observe their recommendations is deemed a violation of the agreement. The only alternative is the adoption of a resolution by the board of directors of any company providing for a change of rates so far as that company is concerned, and the service of a copy thereof upon the board of managers as already stated. This provision for changing rates by any one company is absent from the other agreement. It is this provision which is referred to by counsel as most material and important, and one which constitutes a material and important distinction between the two agreements. It is said to be designed solely to prevent secret and illegal competition in rates, while at the same time providing for and permitting open competition therein, and that unless it can be regarded as restraining competition so as to restrain trade, there is not even an appearance of restraint of trade in the agreement. It is obvious, however, that if such deviation from rates by any company from those agreed upon, be tolerated, the principal object of the association fails of accomplishment, because the purpose of its formation is the establishment and maintenance of reasonable and just rates and a general uniformity therein. If one company is allowed, while remaining a member of the association, to fix its own rates and be guided by them, it is plain that as to that company the agreement might as well be rescinded. This result was never contemplated. In order, therefore, not only to prevent secret competition, but also to prevent any competition whatever among the companies parties to the agreement, the provision is therein made for the prompt action of the board of managers whenever it receives a copy of the resolution adopted by the board of directors of any one company for a change of the rates as established under the agreement. By reason of this provision the board undoubtedly has authority and power to enforce the uniformity of rates as against the offending company upon pain of an open, rigorous and relentless war of competition against it on the part of the whole association.

[564] A company desirous of deviating from the rates agreed upon and which its associates desire to maintain is at once confronted with this probability of a war between itself on the one side and the whole association on the other, in the course of which rates would probably drop lower than the company was proposing, and lower than it would desire or could afford, and such a prospect would be generally sufficient to prevent the inauguration of the change of rates and the consequent competition. Thus the power to commence such a war on the part of the managers would operate to most effectually prevent a deviation from rates by any one company against the desire of the other parties to the agreement. Competition would be prevented by the fear of the united competition of the association against the particular member. Counsel for the association themselves state that the agreement makes it the duty of the managers, in case the defection should injuriously affect some particular members more than others, to endeavor to furnish reasonable protection to such members, presumably by allowing them to change rates so as to meet such competition, or by recommending such fierce competition as to persuade the recalcitrant to fall back into line. By this course the competition is open, but none the less sufficient on that account, and the desired and expected result is to be the yielding of the offending company, induced by the war which might otherwise be waged against it by the combined force of all the other parties to the agreement. Under these circumstances the agreement, taken as a whole, prevents, and was evidently intended to prevent, not only secret but any competition. The abstract right of a single company to deviate from the rates becomes immaterial, and its exercise, to say the least, very inexpedient, in the face of this power of the managers to enlist the whole association in a war upon it. This is not all, however, for the agreement further provides that the managers are to have power to organize such joint freight and passenger agencies as they may deem desirable, and if established they are to be so arranged as to give proper representation to each company, and no soliciting or contract-

ing passenger or freight agency can be maintained by any of the [565] companies, except with the approval of the managers. They are also charged with the duty of securing to each company, party to the agreement, equitable proportions of the competitive traffic covered by the agreement, so far as can be legally done. The natural, direct and necessary effect of all these various provisions of the agreement is to prevent any competition whatever between the parties to it for the whole time of its existence. It is probably as effective in that way as would be a provision in the agreement prohibiting in terms any competition whatever.

It is also said that the agreement in the first case conferred upon the association an unlimited power to fix rates in the first instance, and that the authority was not confined to reasonable rates, while in the case now before us the agreement starts out with rates fixed by each company for itself and filed with the Interstate Commerce Commission, and which rates are alleged to be reasonable. The distinction is unimportant. It was considered in the other case that the rates actually fixed upon were reasonable, while the rates fixed upon in this case are also admitted to be reasonable. By this agreement the board of managers is in substance and as a result thereof placed in control of the business and rates of transportation, and its duty is to see to it that each company charges the rates agreed upon and receives its equitable proportion of the traffic.

The natural and direct effect of the two agreements is the same, viz., to maintain rates at a higher level than would otherwise prevail, and the differences between them are not sufficiently important or material to call for different judgments in the two cases on any such ground. Indeed, counsel for one of the railroad companies on this argument, in speaking of the agreement in the *Trans-Missouri case*, says of it that its terms, while substantially similar to those of the agreement here, were less explicit in making it just and reasonable.

Regarding the two agreements as alike in their main and material features, we are brought to an examination of the question of the constitutionality of the act, construed as it has [566] been in the *Trans-Missouri case*. It is worthy of

remark that this question was never raised or hinted at upon the argument of that case, although, if the respondents' present contention be sound, it would have furnished a conclusive objection to the enforcement of the act as construed. The fact that not one of the many astute and able counsel for the transportation companies in that case raised an objection of so conclusive a character, if well founded, is strong evidence that the reasons showing the invalidity of the act as construed do not lie on the surface and were not then apparent to those counsel.

The point not being raised and the decision of that case having proceeded upon an assumption of the validity of the act under either construction, it can, of course, constitute no authority upon this question. Upon the constitutionality of the act it is now earnestly contended that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society, and that Congress is without power to prohibit generally all contracts in restraint of trade, and the effort to do this invalidates the act in question. It is urged that it is for the court to decide whether the mere fact that a contract or arrangement, whatever its purpose or character, may restrain trade in some degree, renders it injurious or prejudicial to the welfare or security of society, and if the court be of opinion that such welfare or security is not prejudiced by a contract of that kind, then Congress has no power to prohibit it, and the act must be declared unconstitutional. It is claimed that the act can be supported only as an exercise of the police power, and that the constitutional guarantees furnished by the Fifth Amendment secure to all persons freedom in the pursuit of their vocations and the use of their property, and in making such contracts or arrangements as may be necessary therefor. In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat [567] restraining trade and commerce,

although to a very slight extent, but yet, under the construction adopted, they are illegal.

As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good will of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; **[568]** and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have in our judgment little or no bearing upon the question under consideration. In *Hopkins* v. *United States*, decided at this term, *post*, 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that "the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, directly or remotely, some bearing upon interstate commerce, and possibly to restrain it." To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court.

The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint **[569]** of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining inter-

state rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.

If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned. Its acknowledged purpose is to maintain rates, and if executed, it does so. It must be remembered, however, that the act does not prohibit any railroad company from charging reasonable rates. If in the absence of any contract or combination among the railroad companies the rates and fares would be less than they are under such contract or combination, that is not by reason of any provision of the act which itself lowers rates, but only because the railroad companies would, as it is urged, voluntarily and at once inaugurate a war of competition among themselves, and thereby themselves reduce their rates and fares.

Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.

As counsel for the Traffic Association has truly said, the ordinary highways on land have generally been established and maintained by the public. When the matter of the building of railroads as highways arose, a question was presented whether the State should itself build them or permit others to do it. The State did not build them, and as their building required, among other things, the appropriation of **[570]** land, private individuals could not enforce such appropriation without a grant from the State.

The building and operation of a railroad thus required a public franchise. The State would have had no power to

grant the right of appropriation unless the use to which the land was to be put was a public one. Taking land for railroad purposes is a taking for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between States such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several States.

Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered.

Although the franchise when granted by the State becomes by the grant the property of the grantee, yet there are some regulations respecting the exercise of such grants which Congress may make under its power to regulate commerce among the several States. This will be conceded by all, the only question being as to the extent of the power.

We think it extends at least to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine **[571]** as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for

the time be not more than are reasonable. They may easily and at any time be increased. It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit.

The prohibition of such contracts may in the judgment of Congress be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief.

The cases cited by the respondents' counsel in regard to the general constitutional right of the citizen to make contracts relating to his lawful business are not inconsistent with the existence of the power of Congress to prohibit contracts of the nature involved in this case. The power to regulate commerce has no limitation other than those prescribed in the Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guarantees which are also placed in the Constitution or in any of the amendments to that instrument. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312–336; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447–479.

Among these limitations and guarantees counsel refer to those which provide that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation. The latter limitation is, we think, plainly irrelevant.

[572] As to the former, it is claimed that the citizen is deprived of his liberty without due process of law when, by a general statute, he is arbitrarily deprived of the right to make a contract of the nature herein involved.

The case of *Allgeyer* v. *Louisiana*, 165 U. S. 578, is cited as authority for the statement concerning the right to contract. In speaking of the meaning of the word "liberty," as used in the Fourteenth Amendment to the Constitution, it was said in that case to include, among other things, the liberty of the citizen to pursue any livelihood or vocation, and for that purpose to enter into all contracts which might be proper, necessary and essential to his carrying out those objects to a successful conclusion.

We do not impugn the correctness of that statement. The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is, whether the contract is a proper or lawful one, and we have not advanced a step towards its solution by saying that the citizen is protected by the Fifth, or any other amendment, in his right to make proper contracts to enable him to carry out his lawful purposes. We presume it will not be contended that the court meant, in stating the right of the citizen "to pursue any livelihood or vocation," to include every means of obtaining a livelihood, whether it was lawful or otherwise. Precisely how far a legislature can go in declaring a certain means of obtaining a livelihood unlawful, it is unnecessary here to speak of. It will be conceded it has power to make some kinds of vocations and some methods of obtaining a livelihood unlawful, and in regard to those the citizen would have no right to contract to carry them on.

Congress may restrain individuals from making contracts under certain circumstances and upon certain subjects. *Frisbie* v. *United States*, 157 U. S. 160.

Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or *mala in se*, may yet be prohibited by the **[573]** legislation of the States or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce and a valid regulation thereof. The question is, for us, one of power only, and not of policy. We think the power exists in Congress, and that the statute is therefore valid.

Finally, we are asked to reconsider the question decided in the *Trans-Missouri case*, and to retrace the steps taken

therein, because of the plain error contained in that decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case.

It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the *Trans-Missouri case* shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court.

That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at length which was certainly commensurate with the importance of the case.

[574] This court, with care and deliberation and also with a full appreciation of their importance, again considered the questions involved in its former decision.

A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now for the third time the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct

opposition to the conclusion arrived at in the *Trans-Missouri case*.

The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it nor is it necessary to repeat it.

The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did.

It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed.

As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

While an erroneous decision might be in some cases properly reconsidered and overruled, yet it is clear that the first necessity is to convince the court that the decision was erroneous. It is scarcely to be assumed that such a result could be **[575]** secured by the presentation for a third time of the same arguments which had twice before been unsuccessfully urged upon the attention of the court.

We have listened to them now because the eminence of the counsel engaged, their earnestness and zeal, their evident belief in the correctness of their position, and, most important of all, the very grave nature of the questions argued, called upon the court to again give to those arguments strict and respectful attention. It is not matter for surprise that we still are unable to see the error alleged to exist in our former

decision, or to change our opinion regarding the questions therein involved.

Upon the point that the agreement is not in fact one in restraint of trade, even though it did prevent competition, it must be admitted that the former argument has now been much enlarged and amplified, and a general and most masterly review of that question has been presented by counsel for the respondents. That this agreement does in fact prevent competition, and that it must have been so intended, we have already attempted to show. Whether stifling competition tends directly to restrain commerce in the case of naturally competing railroads, is a question upon which counsel have argued with very great ability. They acknowledge that this agreement purports to restrain competition, although, they say, in a very slight degree and on a single point. They admit that if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce. Counsel then add (and therein we entirely agree with them) that no such identity can be pretended, because it is plain that commerce can and does take place on a large scale and in numerous forms without competition. The material considerations therefore turn upon the effects of competition upon the business of railroads, whether they are favorable to the commerce in which the roads are engaged, or unfavorable and in restraint of that commerce. Upon that question it is contended that agreements between railroad companies of the **[576]** nature of that now before us are promotive instead of in restraint of trade.

This conclusion is reached by counsel after an examination of the peculiar nature of railroad property and the alleged baneful effects of competition upon it and also upon the public. It is stated that the only resort open to railroads to save themselves from the effects of a ruinous competition is that of agreements among themselves to check and control it. A ruinous competition is, as they say, apt to be carried on until the weakest of the combatants goes to destruction. After that the survivor, being relieved from competition, proceeds to raise its prices as high as the business will bear. Commerce, it is said, thus finally becomes restrained by the effects of competition, while, at the same time, otherwise valuable railroad property is thereby destroyed or greatly reduced in value. There can be no doubt that the general tendency of competition among competing railroads is towards lower rates for transportation, and the result of lower rates is generally a greater demand for the articles so transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases commerce. This is the first and direct result of competition among railroad carriers.

In the absence of any agreement restraining competition, this result, it is argued, is neutralized, and the opposite one finally reached by reason of the peculiar nature of railroad property which must be operated and the capital invested in which cannot be withdrawn, and the railroad managers are therefore, as is claimed, compelled to not only compete among themselves for business, but also to carry on the war of competition until it shall terminate in the utter destruction or the buying up of the weaker roads, after which the survivor will raise the rates as high as is possible. Thus the indirect but final effect of competition is claimed to be the raising of rates and the consequent restraint of trade, and it is urged that this result is only to be prevented by such an agreement as we have here. In that way alone it is said that competition is overcome, and general uniformity and reasonableness of rates securely established.

[577] The natural, direct and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce. Whether, in the absence of an agreement as to rates, the consequences described by counsel will in fact follow as a result of competition, is a matter of very great uncertainty, depending upon many contingencies and in large degree upon the voluntary action of the managers of the several roads. Railroad companies may and often do continue in existence and engage in their lawful traffic at some profit, although they are competing railroads

and are not acting under any agreement or combination with their competitors upon the subject of rates. It appears from the brief of counsel in this case that the agreement in question does not embrace all of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast. It cannot be said that destructive competition, or, in other words, war to the death, is bound to result unless an agreement or combination to avoid it is entered into between otherwise competing roads.

It is not only possible but probable that good sense and integrity of purpose would prevail among the managers, and while making no agreement and entering into no combination by which the whole railroad interest as herein represented should act as one combined and consolidated body, the managers of each road might yet make such reasonable charges for the business done by it as the facts might justify. An agreement of the nature of this one which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them.

Coming to the conclusion we do, in regard to the various questions herein discussed, we think it unnecessary to [578] further allude to the other reasons which have been advanced for a reconsideration of the decision in the *Trans-Missouri case*.

The judgments of the Circuit Court of the United States for the Southern District of New York and of the Circuit Court of Appeals for the Second Circuit are reversed, and the case remanded to the Circuit Court with directions to take such further proceedings therein as may be in conformity with this opinion.

Mr. Justice Gray, Mr. Justice Shiras and Mr. Justice White dissented.

Mr. Justice McKenna took no part in the decision of the case.

[578] HOPKINS *v.* UNITED STATES.[a]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 210. Argued February 28, March 1, 1898.—Decided October 24, 1898.

[171 U. S., 578.]

The Kansas City Live Stock Exchange was an unincorporated volunteer association of men, doing business at its stock yards, situated partly in Kansas City, Missouri, and partly across the line separating Kansas City, Missouri, from Kansas City, Kansas. The business of its members was to receive individually consignments of cattle, hogs, and other live stock from owners of the same, not only in the States of Missouri and Kansas, but also in other States and Territories, and to feed such stock, and to prepare it for the market, to dispose of the same, to receive the proceeds thereof from the purchasers, and to pay the owners their proportion of such proceeds, after deducting charges, expenses and advances. The members were individually in the habit of soliciting consignments from the owners of such stock, and of making them advances thereon. The rules of the association forbade members from buying live stock from a commisison merchant in Kansas City, not a member of the exchange. They also fixed the commission for selling such live stock, prohibited the employment of agents to solicit consignments except upon a stipulated salary, and forbade the sending of prepaid telegrams or telephone messages, with information as to the condition of the markets. It was also provided that no member should transact business with any person vio- [579] lating the rules and regulations, or with an expelled or suspended member after notice of such violation. *Held*, that the situation of the yards, partly in Kansas and partly in Missouri, was a fact without any weight; that such business or occupation of the several members of the association was not interstate commerce, within the meaning of the act of July 2, 1890, c. 647, "to protect trade and commerce against unlawful restraints and monopolies;" and that that act does not cover, and was not intended to cover, such kind of agreements.[b]

[a] This suit was begun in the Circuit Court of the United States for the District of Kansas, which court granted the prayers in the bill asking for the dissolution of the Kansas City Live Stock Exchange, and for an injunction restraining defendant from enforcing or acting pursuant to the rules and by-laws of that association (82 Fed., 529). See p. 725. Appeal was taken to the Circuit Court of Appeals, Eighth Circuit, and removed from there to the Supreme Court by writ of certiorari (84 Fed. 1018). See p. 748. Decree reversed by Supreme Court, with directions to dismiss the bill (171 U. S., 578).

[b] The foregoing syllabus copyrighted, 1898, by Banks & Bros.

Syllabus.

[43 L. ed., 290.][a]

[The business of buying and selling live-stock at stock yards in a city by members of a stock exchange as commission merchants is not interstate commerce, although most of the purchases and sales are of live stock sent from other states, and the members of the stock exchange are employed to sell by letter from the owners of the stock in other states, and send agents to other states to solicit business, and advance money to the cattle owners, and pay their drafts, and aid them in making the cattle fit for market.]

[A by-law of the Kansas City Live-Stock Exchange, which regulates the commissions to be charged by members of that association for selling live stock is not in restraint of interstate commerce, or a violation of the act of July 2, 1890, to protect commerce from unlawful restraints.]

[A commission agent who sells cattle at their place of destination, which are sent from another state to be sold, is not engaged in interstate commerce; nor is his agreement with others in the same business, as to the commissions to be charged for such sales, void as a contract in restraint of that commerce.]

[In order to come within the provisions of the statute, the direct effect of an agreement or combination must be in restraint of trade or commerce among the several states or with foreign nations.]

[Restrictions on sending prepaid telegrams or telephone messages, made by a by-law of a live-stock exchange, when these restrictions are merely for the regulation of the business of the members, and do not affect the business of the telegraph company, are not void as regulations of interstate commerce.]

[The business of agents in soliciting consignments of cattle to commission merchants in another state for sale, is not interstate commerce; and a by-law of a stock exchange restricting the number of solicitors to three does not restrain that commerce, or violate the act of Congress.]

[The fact that a state line runs through stock yards, and that sales may be made of a lot of stock in the yards which may be partly in one state and partly in another, has no effect to make the business of selling stock interstate commerce.]

[A combination of commission merchants at stock yards, by which they refuse to do business with those who are not members of their association, even if it is illegal, is not subject to the act of Congress of July 2, 1890, to protect trade and commerce, since their business is not interstate commerce.]

THIS suit was commenced by the United States attorney for the District of Kansas, acting under the direction and by

[a] The following paragraphs inclosed in brackets are taken from the syllabus to this case in the U. S. Supreme Court Reports, Book 43, p. 290. Copyrighted, 1899, by The Lawyers' Co-Operative Publishing Co.

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the authority of the Attorney General of the United States, against Henry Hopkins and the other defendants, residents of the State of Kansas and members of a voluntary unincorporated association, known and designated as the Kansas City Live Stock Exchange. The purpose of the action is to obtain the dissolution of the exchange, and to perpetually enjoin the members from entering into or from continuing in any combination of a like character.

As a foundation for the relief sought it was alleged in the bill that the members of this association, known as the Kansas City Live Stock Exchange, have adopted articles of association, rules and by-laws which they have agreed to be bound by; that the business of the exchange is carried on and conducted by a board of directors at the Kansas City stock yards, which are situated partly in Kansas City in the State of Missouri and partly in Kansas City in the State of Kansas, the building owned by the stock yards company being located one half of it in the State of Missouri and the other half in the State of Kansas, and half of the defendants have offices and transact business in these stock yards and in that part of the building which is within the State of Kansas, and the other half in that part of the building which is in the State of Missouri; that the Kansas City Stock Yards Company is a corporation owning the stock yards, where the business is done by the members of the exchange; that substantially all the business transacted in the matter of receiving, buying, selling and handling their live stock at Kansas City is carried on by the defendants herein and by the other members of the exchange as commission merchants, and that large numbers of the live stock, consisting [580] of cattle and hogs and sheep bought and sold and handled at the stock yards by the defendants and their fellow members in the exchange, are shipped from the States of Nebraska, Colorado, Texas, Missouri, Iowa, and Kansas, and the Territories of Oklahoma, Arizona and New Mexico; that when this stock is received at the stock yards it is sold by the defendants, members of the exchange, to the various packing houses situated at Kansas City, Missouri, and Kansas City, Kansas, and it is also sold for shipment to the various other markets, particularly Chicago, St. Louis and New York; that vast numbers

of cattle, hogs and other live stock are received annually at the stock yards and handled by the members of the exchange.

The bill also alleges that large numbers of the live stock sold at the stock yards by the defendants are incumbered by mortgages thereon, executed by their owners in the various States and Territories, which mortgages have been given to various defendants as security for money advanced by them to the different owners to enable them to feed and prepare the cattle for market, and that when the live stock so mortgaged are ready for shipment, they are sent to the defendants who have advanced the money and received the mortgages, and on the sale of the stock the amount of these advances and interest is deducted from the proceeds of the sale of the cattle by the commission merchants owning the mortgages; that ninety per cent of the members of the exchange make such advances, and that the market is largely sustained by means of the money thus advanced to the cattle raisers by the defendants, and that Kansas City is the only place for many miles about, which constitutes an available market for the purchase and sale of live stock from the large territory located in the States and Territories already named; that it is the custom of the owners of the cattle, many of them living in different states, and who consign their stock to the Kansas City stock yards for sale to draw drafts on the commission merchants to whom the live stock is consigned, which the consignors attach to the bill of lading issued by the carrier, and the money on these drafts is advanced by the local banks throughout the western States [581] and Territories. These drafts are paid by the consignees and the proceeds remitted to the various owners through the banks.

The business thus conducted is alleged to be interstate commerce, and it is further alleged that if the person to whom the live stock is consigned at Kansas City is not a member of the exchange, he is not permitted to and cannot sell or dispose of the stock at the Kansas City market, for the reason that the defendants, and all the other commission merchants, members of the exchange, refuse to buy live stock or in any manner negotiate or deal with or buy from a person or commission merchant who is not a member of the exchange, and thus the owner of live stock shipped to the Kansas City market is compelled to re-ship the same to other markets, and by reason of the unlawful combination existing among the defendants and the other members of the exchange the owner is prevented from delivering this stock at the Kansas City stock yards, and the sale of stock is thereby hindered and delayed, entailing extra expense and loss to the shipper, and placing an obstruction and embargo on the marketing of all live stock shipped from the States and Territories to the Kansas City market which is not consigned to the stock yards company or to the defendants, or some of them, members of the stock exchange.

It is alleged that the defendants, as members of the exchange, have adopted certain rules, among them being rules 9 and 16, which are particularly alleged to be in restraint of trade and commerce between the States, and intended to create a monopoly, in contravention of the laws of the United States in that behalf.

Rule 9 provides as follows:

"SECTION 1. Commissions charged by members of this association for selling live stock shall not be less than the following named rates."

Sections 2, 3, 4, 5, 6 and 7 relate to the amounts of such commissions, and it is alleged that in some instances the commissions are greater than had theretofore been paid.

Section 8 permits the members to handle the business of [582] non-resident commission firms when the stock is consigned directly to or from such firm, at half the rates fixed by the rule, provided the non-resident commission firms are established at the markets named in the section.

Section 10 prohibits the employment of any agent, solicitor or employé except upon a stipulated salary not contingent upon the commissions earned, and it provides that not more than three solicitors shall be employed at one time by a commission firm or corporation, resident or non-resident of Kansas City.

Section 11 forbids any member of the exchange from sending or causing to be sent a prepaid telegram or telephone message quoting the markets or giving information as to the condition of the same, under the penalty of a fine as therein

stated. The rule, however, permits prepaid messages to be sent to shippers quoting actual sales of their stock on the date made; also to parties desiring to make purchases on the market.

Rule 16 provides, in section 1, "That no member of the exchange shall transact business with any persons violating any of the rules or regulations of the exchange, or with an expelled or suspended member after notice of such violation. suspension or expulsion shall have been issued by the secretary or board of directors of the exchange."

It is alleged that the defendants in adopting these rules and in forming the exchange and carrying out the same have violated and are violating the statute of the United States, approved July 2, 1890, c. 647, 26 Stat. 209, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and it is charged that it was the purpose of the defendants, in organizing the exchange and in adopting the rules mentioned, to prevent the shipment or consignment of any live stock to the Kansas City market unless it was shipped or consigned to the Kansas City stock yards and to some one or other of the defendants, members of the exchange, and to compel the shippers of live stock from other States and from the Territories to pay to the defendants the commissions and charges provided for in rule 9, and to preprevent such shippers **[583]** from placing their property on sale at the Kansas City market unless these commissions were paid.

The answer of the defendants admitted their forming the exchange and becoming members thereof, and adopting, among others, the rules specially mentioned in complainants' bill. They denied that the exchange itself engaged in any business whatever, and alleged that it existed simply in order to prescribe rules and provide facilities for the transaction of business by the members thereof, and to govern them by such rules and regulations as have been evolved and sanctioned by the developments of commerce, and which are universally recognized to be just and fair to all concerned.

It was further set up in the answer that each member of the organization was in fact left free to compete in every manner, and by all means recognized to be fair and just, for

his share of the business which comes to the point at which the members of the organization do business; that in adopting their rules they followed in all substantial respects the provisions which had been made upon the same subject respectively by the exchanges theretofore established at Chicago and East St. Louis, Illinois, and which have been since established at St. Louis, Omaha, Indianapolis, Buffalo, Sioux City and Fort Worth; and that the exchange at no time refused to admit as a member any reputable person who was willing to comply with the conditions of membership and to abide by the rules of the organization.

Various allegations in the bill as to the effect of the organization in precluding any sales or purchases of cattle other than by its members are denied.

The defendants also deny that the exercise of their occupation as commission merchants, doing business as members of the exchange, constitutes or amounts to interstate commerce, within the meaning of the Constitution or laws of the United States. They allege that they have no part in or control over the disposition of the live stock sold by them to others, nor of live stock purchased by them as commission merchants acting for others. They allege that the stock yards company permits any person whatsoever to transact business at its yards who **[584]** will pay the established charges of that company for its services, and that in point of fact a very large part of the business done at said yards is transacted by persons who are not members of the exchange, and without the interposition of such members. It is also alleged in their answer that they are under no obligations to extend the privileges of the exchange to a person who is not a member thereof, who has violated its rules and been suspended from membership, and who has voluntarily withdrawn therefrom, and announced his purpose to carry on his business as a competitor of the members of such exchange, to the destruction of said organization and its rules and to the injury of his competitors.

It is also set up that defendants cannot be compelled to deal with a non-member of their organization, or a person violating its rules, or with one who has been suspended for such violation, or who has withdrawn therefrom, or who

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has announced his intention to destroy said organization and to compete with the members thereof, and the defendants allege that they cannot be compelled to deal with any person whatsoever, and that they had a right to establish said exchange, and now have the right to maintain the same, and to require the observance of its rules and regulations on the part of their associates, so long as they desire to retain the privileges of membership in the body. They allege that their rules are in harmony with the rules and regulations of commercial exchanges which have existed for more than a hundred years, and which are now to be found in every State almost in the United States, and throughout the world, and that such rules and regulations are in all respects legal and binding. They deny all general and special allegations of illegal agreements, combinations or conspiracies to violate any law of the United States, or of the State of Kansas.

The complainants, in addition to their bill, used several affidavits, the tendency of which was to show that by virtue of the adoption of rules 9 and 16, the members of the exchange refused to deal with one who had violated a rule and had been suspended by reason thereof, and that by reason of this refusal to do business, the member thus suspended was [585] substantially incapacitated from carrying on his business as a commission merchant, and that by this combination defendants, in forming such rule and in adhering to it, have greatly injured the business of such member.

The defendants read counter-affidavits for the purpose of sustaining their answer, which were replied to by the complainants filing affidavits in rebuttal, and upon these affidavits and the pleadings above described an application for an injunction was made to the Circuit Court of the United States for the District of Kansas, First Division. That court, after argument, granted an injunction restraining the defendants from combining by contract, express or implied, so as by their acts, conduct or words to interfere with, hinder or impede others in shipping, trading, selling or buying live stock that is received from the States and Territories at the stock yards in Kansas City, Missouri, and Kansas City, Kansas; also enjoining them from acting under the rules of the exchange known as rules 9 and 16, and from attempting to impose any

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fines or penalties upon members for trading or offering to trade with any person respecting the purchase and sale of any live stock; and also from discriminating in favor of any member of the exchange because of such membership, and especially from discriminating against any person trading at the stock yards, and from refusing, by united or concerted action, or by word, persuasion, threat or by other means, to deal or trade with persons with respect to such live stock who are not members of the association, because they are not members of such association, or in any manner from interfering with the right and freedom of all and any persons trading or desiring to trade in such live stock at the stock yards, the same as if the exchange did not exist. The defendants were also enjoined from agreeing or attempting to limit the right of any person in business at the Kansas City stock yards to employ labor or assistance in soliciting shipments of live stock from other States or Territories, and from enforcing any agreement not to send prepaid telegrams from the stock yards to any other State or Territory.

The District Judge delivered an opinion upon granting the [586] injunction, which will be found reported in 82 Fed. Rep. 529. From the order granting it an appeal was taken by the defendants to the United States Circuit Court of Appeals for the Eighth Circuit, which court certified to this court certain questions under the provisions of section 6 of the act of March 3, 1891, and thereupon a writ of certiorari was issued from this court, and the whole case brought here for decision.

Mr. L. C. Krauthoff for Hopkins and others.

Mr. John S. Miller filed a brief for same.

Mr. Gustavus A. Koerner filed a brief for same.

Mr. Samuel W. Moore for the United States. *Mr. Solicitor General* was on his brief.

Mr. Justice Peckham, after stating the case, delivered the opinion of the court.

The relief sought in this case is based exclusively on the act of Congress approved July 2, 1890, c. 647, entitled "An act

to protect trade and commerce against unlawful restraints and monopolies," commonly spoken of as the Anti-Trust act. 26 Stat. 209.

The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce.

The question meeting us at the threshold, therefore, in this case is, what is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several States or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several States or with foreign nations?

[587] That part of the bill which alleges that no one is permitted to do business at the cattle market at Kansas City unless he is a member of this exchange, does not mean that there is any regulation at the stock yards by which one who is not a member of the exchange is prevented from doing business, although ready to pay the established charges of the stock yards company for its services; but it simply means that by reason of the members of the exchange refusing to do business with those who are not members the non-member cannot obtain the facilities of a market for his cattle such as the members of the exchange enjoy. It is unnecessary at present to discuss the question whether there is any illegality in a combination of business men who are members of an exchange not to do business with those who are not members thereof, even if the business done were in regard to interstate commerce. The first inquiry to be made is as to the character of the business in which defendants are engaged, and if it be not interstate commerce, the validity of this agreement not to transact their business with non-members does not come before us for decision.

We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has

been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner.

As set forth in the record, the main facts are that the defendants have entered into a voluntary association for the purpose of thereby the better conducting their business, and that after they had entered into such association they still continued their individual business in full competition with each other, and that the association itself, as an association, does no business whatever, but is simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; to maintain and uphold a proper way of doing it; and to create the means for preserving business integrity in the transaction [588] of the business itself. The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the State from other States or from the Territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city.

If an owner of cattle in Nebraska accompanied them to Kansas City and there personally employed one of these defendants to sell the cattle at the stock yards for him on commission, could it be properly said that such defendant in conducting the sale for his principal was engaged in interstate commerce? Or that an agreement between himself and others not to render such services for less than a certain sum was a contract in restraint of interstate trade or commerce? We think not. On the contrary, we regard the

services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce.

Is the true character of the transaction altered when the owner, instead of coming from Nebraska with his cattle, sends them by a common carrier consigned to one of the defendants at Kansas City with directions to sell the cattle and render him an account of the proceeds? The services rendered are the same in both instances, only in one case they are rendered under a verbal contract made at Kansas [589] City personally, while in the other they are rendered under written instructions from the owner given in another State. This difference in the manner of making the contract for the services cannot alter the nature of the services themselves. If the person, under the circumstances stated, who makes a sale of the cattle for the owner by virtue of a personal employment at Kansas City, is not engaged in interstate commerce when he makes such sale, we regard it as clear that he is not so engaged, although he has been employed by means of a written communication from the owner of the cattle in another State.

The by-laws of the exchange relate to the business of its members who are commission merchants at Kansas City, and some of these by-laws, it is claimed by the Government, are in violation of the act of Congress, because they are in restraint of that business which is in truth interstate commerce That one of the by-laws which relates to the commissions to be charged for selling the various kinds of stock, is particularly cited as a violation of the act. In connection with that by-law it will be well to examine with some detail the nature of the defendants business.

It is urged that they are active promoters of the business of selling cattle upon consignment from their owners in other States, and that in order to secure the business the defendants send their agents into other States to the owners of the cattle to solicit the business from them; that the defendants also lend money to the cattle owners and take back mortgages

upon the cattle as security for the loan; that they make advances of a portion of the purchase price of the cattle to be sold, by means of the payment of drafts drawn upon them by the shippers of the cattle in another State at the time of the shipment. All these things, it is said, constitute intercourse and traffic between the citizens of different States, and hence the by-law in question operates upon and affects commerce between the States.

The facts stated do not, in our judgment, in any degree alter the nature of the services performed by the defendants, nor do they render that particular by-law void as in restraint [590] of interstate trade or commerce because it provides for a minimum amount of commissions for the sale of the cattle.

Objections are taken to other parts of the by-laws which we will notice hereafter.

Notwithstanding these various matters undertaken by defendants, we must keep our attention upon the real business transacted by them, and in regard to which the section of the by-law complained of is made. The section amounts to an agreement, and it relates to charges made for services performed in selling cattle upon commission at Kansas City. The charges relate to that business alone. In order to obtain it the defendants advance money to the cattle owner; they pay his drafts, and they aid him to keep his cattle and make them fit for the market. All this is done as a means towards an end; as an inducement to the cattle owner to give one of the defendants the business of selling the cattle for him when the owner shall finally determine to sell them. That business is not altered in character because of the various things done by defendants for the cattle owner in order to secure it. The competition among the defendants and others who may be engaged in it, to obtain the business, results in their sending outside the city, to cattle owners, to urge them by distinct and various inducements to send their cattle to one of the defendants to sell for them. In this view it is immaterial over how many States the defendants may themselve or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the

services at that point in selling the cattle for the owner. Thus everything at last centres at the market at Kansas City, and the charges are for services there, and there only, performed.

The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a [591] combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another State, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade. The commission agent in selling the cattle for their owner simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce, nor is his agreement with others engaged in the same business, as to the terms upon which they would provide these facilities, rendered void as a contract in restraint of that commerce. Even all agreements among buyers of cattle from other States are not necessarily a violation of the act, although such agreements may undoubtedly affect that commerce.

The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different States are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from

another State. Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation. Indirectly and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself; they are charges for the [592] facilities given or provided the owner in the course of the movement from the home *situs* of the article to the place and point where it is sold.

The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 329, 330; *Kentucky & Indiana Bridge Company* v. *Louisville &c. Railroad*, 37 Fed. Rep. 567.

To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act. The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects it only incidently and remotely although certainly. *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1. Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agreements which

in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature.

[539] It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the landowners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the landowners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the States? Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the act because horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one State to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at their place of destination to the cattle yards where sold, for less than a minimum sum, come within the statute? Would an agreement among them- [594] selves by locomotive engineers, firemen or trainmen engaged in the service of an interstate railroad not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

In our opinion all these queries should be answered in the negative. The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid provided the charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate. *New York, Lake Erie & Western Railroad* v. *Pennsylvania*, 158 U. S. 431, 439.

An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct. *Sherlock* v. *Alling*, 93 U. S. 99–103; *United States* v. *E. C. Knight Company*, 156 U. S. 1, 16; *Pittsburg & Southern Coal Co.* v. *Louisiana*, 156 U. S. 590, 597; *Transportation Company* v. *Parkersburg*, 107 U. S. 691; *Ficklen* v. *Shelby County*, *supra*. Reasonable charges for the use of a facility for the transportation of interstate commerce have heretofore been regarded as valid in this court, even though such charges might necessarily enhance the cost of doing the business. *Packet Company* v. *St. Louis*, 100 U. S. 423; *Packet Company* v. *Catlettsburg*, 105 U. S. 559; *Transportation Company* v. *Parkersburg*, 107 U. S. 691; *Huse* v. *Glover*, 119 U. S. 543; *Ouachita Packet Company* v. *Aiken*, 121 U. S. 444; *St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92. An agreement among the owners of such facilities, to charge not less than

a minimum rate for their use, cannot be condemned as illegal under the act of Congress.

The fact that the above cited cases relate to tangible property, the use of which was charged for, does not alter the [595] reasoning upon which the decisions were placed. The charges were held valid because they related to facilities furnished in aid of the commerce and which did not constitute a regulation thereof. Facilities may consist in privileges or conveniences provided and made use of or in services rendered in aid of commerce, as well as in the use of tangible property, and so long as they are facilities and the charges not unreasonable an agreement relating to their amount is not invalid. The cattle owner has no constitutional right to the services of the commission agent to aid him in the sale of his cattle and the agent has the right to say upon what terms he will render them, and he has the equal right, so far as the act of Congress is concerned, to agree with others in his business not to render those services unless for a certain charge. The services are no part of the commerce in the cattle.

In *Brown* v. *Maryland*, 12 Wheat. 419, Chief Justice Marshall, while maintaining the right of an importer to sell his article in the original package, free from any tax, recognized the distinction between the importer selling the article himself and employing an auctioneer to do it for him, and he said that in the latter case the importer could not object to paying for such services as for any other, and that the right to sell might very well be annexed to importation without annexing to it also the privilege of using auctioneers, and thus to make the sale in a peculiar way. In such case a tax upon the auctioneer's license would be valid.

The same view is enforced in *Emert* v. *Missouri*, 156 U. S. 296.

The right of the cattle owners themselves to sell their own cattle is not affected or touched by the agreement in question, while the privilege of having their cattle sold for them at the market place frequented by defendants, and with the aid of one of them, is a privilege which they are charged for, and which is not annexed to their right to sell their own cattle.

It is possible that exorbitant charges for the use of these facilities might have similar effect as a burden on commerce that a charge upon commerce itself might have. In a case [596] like that the remedy would probably be forthcoming. *Transportation Co.* v. *Parkersburg*, 107 U. S. 691. As was said by Mr. Justice Field in *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288, 294, 295, "should there be any gross injustice in the rate of tolls fixed, it would not in our system of government, remain long uncorrected."

But whether the charges are or are not exorbitant is a question primarily of local law, at least in the absence of any superior or paramount law providing for reasonable charges. *Transportation Co.* v. *Parkersburg*, 107 U. S. 691. This case does not involve that question.

If charges of the nature described do not amount to a regulation of interstate trade or commerce because they touch it only in an indirect and remote way, or else because they are in the nature of compensation for the use of property or privileges as a mere facility for that commerce, it would for a like reason seem clear that agreements relating to the amounts of such charges among those who furnish the privileges or facilities are not in restraint of that kind of trade. While the indirect effect of the agreements may be to enhance the expense to those engaged in the business, yet as the agreements are in regard to compensation for privileges accorded for services rendered as a facility to commerce or trade, they are not illegal as a restraint thereon.

The facilities or privileges offered by the defendants are apparent and valuable. The cattle owner has the use of a place for his cattle furnished by the defendants and all the facilities arising from a market where the sales and purchases are conducted under the auspices of the association of which the defendants are members, and in a manner the least troublesome to the owners and at the same time the most expeditious and effective. Each of these defendants has the right to have the cattle which are consigned to him taken to the cattle yards, where, by virtue of the arrangements made by defendants with the owners of the yards, the cattle are placed in pens, watered and fed, if necessary, and a sale effected at the earliest moment. It is these facilities and

services which are paid for by a commission on the sale effected by the commission men. [597] If, as is claimed, the commission men sometimes own the cattle they sell, then the rules do not apply, for they relate to charges made for selling cattle upon commission and not at all to sales of cattle by their owners.

Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted. *Welton* v. *Missouri*, 91 U. S. 275; *Mobile County* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196; *Hooper* v. *California*, 155 U. S. 648, 653; *United States* v. *E. C. Knight Company*, 156 U. S. 1.

But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility.

The services of members of the different stock and produce exchanges throughout the country in effecting sales of the articles they deal in are of a similar nature. Members of the New York Stock Exchange buy and sell shares of stock of railroads and other corporations, and the property represented by such shares of stock is situated all over the country. Is a broker whose principal lives outside of New York State, and who sends him the shares of stock or the bonds of a corporation created and doing business in another State, for sale, engaged in interstate commerce? If he is employed to purchase stock or bonds in a like corporation under the same circumstances, is he then engaged in the business of interstate commerce? It may, perhaps, be answered that stocks or

[598] bonds are not commodities, and that dealers therein are not engaged in commerce. Whether it is an answer to the question need not be considered, for we will take the case of the New York Produce Exchange. Is a member of that body to whom a cargo of grain is consigned from a western State to be sold engaged in interstate commerce when he performs the service of selling the article upon its arrival in New York and transmitting the proceeds of the sale less his commissions? Is a New Orleans cotton broker who is a member of the Cotton Exchange of that city, and who receives consignments of cotton from different States and sells them on 'change in New Orleans and accounts to his consignors for the proceeds of such sales less his commission, engaged in interstate commerce? Is the character of the business altered in either case by the fact that the broker has advanced moneys to the owner of the article and taken a mortgage thereon as his security? We understand we are in these queries assuming substantially the same facts as those which are contained in the case before us, and if these defendants are engaged in interstate commerce because of their services in the sale of cattle which may come from other States, then the same must be said in regard to the members of the other exchanges above referred to. We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from States different from the one in which the exchange is situated and the sale made.

The theory upon which we think the by-law or agreement regarding commissions is not a violation of the statute operates also in the case of the other provisions of the by-laws. The answer in regard to all objections is, the defendants are not engaged in interstate commerce.

But special weight is attached to the objection raised to section 11 of rule 9 of the by-laws, which provides against sending prepaid telegrams as set forth in the statement of facts herein. It is urged that the purpose of this section is to prevent the sending of prepaid telegrams by the defend-

ants [599] to their various customers in the different States tributary to the Kansas City market, and that the section is a part of the contract between the members of the exchange, and is clearly an attempt to regulate and restrict the sending of messages by telegraph and telephone between citizens of various States and Territories, and operates upon and directly affects the interstate business of communicating between points in different States by telegraph or telephone.

An agreement among the defendants to abstain from telegraphing in certain circumstances and for certain purposes is so clearly not an attempt to regulate or restrain the general sending of telegrams that it would seem unnecessary to argue the question. An agreement among business men not to send telegrams in regard to their business in certain contingencies, when the agreement is entered into only for the purpose of regulating the business of the individuals, is not a direct attempt to affect the business of the telegraph company, and has no direct effect thereon. Although communication by telegraph may be commerce, and if carried on between different States may be commerce among the several States, yet an agreement or by-law of the nature of the one under consideration is not a burden or a regulation of or a duty laid upon the telegraph company, and was clearly not entered into for the purpose of affecting in the slightest degree the company itself or its transaction of interstate commerce.

The argument of counsel in behalf of the United States, that because none of the States or Territories could enact any law interfering with or abridging the right of persons in Kansas or Missouri to send prepaid telegrams of the nature in question, therefore an agreement to that effect entered into between business men as a means towards the proper transaction of their legitimate business would be void, is, as we think, entirely unsound. The conclusion does not follow from the facts stated. The statute might be illegal as an improper attempt to interfere with the liberty of transacting legitimate business enjoyed by the citizen, while the agreement among business men for the better conduct of their own [600] business, as they think, to refrain from using the telegraph for certain purposes, is a matter purely for their own

consideration. There is no similarity between the two cases, and the principle existing in the one is wholly absent in the other. The private agreement does not, as we have said, regulate commerce or impose any impediment upon it or tax it. Communication by telegraph is free from any burden so far as this agreement is concerned, and no restrictions are placed on the commerce itself.

The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements.

The next by-law which complainants object to is section 10 of the same rule 9, which prohibits the hiring of a solicitor except upon a stipulated salary not contingent upon commissions earned, and which provides that no more than three solicitors shall be employed at one time by a commission firm or corporation.

The claim is that these solicitors are engaged in interstate commerce, and that such commerce must be free from any state legislation and free from the control or restraint by any person or combination of persons. They also object that the rule is an unlawful inhibition upon the privilege possessed by each person under the Constitution to make lawful contracts in the furtherance of his business, and they allege that in this respect these members have surrendered their dominion over their own business and permitted the exchange to establish a species of regency, and that the by-law in regard to the employment of solicitors is one which directly affects interstate commerce.

McCall v. *California*, 136 U. S. 104, is cited for the proposition that the solicitors employed by these defendants are engaged in interstate commerce. In that case the railroad company was itself engaged in such commerce, and its agent in California was taxed by reason of his business in soliciting [601] for his company that which was interstate commerce. The fact that he did not sell tickets or receive or pay out money on account of it was not regarded as material. His principal was a common carrier, engaged in interstate com-

merce, and he was engaged in that commerce because he was soliciting for the transportation of passengers by that company through the different States in which the railroad ran from the State of California. In the case before us the defendants are not employed in interstate commerce but are simply engaged in the performance of duties or services relating to stock upon its arrival at Kansas City. We do not think it can be properly said that the agents of the defendants whom they send out to solicit the various owners of stock to consign the cattle to one of the defendants for sale are thereby themselves engaged in interstate commerce. They are simply soliciting the various stock owners to consign the stock owned by them to particular defendants at Kansas City, and until the arrival of the stock at that point and the delivery by the transportation company no duties of an interstate-commerce nature arise to be performed by the defendants. As the business they do is not interstate commerce, the business of their agents in soliciting others to give them such business is not itself interstate commerce. Not being engaged in interstate commerce, the agreement of the defendants through the by-law in question, restricting the number of solicitors to three, does not restrain that commerce, and does not therefore violate the act of Congress under discussion.

The position of the solicitors is entirely different from that of drummers who are travelling through the several States for the purpose of getting orders for the purchase of property. It was said in *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, that the negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce.

But the solicitors for these defendants have no property or goods for sale, and their only duty is to ask or induce those who own the property to agree that when they send it to **[602]** market for sale they will consign it to the solicitor's principal, so that he may perform such services as may be necessary to sell the stock for them and account to them for the proceeds thereof. Unlike the drummer who contracts in one State for the sale of goods which are in another, and which are to be thereafter delivered in the State in which the contract is made, the solicitor in this case has no goods or samples of goods and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal. There is no interstate commerce in that business.

Hooper v. *California*, 155 U. S. 648, is another illustration of the meaning of the term "commerce," as used in the Constitution of the United States. In that case, contracts of marine insurance are stated not to appertain to interstate commerce, and cases are cited upon the nature of the contract of insurance generally at page 653 of the opinion.

It is also to be remarked that the effect of the agreement as to the number of solicitors to be employed by defendants can only be remote and indirect upon interstate commerce. The number of solicitors employed has no direct effect upon the number of cattle transported from State to State. The solicitors do not solicit transportation of the cattle. They are not in the interest of the transportation company, and the transportation is an incident only. They solicit a consignment of cattle to their principals, so that the latter may sell them on commission and thus transact their local business. The transportation would take place any way and the cattle be consigned for sale by some one of the defendants or by others engaged in the business. It is not a matter of transportation but one of agreement as to who shall render the services of selling the cattle for their owner at the place of destination.

We say nothing against the constitutional right of each one of the defendants and each person doing business at the Kansas City stock yards to send into distant States and Territories as many solicitors as the business of each will warrant. This **[603]** original right is not denied or questioned. But cannot the citizen, for what he thinks good reason, contract to curtail that right? To say that a State would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a

way which they may think the most conducive to their own interests. What a State may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing.

The liberty of contract as referred to in *Allgeyer* v. *Louisiana*, 165 U. S. 578, is the liberty of the individual to be free, under certain circumstances, from the restraint of legislative control with regard to all his contracts, but the case has no reference to the right of individuals to sometimes enter into those voluntary contracts by which their rights and duties may properly be measured and defined and in many cases greatly restrained and limited.

We agree with the court below in thinking there is not the slightest materiality in the fact that the state line runs through the stock yards in question, resulting in some of the pens in which the stock may be confined being partly in the State of Kansas and partly in the State of Missouri, and that sales may be made of a lot of stock which may be at the time partly in one State and partly in the other. The erection of the building and the putting up of the stock pens upon the ground through which the state line ran were matters of no moment so far as any question of interstate commerce is concerned. The character of the business done is not in the least altered by these immaterial and incidental facts.

It follows from what has been said that the complainants have failed to show the defendants guilty of any violations of the act of Congress, because it does not appear that the defendants are engaged in interstate commerce, or that any agreements or contracts made by them and relating to the conduct of their business are in restraint of any such commerce.

Whether they refused to transact business which is not interstate commerce, except with those who are members of the exchange, and whether such refusal is justifiable or not, **[604]** are questions not open for discussion here. As defendants' actions or agreements are not a violation of the act of Congress, the complainants have failed in their case, and the order for the injunction must be

Reversed and the case remitted to the Circuit Court of the United States for the District of Kansas, First Division, with directions to dismiss the bill with costs.

MR. JUSTICE HARLAN dissented.

MR. JUSTICE MCKENNA took no part in the decision of this case.

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[604] ANDERSON *v.* UNITED STATES.[a]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 181. Argued February 25, 28, 1898.—Decided October 24, 1898.

[171 U. S., 604.]

The Traders' Live Stock Exchange was an unincorporated association in Kansas City, whose members bore much the same relation to it, and through it carried on much the same business as that carried on by the members of the Kansas City Live Stock Exchange, considered and passed upon in *Hopkins* v. *United States*, just decided. The main difference was, that the members of the Traders' Exchange, defendants in the present proceedings, were themselves purchasers of cattle on the market, while the defendants in the former case were commission merchants who sold cattle upon commission as a compensation for their service. The articles of association of the Traders' Exchange contained the following preamble: "We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to cultivate courteous and manly conduct towards each other, and give dignity and responsibility to yard traders, have associated ourselves together under the name of Traders' Live Stock Exchange, and hereby agree, each with the other, that we will faithfully observe and be bound by the following rules and by-laws and such new rules, additions or amendments as may from time to time be adopted in conformity with the provisions thereof from the date of organization." The rules objected to in the bill in this case were the following: "Rule 10. This exchange will not recognize any yard trader unless he is a member of the Traders' Live Stock Exchange. Rule 11. **[605]** When there are two or more parties trading together as partners, they shall each and all of them be members of this

[a] Certified to the Supreme Court by the Circuit Court of Appeals, Eighth Circuit (82 Fed., 998). Memorandum decision. See p. 742. Decision in the Circuit Court not reported.

Syllabus.

exchange. Rule 12. No member of this exchange shall employ any person to buy or sell cattle unless such person hold a certificate of membership in this exchange. Rule 13. No member of this exchange shall be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party." *Held:*

(1) That this court is not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act;

(2) That, following the preceding case, in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations;

(3) That where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object;

(4) That the rules are evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and that for such purpose they are reasonable and fair, and that they can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress.[a]

[43 L. ed., 300.][b]

[An agreement among persons engaged in the common business, as yard trader, of buying at a city stock-yard cattle which came from different states, that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, or buy cattle from those who also sell to yard traders who are not members of the association, is not in violation of the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies].

[A rule of a live-stock exchange, that its members shall not recognize any yard trader who is not also a member of the exchange, is not in restraint of, or an attempt to monopolize, trade, where the exchange does not itself do any business, and there is nothing to prevent all yard traders from being members of the exchange, and no one is hindered from having access to the yards or having all their facilities, except that of selling to members of the exchange.]

[Rules to enforce the purpose and object of such exchange, if reasonable and fair, cannot, except remotely, affect interstate trade and commerce, and are not void as violations of the act of July 2, 1890.]

[a] The foregoing syllabus copyrighted, 1898, by Banks & Bros.

[b] The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 43, p. 300. Copyrighted, 1899, by The Lawyers' Co-Operative Publishing Co.

Statement of the Case.

THIS suit is somewhat similar to the *Hopkins suit*, just decided, and was brought by the United States against the defendants named, who were citizens and residents of the Western Division of the Western District of Missouri and members of a voluntary unincorporated association known and designated as the Traders' Live Stock Exchange, the suit being brought for the purpose of obtaining a decree dissolving the exchange and enjoining the members thereof from entering into or continuing any sort of combination to deprive any people engaged in shipping, selling, buying and handling **[606]** live stock (received from other States and from the Territories, intended to be sold at the Kansas City market), of free access to the markets at Kansas City, and to the same facilities afforded by the Kansas City stock yards, to defendants and their associate members of the Traders' Live Stock Exchange.

The bill was filed under the direction of the Attorney General of the United States by the United States District Attorney for the Western District of Missouri. It alleged in substance that the exchange was governed by a board of eight directors, who carried on the business thereof with the consent and approbation of the defendants, they personally being members of the exchange. It then made the same allegations in relation to the stock yards being partly in Kansas City, Kansas, and partly in Kansas City, Missouri, that are contained in the bill in the *Hopkins case*, just decided, and also as to the sales of herds or droves of cattle which were at the time of the sale partly in one State and

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partly in another. It is further alleged that the Kansas City stock yards are a public market, and, next to the market at Chicago in the State of Illinois, the largest live stock market in the world, and vast numbers of cattle, hogs and other live stock are received annually at the market, shipped from various States and from the Territories, and are sold at the market to buyers who reside in other States and Territories, and who reship the stock; that the stock is shipped to the market under contracts by which the shipper is permitted to unload the stock at the Kansas City stock yards, rest, water and feed the same, and is accorded the privilege of selling the stock on the Kansas City market if the prices prevailing at the time justify the sale, and many head of such stock are so sold; that prior to the month of March, 1897, as alleged, the defendants herein were engaged as speculators at the Kansas City stock yards, and were buying upon the market and reselling upon the same market and reshipping to other markets in other States the cattle so received at the Kansas City stock yards; that all the live stock shipped to and received at these stock yards is consigned to commission merchants, who take charge of the stock when it is received, and who sell the same **[607]** to packing houses located at Kansas City, Missouri, and Kansas City in the State of Kansas, and they sell large numbers of cattle to the defendants herein.

The bill then alleges that the defendants "have unlawfully entered into a contract, combination and conspiracy in restraint of trade and commerce among the several States and with foreign nations, in this, to wit, that they have unlawfully agreed, contracted, combined and conspired to prevent all other persons than members of the Traders' Live Stock Exchange, as aforesaid, from buying and selling cattle upon the Kansas City market at the Kansas City stock yards as aforesaid; that the commission, firm, person, partnership or corporation to whom said cattle are consigned at Kansas City, as aforesaid, is not permitted to and cannot sell or dispose of said cattle at the Kansas City market as aforesaid to any buyer or speculator at the Kansas City stock yards unless said buyer or speculator is a member of the Traders' Live Stock Exchange, and these defendants (and each of them), unlawfully and oppressively refuse to purchase cattle, or in

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any manner negotiate or deal with or buy from any commission merchant who shall sell or purchase cattle from any speculator at the said Kansas City stock yards who is not a member of the said Traders' Live Stock Exchange; that by and through the unlawful agreement, combination and conspiracy of these defendants the business and traffic in cattle at the said Kansas City stock yards is interfered with, hindered and restrained, thus entailing extra expense and loss to the owner, and placing an obstruction and embargo on the marketing of cattle shipped from the States and Territories aforesaid to the Kansas City stock yards."

It is further alleged that, acting in pursuance of the unlawful combination above described, the board of directors of the exchange have imposed fines upon certain members of the exchange "who had traded with persons, speculators upon the markets, who were not members of the said live stock exchange, and within three months last past have imposed fines upon members of said live stock exchange who have traded with commission firms at said Kansas City stock yards **[608]** which said commission firms had bought from, and sold cattle to speculators upon said market who were not members of the said live stock exchange."

It was further stated in the bill that in carrying out the purposes and aims of this exchange and by the conduct of its members engaged in this alleged combination, conspiracy and confederation, they were acting in violation of the laws of the United States, and particularly in violation of section 1 of the act of Congress, approved July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, and in the prosecution of this unlawful combination they had agreed to hinder and delay the business of buying and selling cattle at the market named and had confederated together in restraint of trade and commerce between the States, and that the object of the defendants in organizing the exchange was to prevent the sale by any commission merchant at the Kansas City stock yards of any cattle to any person who might be a buyer and speculator upon the market who is not a member of the exchange.

Accompanying this bill were several affidavits of indi-

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viduals not members of the exchange, but who were traders or speculators at the stock yards, and those persons said that they were acquainted with the association in question and with the officers and members, and that they did everything in their power to prevent other persons who were not members from trading at the stock yards, and a number of instances were given in which the affiants who were not members of the exchange were endeavoring to do business with commission merchants and others at the exchange in question, when the affiants were notified that they could not continue in business unless they became members of the association, and where partnerships were engaged in business where one partner was a member of the association, the partner who was a member was notified that he could not continue in the partnership business with the other unless such other also became a member; that they had attempted to buy cattle from a great many commission firms and from their salesmen at these stock yards, **[609]** but as soon as they went into the yards where the cattle were that were consigned to commission firms and attempted to purchase them, some of the defendants would appear, call the salesman aside, and, after having a conversation with such salesman, the latter would invariably return to affiant and say that he could not price cattle to the affiant or sell the same to him, as he had been warned by members of the exchange not to do so; that the Traders' Live Stock Exchange would not permit other traders and speculators upon the market, and that the exchange does not permit commission firms at the stock yards to sell cattle consigned to them to any trader or speculator upon the market who is not a member of the exchange, and that commission firms had been notified by the officers of the stock exchange not to sell to speculators on the market who were not members of the Live Stock Exchange, and where commission firms sold cattle to traders and speculators upon the market who were not members of the exchange, the association and members thereof would boycott the commission firm making such sales, and refuse to purchase any cattle from them, and refuse to go into the lots and look at cattle which had been consigned to them.

Upon the bill and affidavits application was made to the Circuit Court for the Western Division of the Western District of Missouri for an injunction as prayed for in the bill, in opposition to which application various affidavits were read on the part of the defendants, and copies of the articles of association and by-laws of the exchange were attached to the affidavit of the president of the exchange and read on the motion.

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Among other affidavits was that of the general superintendent of the stock yards company, who said that he had known the organization, the Traders' Live Stock Exchange, since its formation, and that it had been a benefit to the live stock market at Kansas City by furnishing constant buyers for cattle shipped to the market, no matter how large the receipts for any one day or series of days might be, and also by raising the standard of business integrity among its members, because it required every member to comply with his business promises **[610]** and verbal agreements; that no embargo was placed upon any one purchasing or desiring to purchase cattle at the yards, but a free and open market was offered to all buyers and sellers; that the members of the organization were engaged in the business of buying and selling cattle on the market, and were competitors among and against each other; that their organization did not restrain or interfere with interstate or local commerce, and the members did not monopolize or attempt to monopolize the business of buying and selling cattle at Kansas City, nor did the organization in any manner tend to limit or decrease the number of cattle marketed at Kansas City, but that it had the contrary effect; that about eighty-five per cent of the total receipts for the years 1895, 1896 and 1897 at the Kansas City market of cattle had been billed to the Kansas City market alone for purposes of sale there.

Other affidavits were presented to the same effect. Also the affidavit of the president of the exchange. The president denied all allegations in relation to conspiracies to prevent other persons than members of the exchange from buying and selling cattle upon the Kansas City market, and on the contrary alleged that in buying cattle the defendants were in competition with each other, with the representative buyers of all the packing houses, with the representatives of the various commission merchants who buy constantly on orders from a

distance, and with others who buy on orders on their own account, none of whom are members of the exchange, and that with these various classes of buyers the defendants constantly deal, and that in selling cattle they compete with each other and with shippers and commission merchants offering stock for sale on the market; that the business in which these defendants are engaged is that of buying and selling cattle known as "stockers and feeders:" that the business is purely local to that market; that the defendants do not deal in quarantine cattle subject to government inspection or cattle shipped through to other markets, with or without the privilege of the Kansas City market, nor in fat cattle sold on the local market shipped to other States or to foreign countries; that except in rare instances both purchases and sales made **[611]** by the defendants are made from and to persons not members of the exchange, and that in the judgment of the president about ninety-nine per cent of the transactions by the defendants are with persons not members of the exchange.

A copy of the articles of association is annexed to the affidavit, which contains the following preamble:

"We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to cultivate courteous and manly conduct towards each other, and give dignity and responsibility to yard traders, have associated ourselves together under the name of Traders' Live Stock Exchange, and hereby agree, each with the other, that we will faithfully observe and be bound by the following rules and by-laws and such new rules, additions or amendments as may from time to time be adopted in conformity with the provisions thereof from the date of organization."

Rules 10, 11, 12 and 13 are as follows:

"Rule 10. This exchange will not recognize any yard trader unless he is a member of the Traders' Live Stock Exchange.

"Rule 11. When there are two or more parties trading together as partners, they shall each and all of them be members of this exchange.

"Rule 12. No member of this exchange shall employ any person to buy or sell cattle unless such person hold a certificate of membership in this exchange.

"Rule 13. No member of this exchange shall be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party."

These are the rules which are specially obnoxious to the complaints, and are alleged to be in their effect in violation of the Federal statute above mentioned.

Mr. R. E. Ball for Anderson and others. *Mr. I. P. Ryland* and *Mr. John L. Peak* were on his brief.

Mr. John R. Walker for the United States. *Mr. Solicitor General* was on his brief.

[612] Mr. Justice Peckham, after stating the case, delivered the opinion of the court.

There is really no dispute in regard to the facts in the case. Although the bill contains various allegations in regard to conspiracies, agreements and combinations in restraint of trade and in violation of the Federal statute, yet there is no evidence of any act on the part of the defendants preventing access to the yards or preventing purchases and sales of cattle by any one, other than as such sales may be prevented by the mere refusal on the part of the defendants as "yard traders" to do business with those who are also yard traders, but are not members of the exchange, or with commission merchants where such commission merchants themselves do business with yard traders who are not members of the exchange. In other words, there is no evidence and really no charge against the defendants that they have done anything other than to form this exchange and adopt and enforce the rules mentioned above, and the question is whether by their adoption and by peacefully carrying them out without threats and without violence, but by the mere refusal to do business with those who will not respect their rules, there is a violation of the Federal statute.

This case differs from that of *Hopkins* v. *United States*, *supra*, in the fact that these defendants are themselves purchasers of cattle on the market, while the defendants in the *Hopkins case* were only commission merchants who sold the cattle upon commission as a compensation for their services.

Counsel for the Government assert that any agreement or combination among buyers of cattle coming from other States, of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce.

The facts first set forth in the complainants' bill upon which to base the claim that the business of defendants is in-

terstate commerce, we have already decided in the *Hopkins case* to be immaterial. The particular situation of the yards, partly in Kansas and partly in Missouri, we there held was a fact without any weight, and one which did not make business inter- **[613]** state commerce which otherwise would not partake of that character.

There remain in the bill of the complainants the allegations that the cattle come from various States and are placed on sale at these stock yards which form the only available market for many miles around, and that they are sold by the commission merchants and are bought in large numbers by the defendants who have entered into what the complainants allege to be a contract, combination and conspiracy in restraint of trade and commerce among the several States, which contract, etc., it is alleged is carried out by defendants unlawfully and oppressively refusing to purchase cattle from a commission merchant who sells or purchases cattle from any speculator (yard trader) who is not a member of the exchange; and it is further alleged that by these means the traffic in cattle at the Kansas City stock yards is interfered with, hindered and restrained, and extra expense and loss to the owner incurred, and that thereby the defendants have placed an obstruction and embargo on the marketing of cattle shipped from other States. All these results are alleged to flow from the agreement among the defendants as contained in the by-laws of their association, particularly those numbered ten, eleven, twelve and thirteen, copies of which are set forth in the statement of facts herein.

There is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading or selling their stock, or that they have in any way interfered with the freedom of access to the stock yards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stock yards company to the defendants as members of the exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to.

In regard to rule 10, the question is whether, without a

violation of the act of Congress, persons who are engaged in the common business as yard traders of buying cattle at the **[614]** Kansas City stock yards, which come from different States, may agree among themselves that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, nor will they buy cattle from those who also sell to yard traders who are not members of the association.

It will be remembered that the association does no business itself. Those who are members thereof compete among themselves and with others who are not members, for the purchase of the cattle, while the association itself has nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. Any yard trader can become a member of the association upon complying with its conditions of membership, and may remain such as long as he comports himself in accordance with its laws. A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market prices of cattle have been lowered by reason of its existence. There is no feature of monopoly in the whole transaction.

The defendants are engaged in buying what are called "stockers and feeders;" being cattle not intended for any other market, and the demand for which is purely local. They have arrived at their final destination when offered for sale, and there is free and full competition for their purchase between all the members of the exchange, as well as between them and all buyers not members thereof, who are not also yard traders. With the latter the defendants will not compete, nor will they buy of the commission men if the latter continue to sell cattle to such yard traders.

Have the defendants the right to agree to conduct their own private business in this way?

Whether there is any violation of the act of Congress by the adoption and enforcement of the other rules of the association, above referred to, will be considered hereafter.

It is first contended on the part of the appellants that they **[615]** are not engaged in interstate commerce or trade, and that therefore their agreement is not a violation of the act. They urge that the cattle, by being taken from the cars in which they were transported and placed in the various pens hired by commission merchants at the cattle yards of Kansas City, and there set up for sale, have thereby been commingled with the general mass of other property in the State, and that their interstate commercial character has ceased within the decisions of this court in *Brown* v. *Houston*, 114 U. S. 622, and *Pittsburg and Southern Coal Co.* v. *Bates*, 156 U. S. 577.

On the other hand, it is answered that the cases cited involved nothing but the general power of the State to tax all property found within its limits, by virtue of general laws providing for such taxation, where no tax is levied upon the article or discrimination made against it by reason of the fact that it has come from another State, and it is maintained that the agreement in question acts directly upon the subject of interstate commerce and adds a restraint to it which is unlawful under the provisions of the statute.

In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act.

It has already been stated in the *Hopkins case*, above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations. Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged,

such agreement will be upheld as **[616]** not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith* v. *Alabama*, 124 U. S. 465, 473; "There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations." The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void. We think, within the plain and obvious construction to be placed upon the act, and following the rules in this regard already laid down in the cases heretofore decided in this court, we must hold the agreement under consideration in this suit to be valid.

From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus to ensure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them and enforcing the same by penalties for their violation. The agreements have been voluntary,

and the [617] penalties have been enforced under the supervision and by members of the association. The preamble adopted by the association in this case shows the ostensible purpose of its formation. It was not formed for pecuniary profits, and a careful perusal of the whole agreement fails, as we think, to show that its purpose was other than as stated in the preamble. In other words, we think that the rules adopted do not contradict the expressed purpose of the preamble, and that the result naturally to be expected from an enforcement of the rules would not directly, if at all, affect interstate trade or commerce. The agreement now under discussion differs radically from those of *United States* v. *Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *United States* v. *Coal Dealers Association of California*, 85 Fed. Rep. 252, and *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271. The agreement in all of these cases provided for fixing the prices of the articles dealt in by the different companies, being in one case iron pipe for gas, water, sewer and other purposes, and coal in the other two cases. If it were conceded that these cases were well decided, they differ so materially and radically in their nature and purpose from the case under consideration, that they form no basis for its decision. This association does not meddle with prices and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting or in any manner restraining interstate commerce, which, if affected at all, can only be in a very indirect and remote manner. The rule has no direct tendency to diminish or in any way impede or restrain interstate commerce in the cattle dealt in by defendants. There is no tendency as a result of the rule, directly or indirectly, to restrict the competition among defendants for the class of cattle dealt in by them. Those who are selling the cattle have the market composed of defendants, and also composed of the representative buyers of all the packing houses at Kansas City, and also of the various commission merchants who are constantly buying on orders and of those who are buying on their own account. This makes a large competition wholly outside of the defendants. The owner of [618] cattle for sale is, therefore,

furnished with a market at which the competition of buyers has a broad effect. All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof.

The design of the defendants evidently is to bring all the yard traders into the association as members, so that they may become subject to its jurisdiction and be compelled by its rules and regulations to transact business in the honest and straightforward manner provided for by them. If while enforcing the rules those members who use improper methods or who fail to conduct their business transactions fairly and honestly are disciplined and expelled, and thereby the number of members is reduced, and to that extent the number of competitors limited, yet all this is done, not with the intent or purpose of affecting in the slightest degree interstate trade or commerce, and such trade or commerce can be affected thereby only most remotely and indirectly, and if, for the purpose of compelling this membership, the association refuse business relations with those commission merchants who insist upon buying from or selling to yard traders who are not members of the association, we see nothing that can be said to affect the trade or commerce in question other than in the most roundabout and indirect manner. The agreement relates to the action of the associates themselves, and it places in effect no tax upon any instrument or subject of commerce; it exacts no license from parties engaged in the commercial pursuits, and prescribes no condition in accordance with which commerce in particular articles or between particular places is required to be conducted. *Sherlock* v. *Alling*, 93 U. S. 99; *Smith* v. *Alabama*, 124 U. S. 465, 473; *Pittsburg and Southern Coal Company* v. *Louisiana*, 156 U. S. 590, 598.

If for the purpose of enlarging the membership of the exchange, and of thus procuring the transaction of their business upon a proper and fair basis by all who are engaged therein, the defendants refuse to do business with those commission men who sell to or purchase from yard traders who are not members of the exchange, the possible effect of such a course [619] of conduct upon interstate commerce is quite remote, not intended and too small to be taken into account.

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The agreement lacks, too, every ingredient of a monopoly. Every one can become a member of the association, and the natural desire of each member to do as much business as he could would not be in the least diminished by reason of membership, while the business done would still be the individual and private business of each member, and each would be in direct and immediate competition with each and all of the other members. If all engaged in the business were to become members of the association, yet, as the association itself does no business, it can and does monopolize none. The amount and value of interstate trade is not at all directly affected by such membership; the competition among the members and with others who are seeking purchasers would be as large as it would otherwise have been, and the only result of the agreement would be that no yard traders would remain who were not members of the association. It has no tendency, so far as can be gathered from its object or from the language of its rules and regulations, to limit the extent of the demand for cattle or to limit the number of cattle marketed or to limit or reduce their price or to place any impediment or obstacle in the course of the commercial stream which flows into the Kansas City cattle market. While in case all the yard traders are not induced to become members of the association, and those who are such members refuse to recognize the others in business, we can see no such direct, necessary or natural connection between that fact and the restraint of interstate commerce as to render the agreement not to recognize them void for that reason. A claim that such refusal may thereby lessen the number of actual traders on the market, and thus possibly reduce the demand for and the prices of the cattle there set up for sale, and so affect interstate trade, is entirely too remote and fanciful to be accepted as valid.

This case is unlike that of *Hopkins* v. *Oxley Stave Company*, 83 Fed. Rep. 912, to which our attention has been called. The case cited was decided without reference to the act of Con- **[620]** gress upon which alone the case at bar is prosecuted, and the agreement was held void at common law as a conspiracy to wrongfully deprive the plaintiff of its right to manage its business according to the dictates of its own judgment. It was also said that the fact could not be overlooked that another object of the conspiracy was to deprive the public at large of the benefits to be derived from a labor-saving machine which seemed to the court to be one of great utility. No question as to interstate commerce arose and none was decided.

Syllabus.

From what has already been said regarding rule 10, it would seem to follow that the other rules (11, 12 and 13) are of equal validity as rule 10, and for the same reasons. The rules are evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and we think that for such purpose they are reasonable and fair. They can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress.

We are of opinion therefore that the order in this case should be reversed and the case remanded to the Circuit Court of the United States for the Western Division of the Western District of Missouri with directions to dismiss the complainants' bill with costs.

MR. JUSTICE HARLAN dissented.

MR. JUSTICE MCKENNA took no part in the decision of this case.

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[479] CRAVENS *v.* CARTER-CRUME CO.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

[92 Fed., 479.]

TRIAL—OBJECTIONS TO EVIDENCE—SUFFICIENCY.—Error cannot be assigned upon the action of the court in receiving documents in evidence, where no ground for their exclusion is stated in the objection made.[a]

MONOPOLIES—COMBINATION TO RESTRICT PRODUCTION—VALIDITY OF CONTRACTS.—At a convention of manufacturers of wooden ware in which 80 per cent. of the production of the country was represented, a combination **[480]** was formed for the purpose of restricting the production of wooden dishes throughout the country, and keeping up the

[a] Syllabus and statement copyrighted, 1899, by West Publishing Co.

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price thereof. To this end it was expected and intended that all the factories would be brought under the control of a central organization, which was to regulate the prices. The articles to which the combination related were such as are in common use. *Held*, that a contract made in pursuance of such combination, by which a manufacturer was guarantied a certain sum as dividends on his stock in the central company, in consideration of the closing of his factory for a year, was contrary to public policy, and therefore unlawful, and would not be enforced by the courts.

Error to the Circuit Court of the United States for the Southern District of Ohio.

Charles Cravens, plaintiff in error, a citizen of Indiana, doing business at Paducah, Ky., under the name of Charles Cravens & Co., brought this action against the Carter-Crume Company, a West Virginia corporation, the National Mercantile Company, an Ohio corporation, and the Crume & Sefton Manufacturing Company, another West Virginia corporation, to recover the sum of $9,000, which he claimed had inured to him under the guaranty of the Carter-Crume Company that the dividends upon certain stock, sold to him by contract between the National Mercantile Company and himself, should amount to the sum of $9,000 for the year then next ensuing. The National Mercantile Company demurred to the petition, and, the demurrer being sustained, the case was dismissed as to that company. The Crume & Sefton Manufacturing Company dropped out of the case by consent of parties. The Carter-Crume Company answered the petition, and the plaintiff replied. As no question arose upon the pleadings, and none of the errors assigned has relation thereto, it is unnecessary to give any detailed statement thereof. The only questions involved are such as arose upon the trial of the case, and they are based entirely upon the testimony. The facts as they appeared upon the trial were substantially these:

The plaintiff, Cravens, was, and for some time had been, engaged in manufacturing wooden dishes and dish machines at Paducah, Ky., at the time of the making of the contract of guaranty, which was on the 28th day of August, 1896. At that time there were also a number of parties engaged in the same kind of business at various other places scattered throughout the United States, principally in the northern portion thereof. One of these was the Carter-Crume Company, which, by its charter, was required to establish its principal office at Niagara Falls, N. Y. The president and secretary kept their offices at that place, but the vice-president and manager had offices at Dayton, Ohio. Another of such manufacturers was the Crume & Sefton Manufacturing Company, the locality of whose principal office is not stated, but it appears to have been doing business at Dayton, Ohio. The National Mercantile Company was an Ohio corporation, having its principal office at Dayton, the majority of the stock in which was owned by parties largely interested in the other two companies just mentioned. William E. Crume, of the Carter-Crume Company, and John C. Crume, of the Crume & Sefton Company, were charter members thereof. William E. Crume was the secretary, and appears to have been largely influential in the direction of the management of the National Mercantile Company. He was also vice president of the Carter-Crume Company, and managed its affairs at Dayton, Ohio. The business for which the National Mercantile Company was incorporated is thus set forth in the third article of incorporation: "Said corporation is formed for the purpose of buying and selling and dealing in wooden ware and grocers' novelties." It was not a manufacturer. This corporation appears to have been formed for the purpose of creating a common controlling head, into connection with which the various manufacturers of wooden dishes throughout the country should, as far as possible, be brought, whereby the output and sale of their manufactures should be controlled in respect to quantity and price. The plaintiff, Cravens, after some preliminary negotiations with the parties representing the corporations doing business at Dayton, as above stated, went there on the date above mentioned, August 28, 1896, for the purpose of meeting and conferring with those parties and others [481] interested in the manufacture of wooden dishes and dish machines. A considerable number of such persons from different places in the country, representing about 80 per cent. of the entire output of wooden dishes in the country, convened there that day, and a meeting was held, which the plaintiff attended, for the purpose of effecting a combination whereby the output of their goods should be restricted and prices maintained. This plan involved the making of contracts by the manufacturers with the National Mercantile Company of a kind similar to that hereinafter stated between the plaintiff and the National Mercantile Company. Having taken some of the stock, the plaintiff was made a director of that company on that day.

The following is an extract from his testimony, as found in the bill of exceptions: "Q. Mr. Cravens, you were contemplating that deal before that? A. I was contemplating a deal with the National Mercantile Company. Q. You went down to Dayton for the purpose of getting into that deal? A. I didn't know. I was asked to go and attend a meeting. Q. In what way? A. A meeting of the different manufacturers. Q. How much of the output of the country was represented at that time? A. I could not say. Q. Have you no idea? A. (No response.) Q. What was the object of the meeting, as stated to you? A. Mr. Crume had been to see me; wanted me to go into the National Mercantile Company. He wanted me to put my factory in. My factory would represent so much stock. My dividend, he said, would amount to six thousand dollars or more. I refused to do it. I told him that I would if Carter-Crume Company would guaranty me nine thousand dollars. I would close my factory, and not run it at all. Q. You were made director of the National Mercantile Company? A. Yes, sir. Q. What was the object of that company, as you understood as a director? A. Well, I saw that they were then working to get all these factories in line. Q. For what purpose? A. They wanted to close my factory. Q. For what purpose? A. To get the factories all in line. Q. As you understand that, as a director of the company? A. They were to maintain prices. Q. And anything else, sir? A. What they wanted to do was to control the business at that time. Q. And that was the object of that meeting, was it not? A. That was the object of that meeting; yes, sir. Q. And you were director of the company? A. I was director of the company. I will state, though, before I went into that company I had the guaranty—I had Mr. Crume's word that Carter-Crume Company would guaranty me nine thousand dollars a year, if I did this. Q. You knew what you were going into? You made the proposition that, if they would guaranty this nine thousand dollars, you would close your factory? A. I was leasing them my machinery. Q. Didn't you know what the Mercantile Company was buying your factory for,—what you were going into it for? A. To get rid of my machinery; to get this nine thousand dollars. Q. Didn't Mr. Crume tell you what he wanted to do? A. That he wanted to get me in line. Q. What for? A. To maintain prices."

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On the occasion of that meeting, the following contracts were entered into between the plaintiff and the other parties named therein:

"CONTRACT.

"This agreement, entered into by and between the National Mercantile Company, a corporation by virtue of and under the laws of Ohio, with office at Dayton, Ohio, their successors or assigns, party of the first part, and Charles Cravens & Co., a co-partnership, of Paducah, Ky., parties of the second part, witnesseth:

"(1) That party of the first part being desirous of leasing all the wood-dish machines now owned or controlled by the party of the second part, and the party of the second part being desirous of renting said machines to the party of the first part, it is hereby agreed that, for the sum of one dollar ($1.00) and other valuable considerations, the party of the second part agrees to lease, and does hereby lease, to the party of the first part, all the wood-dish machines now owned or controlled by it, and all the wood-dish machines that may, during the continuance of this contract, come into the possession or control of the party of the second part.

"(2) It is also agreed and understood that the said machines shall remain [482] in the possession and control of the party of the second part, and it agrees to operate and keep in repair the said machines, and proceed to make wood dishes for the party of the first part, on the following terms and conditions:

"(3) The wood dishes shall be made of gum and maple wood, all light in color, all first quality, and satisfactory to the general trade, and they shall be securely packed in good, substantial crates, containing 250 or 500 dishes, as may be, from time to time, specified by first party. If packed in crates, the crate heads shall be planed, branded, and stenciled as instructed by the party of the first part.

"(4) The party of the first part agrees to take wood dishes per year during the continuance of this contract, which shall be distributed as near as may be to dishes daily.

"(5) It is hereby agreed that the price to be paid for said wood dishes shall be: No. 1-2's, 65c.; No. 1's, 65c.; No. 2's, 75c.; No. 3's, 85c.; No. 5's, $1.05,—per thousand, f. o. b. cars at factory point, and shipped as per instructions from party of the first part; shipping bill, together with invoice, to be promptly mailed to party of the first part. Terms: Cash ten days after date of bill of lading.

"(6) In consideration of the large quantity of wood dishes purchased by the party of the first part, the party of the second part agrees that it will not make for or sell wood dishes, directly or indirectly, to any other person, firm, or corporation.

"(7) The dishes purchased by, and to be made for, the party of the first part shall not become the property of the party of the first part until they are loaded on board cars or vessel, and receipted for by the transportation company.

"(8) It is further agreed that the party of the second part shall make a weekly factory report to the party of the first part; said report to be made out on the Monday following the close of each week, and mailed to the office of the first party. This report to contain a record of the quantity of each size dish made and shipped for the week, and quantity on hand at the end of each week. These reports to be made out on report blanks furnished by the party of the first part.

"(9) The party of the second part agrees to furnish wood dishes additionally in proportion to above-named quantity, at the same prices, and upon the conditions, herein named, if called to do so by the party of the first part.

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"(10) Where the words 'wood dishes' are used herein, it is understood that wire-end wood dishes are meant.

"August 28, 1895.

"THE NATIONAL MERCANTILE COMPANY,
"By W. E. CRUME, *Sec'y.*
"By CHARLES CRAVENS & Co."

"SUPPLEMENTARY AGREEMENT.

"Between the National Mercantile Company of Dayton, Ohio, party of the first part, and Charles Cravens & Co., party of the second part, to be attached to and become a part of an original agreement between the above parties, dated August 28, 1895:

"(1) Party of the second part, being desirous of obtaining forty-nine shares of the capital stock of the National Mercantile Company, hereby agrees to pay for the same five hundred dollars ($500), to be paid for in wood dishes shipped to the order of the party of the first part, all to be of first quality, and at the prices named in the original agreement of August 28, 1895.

"(2) The value of said dishes to be placed to the credit of the second party on the books of the company, representing its shares in the capital stock of the company.

"(3) Said quantity of dishes in value to be furnished by the party of the second part before the party of the first part shall be required to pay cash for dishes, as specified in section 5 of the original agreement.

"(4) It is agreed, upon the expiration of this agreement or any renewal thereof, that the share of assets of the company, as represented by the shares of stock held by the party of the second part, shall be paid over to the party of the second part.

[483] "(5) This agreement to remain in force and effect during the continuance of the contract between the parties hereto of even date herewith.

"THE NATIONAL MERCANTILE COMPANY,
"By W. E. CRUME, *Secretary.*
"By CHARLES CRAVENS & Co.

"It is hereby agreed, by the parties hereto, that the Carter-Crume Company, a corporation under the laws of West Virginia, agrees to assume, and does hereby assume, to make the above quantity of wood dishes at the prices and upon the conditions above named.

"Dated August 28, 1895.

"THE CARTER-CRUME COMPANY,
"By W. E. CRUME, *Vice President.*
"By CHARLES CRAVENS & Co."

"Memorandum of agreement made this 28th day of August, 1895, by and between the Carter-Crume Company, a corporation organized under the laws of the state of West Virginia, party of the first part, and Charles Cravens & Co., of Paducah, Kentucky, parties of the second part, referring to a contract and supplementary agreement made this day between the National Mercantile Company, Dayton, Ohio, and Charles Cravens & Co., of Paducah, Kentucky, parties of the second part: Inasmuch as, under the agreement above referred to, Charles Cravens & Co. have become owners of fifty shares of stock in the National Mercantile Company, parties of the first part guaranty to parties of the second part that the dividends paid by the National Mercantile Company to Charles Cravens & Co., on said fifty shares of stock, shall amount to seven hundred and fifty dollars

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($750) per month, or a total of nine thousand ($9,000) dollars for the year, ending one year from to-day, or, in the event of such dividends not amounting to such amount, then parties of the first part agree to pay to parties of the second part, on or before one year from to-day, the difference in money between the total amount of dividends paid on said fifty shares of stock and the sum of nine thousand ($9,000); it also being a condition of this agreement that party of the second part is not to manufacture the dishes for the National Mercantile Company, as specified in their contract of this date, referred to above, but such dishes are to be made in fulfillment of said contract by the party of the first part. Party of the first part to receive all money paid by the National Mercantile Company for such dishes.

"Signed August 28, 1895.

"THE CARTER-CRUME COMPANY,
"By W. E. CRUME, *Vice President.*
"By CHARLES CRAVENS & Co."

Typewritten minutes of the proceedings at a meeting of the directors of the National Mercantile Company attended by the plaintiff on that day, which a witness testified were taken at the time, were offered in evidence by defendant, and, against objection on behalf of the plaintiff, received, which, among other things, stated that it was resolved: "That it is the policy of this company to hold the price on machine-made wire-end wood butter dishes firm at $1.60 basis, and that the secretary be, and is hereby, instructed to use his best endeavor to stop all attempts to manufacture dishes, or the making of machines for the manufacture of wood dishes, and to use coercive measures, if necessary, to accomplish this result." These minutes had never been entered in any record book of the company.

The plaintiff executed his part of the above agreements, and in due time demanded the $9,000, no part of which had been, or was at any time, paid to him. Numerous other contracts between manufacturers of wooden dishes and the National Mercantile Company or the Carter-Crume Company of a similar character, made about the same time, were offered in evidence, and received, against the objection of counsel for plaintiff, who, however, assigned no reasons or grounds for his objection. Some other incidental facts were shown, but the foregoing is the substance of the case as it appeared upon the trial. The trial judge held, at the conclusion of the evidence, that the contracts between the plaintiff, the National Mercantile Company, and the Carter-Crume Company, were not, standing by themselves, unlawful, but that when taken in connection with the other facts, which had been shown, it appeared that they formed part of an unlawful combination in restraint of trade; [484] that they were therefore contrary to public policy, and could not be enforced. He therefore directed a verdict for the defendant. Counsel for plaintiff duly excepted thereto, and, the verdict and judgment having passed in accordance with the instructions of the court, the case is brought here on writ of error.

Charles W. Baker, for plaintiff in error.

Joseph W. Wilby, for defendant in error.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

Opinion of the Court.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The first of the assignments of error relates to the admission in evidence of the contracts between other parties and the National Mercantile Company of a kind similar to that of the plaintiff with the latter company. But no grounds were stated for the objection to their admission, and for that reason, according to the settled rule, error cannot be assigned upon the action of the court receiving them. 8 Enc. Pl. & Prac. 163, and cases cited. It may not be improper, however, to say that no valid reason occurs to us on which the objection could have been based, seeing that those contracts were immediately connected with the contracts in suit, and, all taken together, constitute the entire transaction in which the parties were engaged. The same observation is applicable to contracts between Cravens and the defendant, the Carter-Crume Company, and the National Mercantile Company, which are copied in the preceding statement of facts. They are to be construed as one.

The second assignment relates to the following ruling of the court at the conclusion of the evidence to the jury:

"Now on the face of the papers themselves, I do not think, and I so charge you, that the contracts—the three of them—are against public policy. But there is evidence tending to show that these contracts were a part of a combination or plan entered into between the manufacturers to the extent of eighty per cent. of the output of the country of wooden dishes, by which they each made a contract with a central company, who was to be the selling company, agreeing to sell all their output to that company at cost, taking shares in that company, and allowing that company to fix the market price for the disposition of the goods after they had been transferred to them for sale, and that these contracts were made for the purpose of maintaining prices, and that for the purpose of maintaining prices further they made contracts to limit the production of machines for the making of wooden dishes."

The record proceeds to state: "Whereupon the counsel for plaintiff excepted to that part of the charge of the court touching the contracts as being against public policy." In explanation, it is proper to say that the above ruling was given in charge to the jury in its preliminary instructions. The jury reported a disagreement. Whereupon the court gave them direct instructions to find for the defendant. The

latter instruction superseded the former, and opens the whole case.

The third assignment is based upon the exception to the direction of the verdict in favor of the defendant. We cannot, of course, assume, and the court below could not, that any fact was established about which there was room for controversy. All questions of fact [485] material to the issue, about which different opinions could fairly have been formed, were for the jury; and the question for us is whether upon the facts, which were substantially uncontroverted, including those to which the plaintiff himself testified, the verdict which the court directed was the only one which the court would have allowed finally to stand. *Railway Co.* v. *Lowery*, 20 C. C. A. 596, 74 Fed. 463, and 43 U. S. App. 408. From the preceding statement of the case as exhibited upon the trial, the material and uncontroverted facts may be gathered into the following synopsis. But first, we lay out of consideration the typewritten minutes of the proceedings at the meeting of the directors of the National Mercantile Company, on August 28, 1896. We think it might well be that the jury would have been justified in sharing the suspicion of counsel for the plaintiff in regard to their genuineness and veracity. It must be admitted that it is most remarkable that any board of directors of a business establishment should pass such a resolution as is quoted in the foregoing preliminary statement, however much in line it might be with their real purposes.

The parties who were engaged in these transactions, of whom the plaintiff was one, representing 80 per cent. of the total product, undertook to, and did in fact, form a combination for the purpose of restricting the production of wooden dishes throughout the country and keeping up the prices thereof. The articles to which this combination had reference were articles in common use. The plaintiff's contracts were part of the means employed for effecting the common object, and he secured the means of sharing in the profits expected to be gained through the combination. To this end all the factories were expected to be brought under the control of the National Mercantile Company, which was to regulate the prices. The plaintiff testified that it was the purpose

to close his factory, and not run it at all. He further testified that it was the purpose "to get all the factories in line," in order "to maintain prices." He was guarantied $9,000 for closing his factory for a year, and the contract included all the dish machines that might come into his possession or control, thus disabling himself from manufacturing, and he obligated himself not to sell any wood dishes to any other person, directly or indirectly, during the continuance of the contract. It is manifest that it was the expectation, and that the parties intended, to get a sufficiently large number of manufacturers into the combination to practically accomplish their purpose. We cannot doubt that such a combination, for such purposes, was opposed to public policy, and therefore unlawful. It is the settled doctrine that one cannot maintain a suit in a court of justice upon a contract entered into for the purpose of promoting such objects. The doctrine was elaborately discussed, upon the principles of the common law, by Judge Taft in a case recently decided by this court. *U. S.* v. *Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271. In that case the question was also discussed whether the anti-trust law of 1890 was applicable to the contract then under consideration. But the relation of that act to the common law was involved in the discussion, and much research was bestowed upon the established principles of the latter. The proposition there maintained [486] was that "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." It was not doubted, nor, indeed, can it be, that where the direct purpose of the contract in suit is to establish, for increasing their profits, a combination among manufacturers and tradesmen whose function is to prevent competition, and thereby prevent the public from obtaining those articles which are in general use, at the prices at which they could be obtained as the result of fair and untrammeled competition, such contract is unlawful, and cannot be enforced. We have, in the foregoing statement of what we suppose to be the conceded rule, restricted it to the case of "articles in

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general use," in order to indicate a test which is not affected by a feature put forward in some decisions as creating a distinction. We do not commit ourselves upon the question whether such distinction exists or not. The result of the application of the test above formulated to the facts of this case is, manifestly, that the contract here in question cannot be enforced. It is argued by counsel for plaintiff that the contract should be sustained, within the principles stated and approved in *U. S.* v. *Addyston Pipe & Steel Co.*, upon the theory that the contract upon which the action is based was collateral merely, and did not require the aid of the agreement for combination. But it seems clear to us that this proposition cannot be maintained. This contract was one of the steps in the forbidden organization, and was intended to be one of many by which the objects of the combination were to be accomplished. Seeing what has been the result to the plaintiff, one cannot help feeling that he may have been duped by more artful men. But he was a business man. It is not claimed for him that he was mentally incompetent in any such sense as to absolve him from responsibility for the legal consequences of his acts, and, in such a case as this, the court does not administer equities according to the relative merit of the parties.

We think the court below was right in directing a verdict for the defendant. The judgment is affirmed, with costs.

[1022] SOUTHERN INDIANA EXP. CO. *v.* UNITED STATES EXP. CO. ET AL.

(Circuit Court of Appeals, Seventh Circuit. March 28, 1899.)

[92 Fed., 1022.]

CARRIERS OF GOODS—DUTIES OF CONNECTING LINES INTER SE.

Appeal from the Circuit Court of the United States for the District of Indiana.

This was a suit in equity by the Southern Indiana Express Company against the United States Express Company and others. A demurrer to the bill was sustained by the circuit

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court, and the bill dismissed (88 Fed. 659), from which order complainant appeals.

F. M. Trissal, for appellant.

Edward Daniels, for appellee.

PER CURIAM. A statement and sufficient discussion of this case will be found in the opinion of the circuit court as reported in *Southern Indiana Exp. Co.* v. *United States Exp. Co.*, 88 Fed. 659. The decree sustaining the demurrer and dismissing the bill is affirmed.

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[For 88 Fed., 659, see p. 862.]

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[978] BLOCK ET AL. *v.* STANDARD DISTILLING & DISTRIBUTING CO.

(Circuit Court, S. D. Ohio, W. D. July 31, 1899.)

[95 Fed. 978.]

JURISDICTION OF FEDERAL COURT—CITIZENSHIP OF CORPORATION—SUFFICIENCY OF ALLEGATION.—An allegation that defendant is a corporation "organized under and pursuant to the laws of the state of New Jersey" is an affirmative statement that defendant is a citizen of New Jersey.[a]

[979] EQUITY PLEADING—MULTIFARIOUSNESS—[ANTI-TRUST LAW].—A bill setting up a claim for damages under the anti-trust law of July 2, 1890, and also asking an injunction restraining defendant from using complainant's trade-mark and trade-name, is multifarious, as joining two distinct causes of action, having no connection with each other, and one of which is triable at law.

UNFAIR COMPETITION—IMITATION OF TRADE-NAME.—A bill which alleges that complainant and defendant are competitors in the same line of business; that defendant has assumed a trade-name similar to, and in imitation of, complainant's trade-name, and the public has been deceived thereby, and great confusion and injury have resulted to complainant's business therefrom; that defendant's incorporators, before it was organized, knew of the existence and character of complainant's business, and the trade-name under which it had for a number of years been conducted; and that defendant has re-

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fused, on complainant's request, to desist from the use of the name,—states a cause of action against defendant for unfair competition.

SAME—TRADE-NAME—FRAUD WHICH WILL DEBAR RELIEF.—The mere fact that complainants, as partners, conduct their business under the name of the "Standard Distilling Company," is not sufficient to show that they represent themselves as a corporation for the purpose of deceiving and defrauding the public, so as to debar them of the right to invoke the protection of a court of equity in the use of such name.

George W. Hardacre and *Peck, Shaffer & Peck*, for complainants.

J. Shroder and *Levy Mayer*, for defendant.

THOMPSON, District Judge.

This cause is submitted to the court upon a demurrer to the bill.

The first assignment of the demurrer denies the jurisdiction of the court. It is claimed that the citizenship of the defendant does not appear affirmatively, and that it cannot be inferred. I think it does affirmatively appear that the defendant is a citizen of the state of New Jersey. The statement that it was "organized under and pursuant to the laws of the state of New Jersey" is an affirmative statement that it is a citizen of New Jersey. In *Insurance Co.* v. *Francis*, 11 Wall. 210, 216, it was alleged that the defendant was a corporation created by the laws of New York, located and doing business in Mississippi under its laws, and the court said:

"This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."

The objection to the jurisdiction of the court therefore is not well taken.

The second and third assignments of the demurrer allege that the bill is multifarious, in that it joins two distinct causes of action not necessarily connected or blended, and joins an action at law with a suit in equity. I think these objections to the bill are well taken. The claim for damages

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under the anti-trust law of July 2, 1890, and the facts set forth upon which the complainants ask that the defendant be enjoined from using complainants' trade-mark and trade-name, constitute distinct causes of action, having no connection or relation to each other; and, besides, one is a cause of action triable [980] at law, while the other is of equitable cognizance. The case attempted to be set forth under the anti-trust law would not justify the allowance of an injunction. So far as the court is advised by the statement of that part of the case, there would be an adequate remedy at law. *Gulf, C. & S. Ry. Co.* v. *Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407, 420; *Blindell* v. *Hagan*, 54 Fed. 40; *Hagan* v. Blindell, 6 C. C. A. 86, 56 Fed. 696.

The fourth assignment of the demurrer is not insisted upon.

The fifth assignment of the demurrer is upon the ground that the bill does not state facts sufficient to constitute a cause of action.[a]

* * * * *

[982] The demurrer will be overruled as to the first and fifth assignments, and sustained as to the second assignment thereof.

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[817] LOWRY ET AL. *v.* TILE, MANTEL & GRATE ASS'N OF CALIFORNIA ET AL.[b]

(Circuit Court, N. D. California. November 13, 1899.)

[98 Fed., 817.]

MISJOINDER OF PARTIES—WAIVER BY APPEARANCE.—Defendants by a general appearance waive the objection of a misjoinder because other defendants are not inhabitants of the district.[c]

GENERAL APPEARANCE.—There is a general appearance by a demurrer which does not alone object to the jurisdiction, but goes to the merits of the case.

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[a] The matter omitted has no bearing whatever upon the anti-trust law.

[b] See also charge to jury (106 Fed. 38). See vol. 2, p. 53. Judgment affirmed by Circuit Court of Appeals, Ninth Circuit (115 Fed., 27). See vol. 2, p. 112. Case there and subsequently entitled Montague & Co. *v.* Lowry. Affirmed by the Supreme Court (193 U. S., 83). See vol. 2, p. 327.

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ANTITRUST LAW—UNLAWFUL COMBINATION.—A complaint alleging that members of an association have conspired and combined to raise the prices of tiles, mantels, and grates, to control the output, and to regulate the prices thereof, with the intent to monopolize the trade and commerce between the other states and California in regard thereto, as well as to arbitrarily fix their prices independently of their natural market value, brings the case within the antitrust act of July 2, 1890 (26 Stat. 209).

Action at Law to Recover Damages under the Provisions of Act July 2, 1890 (26 Stat. 209).

Reddy, Campbell & Metson, for plaintiffs.

Linforth & Whitaker, for certain defendants.

MORROW, Circuit Judge.

This is an action at law brought to recover damages alleged to have been sustained by plaintiffs by reason of injury to their business caused by the forming of an association by defendants claimed to be within the prohibitory provisions of the act of congress of July 2, 1890, commonly known as the "Sherman Antitrust Act." The amended complaint alleges: That plaintiffs are co-partners doing business under the firm name of Lowry & Daly, citizens of the state of California, and residents of the Northern district of said state. That the Tile, Mantel & Grate Association of California, and the officers and members thereof, have since the ——— day of January, 1898, and do now, constitute an unincorporated organization composed of wholesale dealers in tiles, mantels, and grates, and that they are now, and ever since that day have been, citizens and residents of the city and county of San Francisco, and of the city of Sacramento, and of the city of San José, in the state of California, and of the states set forth hereinafter, and that all said defend- [818] ants have been since that date, and now are, carrying on business in the state of California, and within the jurisdiction of the Northern district thereof. That the defendants hereinafter named are corporations created and existing under the laws of the respective states set opposite to their names: Columbia Encaustic Tile Company, Indiana; United States Encaustic Tile Works, Indiana; Cambridge Tile Manufacturing Company, Kentucky; Pittsburg Tile Company, Pennsylvania; Trent Tile Works, New Jersey; W. W. Montague & Co., California; Bush & Mallett Company, California; Star Encaustic Tile Company, Limited, Pennsylvania; Mangrum & Otter, California; American Tile Company, Ohio; Providential Tile Works, New Jersey; the John Stock Sons, California. That the defendants the Columbia Encaustic Tile Company, Cambridge Tile Manufacturing Company, the American Tile Company, the Pittsburg Tile Company, the Providential Tile Works, and the Star Encaustic Tile Company, Limited, are, and were at all the times mentioned, manufacturers of tiles in the states set forth, and that the defendants Heavener Meir, the John Stock Sons, W. W. Montague & Co., Bush & Mallett, Bennett & Schutte, and Mangrum & Otter are, and ever since January 1, 1898, have been, engaged in the wholesale and retail business of buying and selling tiles, mantels, and grates in the cities of Sacramento, San Jose, and San Francisco, in this state. That the following cities, with the respective populations placed opposite their names, are each situated in the Northern district of California: San Francisco, 290,000 and upwards; Oakland, 40,000 and upwards; Sacramento, 30,000 and upwards; San Jose, 20,000 and upwards. That in said cities there are a great number of dwelling houses, buildings used for business, trade purposes, and manufactories. That new buildings are being constantly erected, and in their construction large quantities of tiles, mantels, and grates are necessarily used for their safe construction and comfortable occupation. That none of the tiles used about buildings or dwellings are made in the state of California, but are manufactured in Eastern states, and imported thence, and such importations into this state amount to the annual value of $100,000 or thereabouts. That for many years past plaintiffs have been engaged in the wholesale business of dealing in tiles, mantels, and grates, and in conducting this business have purchased these articles from the various corporations defendant, and shipped them to the state of California, and there sold them; that defendants and their associates who are bound by contract with them comprise all the wholesale dealers who handle and import and sell tiles in the cities aforesaid, and, when combined together, can and do abso-

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lutely control the price charged for tiles in said cities, by reason of the distance of these cities from any manufacturers or wholesale dealers other than defendants and those combined with them in other states or foreign countries, who do not belong to the said Tile, Mantel & Grate Association of California. The rates of transportation are prohibitory, so that no tiles have been or can be imported from places other than those in which the corporations and above-named persons have manufactories, stock on hand, or warerooms, and all the grates and tiles made and manufactured within reach of the state of Cali- [**819**] fornia, where the rate of freight is such that an importation can be made to San Francisco and said other cities at such an amount as to admit of their importation at all, are, and at all times mentioned have been, controlled by the said defendants, or some of them, or those bound by contracts to them. That before the association, combination, and conspiracy hereinafter referred to, defendants were uncombined, and were selling grates, mantels, and tiles on their respective merits, their prices being determined by the law of supply and demand. That in the years 1896 and 1897 there were in San Francisco and the other said cities numerous persons engaged in the wholesale and retail business of selling tiles, and in the placing and laying of them. That defendants, with intent to form a contract, trust, and conspiracy in restraint of trade and commerce between the state of California and the states of Indiana, Kentucky, New Jersey, Pennsylvania, and Ohio, for the purpose of controlling the output and regulating the price of these commodities, and monopolizing the said trade, combined and conspired to monopolize the grate, tile, and mantel importations and trade and commerce from other states to and with the state of California, to the extent of the tiles, grates, and mantels that could be used in the state of California in the erection and construction of dwellings and buildings, and so conspired to raise the price of these commodities in the California market, and for this purpose on or about the ——— day of January, 1898, formed an organization and adopted a constitution and by-laws, which constitution and by-laws are now in effect. That the said constitution and by-laws provided that no sales and deliveries, or

contracts for the sale or delivery, or the placing, of tiles, grates, or mantels, will be made by the manufacturers thereof to any person dealing in these commodities, unless such person belong to the said unincorporated association, and shall pay or cause to be paid ——— dollars to that organization, and bind themselves to abide by its constitution and by-laws; that is to say, that no one who is a member of that organization shall sell to, or deal with or deliver to, any person engaged in the business of buying, selling, or placing tiles, grates, or mantels in the cities of San Francisco, Oakland, Sacramento, and San Jose, and other cities in this state, unless such person shall become a member of the said unincorporated organization, and shall agree that in their general business of selling such commodities to the general public they shall sell them at such prices as may be arbitrarily fixed by the said unincorporated association. That, prior to the formation of that organization, plaintiffs were doing a large business in selling tiles, mantels, and grates, and were making an annual profit of about $5,000. That plaintiffs are unable to join the said organization, because, according to its constitution and by-laws, a unanimous vote of the members of the association is required to elect a member thereof, and certain members of that organization are so antagonistic to plaintiffs, by reason of business differences, that they would not allow them to enter the organization; and further, the rules and regulations of the association require that members must keep constantly in stock goods to the value of $3,000, and there are times when plaintiffs' stock does not amount to that value. That, if [**820**] plaintiffs join said association, they would be bound to sell their wares at prices arbitrarily fixed by the association, and not at their fair market value. That said association is illegal and void, by virtue of the act of congress approved July 2, 1890, and by joining it plaintiffs would be guilty of a crime under the said act. That, since the formation of said organization, plaintiffs have been unable to purchase tiles, mantels, or grates from any of the defendants, although they have tendered to the defendants the price of the same. That defendants have refused to deliver any tiles, mantels, or grates to them since the organization of said association.

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That, about the time of the formation of said association, plaintiffs had placed with defendants certain orders for tiles; but these orders were not filled, but were canceled, by the parties with whom they had been placed, for the reason that plaintiffs did not belong to, and would not join, said organization. That, about the time of the formation of the association, plaintiffs had placed orders for tiles with the Columbia Encaustic Tile Company, which canceled plaintiffs' orders because plaintiffs did not belong to the Tile, Mantel & Grate Association. That said organization is within the statute of the 51st congress, passed and approved July 2, 1890, known as "Chapter 647, Supplement to the Revised Statutes at Large of the United States." That, by reason of the monopoly of such association, plaintiffs are damaged in the sum of $10,000. Plaintiffs pray for treble the sum of $10,000, in accordance with the provisions of the above-named act, and for further equitable relief.

To this amended complaint the defendants W. W. Montague & Co., a corporation; the Bush & Mallett Company, a corporation; Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett & Schutte; the John Stock Sons, a corporation; Heavener Meir; Mangrum & Otter, a corporation; and the Tile, Mantel & Grate Association,—filed a demurrer. The grounds of this demurrer are: That the amended complaint does not state facts sufficient to constitute a cause of action against defendants, or any of them. That there is a misjoinder of parties defendant, in that the Columbia Encaustic Tile Company, the United States Encaustic Tile Works, the Cambridge Tile Manufacturing Company, the Pittsburg Tile Company, the Trent Tile Company, and the Star Encaustic Tile Company, Limited, are all improperly made and joined as defendants in this action. That the amended complaint is uncertain, (1) in that it does not appear therefrom whether the plaintiffs were at any of the times mentioned in the amended complaint engaged in interstate commerce; (2) in that it cannot be ascertained therefrom whether the acts of defendants complained of interfere with interstate commerce directly, immediately, or at all; (3) in that it cannot be ascertained therefrom with sufficient certainty whether plaintiffs have been damaged in

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the sum of $10,000 or at all. It does not appear from the record that the foreign corporations joined as defendants have been served with process, and they have made no appearance.

This action is brought under the provisions of an act of congress dated July 2, 1890, and entitled "An act to protect trade and com- [821] merce against unlawful restraints and monopolies." 26 Stat. 209. Section 7 of this act provides:

"Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit including a reasonable attorney's fee."

It is contended by the counsel for defendants that there is a misjoinder of parties defendant in the amended complaint, in that certain corporations organized and doing business in states other than this state have been joined as defendants in this action; such corporations being residents of districts other than this, and not found within this district, so that no service of process can be made upon them, and themselves subjected to the jurisdiction of the court. The allegations of the amended complaint in this respect are as follows:

"All of said defendants have been since that date, and are now, carrying on business in the state of California, and within the jurisdiction of the Northern district thereof."

Defendants' counsel contend that these allegations are not such as to give the court jurisdiction over such defendants as do not reside in this district, and that, as the defendant corporations joined with them reside only in the states in which they have been respectively organized, they can only be sued in their own districts. It is contended by plaintiffs' counsel that the defendants who have demurred are estopped from demurring to the amended complaint upon the ground that some of their co-defendants are being sued in the wrong district, since they have made a general appearance, and by so doing have lost the right to raise the question that there is a misjoinder of parties on these grounds. In the case of *Improvement Co.* v. *Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401, the action was at law, and the court discussed

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the effect of a general appearance by a defendant upon a demurrer by the same defendant based upon jurisdictional grounds. In this case the complaint alleged that the plaintiff was incorporated under the laws of New Jersey, and was a citizen of that state, and that all the defendants were citizens and residents of the state of Indiana. "On June 19, 1890, the defendants Gibney, McElwaine, and Wheeler, by their attorney, entered a general appearance, but Gibney neither pleaded nor answered, and the defendant Bartley never appeared or made any defense. On September 19, 1891, McElwaine and Wheeler pleaded in abatement that at the time of the bringing of this action, and ever since, Gibney and Bartley were citizens of the state of Pennsylvania, and not citizens or residents of the state of Indiana, and that therefore the court had no jurisdiction of the case. The plaintiff demurred to this plea as not containing facts sufficient to constitute a cause for the abatement of the action. The plaintiff declining to plead further, but electing to stand upon its demurrer to the plea, the court adjudged that the plaintiff take nothing by its action, and that the defendant recover costs." The case was **[822]** taken to the supreme court upon a writ of error. Mr. Justice Gray delivered the opinion of the court, and in the course of that opinion said, at page 220, 160 U. S., page 273, 16 Sup. Ct., and page 402, 40 L. Ed.:

"In *Smith* v. *Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, this court held that the provision of the act of 1888 as to the district in which a suit between citizens of different states should be brought, required such a suit, in which there was more than one plaintiff or more than one defendant, to be brought in the district in which all the plaintiffs or all the defendants were inhabitants. When there are several defendants, some of whom are, and some of whom are not, inhabitants of the district in which the suit is brought, the question whether those defendants who are inhabitants of the district may take the objection, if the nonresident defendants have not appeared in the suit, has never been decided by this court. Strong reasons might be given for holding that, especially where, as in this case, an action is brought against the principals and sureties on a bond, and one of the principals is a nonresident and does not appear, the defendants who do come in may object at the proper stage of the proceedings to being compelled to answer the suit. But in the present case it is unnecessary to decide that question, because one of the principals and both sureties, being all the defendants who pleaded to the jurisdiction, had entered a general appearance long before they took the objection that the sureties were citizens of another district. Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and, of course, cannot object that others of the defendants were such."

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The judgment of the circuit court was reversed, and the case remanded, with directions to sustain the demurrer to the plea.

A general appearance, therefore, on the part of these defendants, must be deemed a waiver of the objection of a misjoinder because the other defendants are not inhabitants of this district. Counsel contend that they have not made such a general appearance, but have demurred specially on the ground that certain defendants are improperly joined with them. The terms of the demurrer constitute a sufficient answer to this contention.

The grounds of demurrer are not confined to the jurisdiction of the court, but the merits of the case are involved in the objection that the complaint does not state facts sufficient to constitute a cause of action. In the case of *Southern Pac. Co.* v. *Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, the question of special appearance was considered. The action was at law, and was brought in the circuit court of the United States for the Western district of Texas. The petition alleged that the defendant was a corporation duly incorporated under the laws of the state of Kentucky, a citizen of the state of Kentucky, and a resident of El Paso county, in the state of Texas; that defendant "was and is engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending eastwardly from the city of El Paso, Texas, into and through the counties of El Paso and Presidio, and the city of San Antonio, all of the state of Texas; that the defendant is now doing business as aforesaid, and has an agent for the transaction of its business in the city and county of El Paso, Texas, to wit, W. E. Jessup." The plaintiff resided in the county of Red River, which is in the Eastern district of Texas. Defendant, by leave of court, filed a document desig- **[823]** nated as an "answer or demurrer," "for the special purpose, and no other, until the question herein raised is decided, of objecting to the jurisdiction of this court," and demurred and excepted to the petition because, upon the above allegations, "it appears that the suit ought, if maintained at all in the state of Texas, to be brought in the district of the residence of the plain-

tiff,—that is to say, in the Eastern district of Texas"; and the defendant prayed judgment whether the court had jurisdiction. The court overruled the demurrer. Defendant thereupon answered to the merits, and, judgment being given against it, sued out a writ of error in the United States supreme court on the question of jurisdiction only, under the act of February 25, 1889 (25 Stat. 693, c. 236). Mr. Justice Gray said, at page 206, 146 U. S., page 45, 13 Sup. Ct., and page 944, 36 L. Ed.:

"It may be assumed that the exemption from being sued in any other district might be waived by the corporation by appearing generally or by answering to the merits of the action without first objecting to the jurisdiction. *Railway Co.* v. *McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Railway Co.* v. *Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. But in the present case there was no such waiver. The want of jurisdiction, being apparent on the face of the petition, might be taken advantage of by demurrer, and no plea in abatement was necessary. *Coal Co.* v. *Blatchford*, 11 Wall. 172, 20 L. Ed. 179. The defendant did file a demurrer, for the special and single purpose of objecting to the jurisdiction; and it was only after that demurrer had been overruled, and the defendant had excepted to the overruling thereof, that an answer to the merits was filed."

The case of *Railway Co.* v. *McBride*, 141 U. S. 127, 130, 11 Sup. Ct. 982, 983, 35 L. Ed. 659, cited in *Southern Pac. Co.* v. *Denton*, *supra*, was also an action at law; and the only question involved was what constituted a general appearance, and its effect upon the jurisdiction of that court. Mr. Justice Brewer, delivering the opinion of the court, said:

"Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds; two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was therefore in the first instance a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives, not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

In the case at bar defendants did not file their demurrer "for the special and single purpose of objecting to the jurisdiction," but for the further purpose of attacking the merits of the case upon the facts as stated in the complaint; and this last issue the court is called upon to decide as a material question in controversy, as will appear hereafter. The

appearance of defendants demurring in this action must, in view of these authorities, be regarded as a general appearance, and they are therefore prevented from objecting that their co-defendants are improperly joined with them on the ground that they are being sued in the wrong district.

Considering next the ground of demurrer that the amended com- **[824]** plaint does not state facts sufficient to constitute a cause of action: The statute under which this action is brought (26 Stat. 209) provides:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. * * *

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor. * * *

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in any territory of the United States, or the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal."

Defendants' counsel rely upon the case of *Anderson* v. *U. S.*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, as supporting their demurrer upon this point. The bill in that case was filed, under the direction of the United States attorney general, by the United States district attorney for the Western district of Missouri. It alleged, among other things, that defendants—

"Have unlawfully entered into a contract, combination, and conspiracy in restraint of trade and commerce among the several states and with foreign nations, in this, to wit: That they have unlawfully agreed, contracted, combined, and conspired to prevent all other persons than members of the Traders' Live Stock Exchange, as aforesaid, from buying and selling cattle upon the Kansas City market, at the Kansas City Stock Yards, as aforesaid; that the commission, firm, person, partnership, or corporation to whom said cattle are consigned at Kansas City, as aforesaid, is not permitted to, and cannot, sell or dispose of said cattle at the Kansas City market, as aforesaid, to any buyer or speculator at the Kansas City Stock Yards, unless said buyer or speculator is a member of the Traders' Live-Stock Exchange, and these defendants, and each of them, unlawfully and oppressively refuse to purchase cattle, or in any manner negotiate or deal with or buy from any commission merchant who shall sell or purchase cattle, from any speculator of the said Kansas City Stock Yards who is not a member of the said Traders' Live-Stock Exchange; that by and through the unlawful agreement, combination, and conspiracy of

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these defendants, the business and traffic in cattle at the said Kansas City Stock Yards is interfered with, hindered, and restrained, thus entailing extra expense and loss to the owner, and placing an obstruction and embargo on the marketing of cattle shipped from the states and territories aforesaid to the Kansas City Stock Yards."

Mr. Justice Peckham, in the course of the opinion of the court, says:

"The agreement now under discussion differs radically from those of *U. S.* v. *Jellico Mountain Coal & Coke Co.* (C. C.) 46 Fed. 432, 12 L. R. A. 753; *U. S.* v. *Coal Dealers' Ass'n* (C. C.) 85 Fed. 252; and *U. S.* v. *Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271. The agreement in all of these cases provided for fixing the prices of the articles dealt in by the different companies; being in one case iron pipe for gas, water, sewer, and other purposes, and coal in the other two cases. If it were conceded that these cases were well decided, they differ so materially and radically in their nature and purpose from the case under consideration that they form no basis for its decision. This association does not meddle with prices, and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting, or in any manner restraining, interstate commerce, which, if affected at all, can only be in a very **[825]** indirect and remote manner. The rule has no direct tendency to diminish or in any way impede or restrain interstate commerce in the cattle dealt in by defendants. There is no tendency, as a result of the rule, directly or indirectly, to restrict the competition among defendants for the class of cattle dealt in by them. Those who are selling the cattle have the market composed of defendants, and also composed of the representative buyers of all the packing houses at Kansas City, and also of the various commission merchants who are constantly buying on orders, and of those who are buying on their own account. This makes a large competition wholly outside of the defendants. The owner of cattle for sale is therefore furnished with a market at which the competition of buyers has a broad effect. All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof."

The allegations of the amended complaint in the present case are that the members of the Tile, Mantel & Grate Association have conspired and combined to raise the prices of tiles, mantels, and grates, to control the output and to regulate the prices of these commodities, with the intent of monopolizing the trade and commerce between the other states and California in regard to such commodities, as well as to arbitrarily fix their prices independent of their natural market price. It will be seen, therefore, that the case of *Anderson* v. *U. S.* cannot be considered as applicable to the case at bar.

The case of *U. S.* v. *Jellico Mountain Coal & Coke Co.* (C. C.) 46 Fed. 432, 12 L. R. A. 753, is more in point. The

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action was brought under the antitrust act against the members of the Nashville Coal Exchange. The purpose of the agreement in that case was to establish the price of coal at Nashville, and to change the same from time to time. Members found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, were fined 2 cents per bushel and $10 for the first offense, and 4 cents per bushel and $20 for the second offense. Owners or operators of mines were not to sell or ship coal to any persons, firms, or corporations in Nashville who were not members of the exchange, and dealers were not to buy coal from any one but a member of the exchange. The court, commenting upon the agreement of this association of coal dealers, said:

"This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steamboats whenever it could; that the mines of coal tributary to Nashville were all expected to become members of the exchange, whereupon the prices of coal could be fixed absolutely; and the necessary inference from this declaration and the entire organic structure of the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that market to a large extent, at least, and that this exchange might now monopolize the business of dealing in domestic coal in the Nashville market, and in the future monopolize by and confine to its membership the entire trade in coal at that point. It seems to me that the purposes and intention of the association could hardly have been more successfully framed to fall within the provisions of the act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that statute; and there is no need of authorities to sustain such view of the case."

In the case of *U. S.* v. *Coal Dealers' Ass'n* (C. C.) 85 Fed. 252, the bill alleged that defendants comprised all the wholesale dealers handling coal in San Francisco, and that they, together with certain retail dealers, had conspired with intent to monopolize the coal **[826]** trade and commerce between British Columbia, Washington, and Oregon, to the extent of the coal used for domestic purposes in the city of San Francisco. It was said by this court in that case:

"But the agreement of the importers and wholesale dealers, which alone gives life and force to the combination, is directed specifically to the maintenance of card rates for certain imported coals, by name; and it is this agreement, and what may be accomplished under it by the combination, that is to be considered, and not what it may be doing at any particular time."

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In *U. S.* v. *Addyston Pipe & Steel Co.*, 54 U. S. App. 723, 29 C. C. A. 141, and 85 Fed. 279, the United States began proceedings in equity against six corporations engaged in the manufacture of cast-iron pipe in localities in Ohio, Kentucky, Alabama, and Tennessee. The bill of complaint charged the defendants with a combination and conspiracy in unlawful restraint of interstate commerce. It appeared that the defendants, who were manufacturers and vendors of cast-iron pipe, entered into a combination to raise the price of pipe for all the states west and south of New York, Pennsylvania, and Virginia, comprising some 36 states in all; and, to carry out this combination, the associated defendants entered into an agreement which provided certain methods of procedure in dealing with the public, whereby competition between themselves was avoided in the territory mentioned. The court, in an able opinion reviewing the whole subject of the law relating to combinations and contracts in restraint of trade, arrived at the conclusion that the association of the defendants was a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood under the act of July 2, 1890. The doctrine of that case is applicable here. The allegations charging conspiracy and combination to raise the price of the commodities in question, and of an agreement by the members of such combination to sell these commodities at such prices as shall be arbitrarily fixed by the combination in question, together with the further allegation that such combination has been made with the intent of monopolizing trade and commerce between California and other states, are sufficient, under these authorities, to bring the case within the operation of the provisions of the Sherman act. Defendants' demurrer upon the ground of the insufficiency of the facts stated to constitute a cause of action cannot, therefore, be sustained.

Defendants also demur on the ground of uncertainty, contending that the complaint fails to show that defendants were engaged in interstate commerce, or that their acts directly or immediately interfered with interstate commerce, or in what manner plaintiffs have been damaged, or at all. Upon consideration, however, this ground of demurrer does not appear to be well founded. The allegations of the complaint are obviously free from uncertainty in these particulars, and this ground of demurrer must therefore be denied. The demurrer of defendants will therefore be overruled.

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[211] ADDYSTON PIPE AND STEEL COMPANY *v.* UNITED STATES.[a]

APPEAL FROM THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 51. Argued April 26, 27, 1899.—Decided December 4, 1899.

[175 U. S., 211.]

Under the grant of power to Congress, contained in Section 8 of article I of the Constitution, "to regulate commerce with Foreign Nations and among the several States, and with Indian Tribes," that body may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract shall be, when carried out, to directly and not as a mere incident to other and innocent purposes, regulate to any extent interstate or foreign commerce.

The provision in the Constitution regarding the liberty of the citizen is to some extent limited by this commerce clause; and the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate, to a greater or less degree, commerce among the States.

Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.

The power to regulate interstate commerce, and to prescribe the rules by which it shall be governed, is vested in Congress, and when that body has enacted a statute such as the act of July 2, 1890, c. 647, entitled "an act to protect trade and commerce against unlawful restraints and monopolies," any agreement or combination which

[a] Bill asking for a preliminary injunction was dismissed by the Circuit Court for the Eastern District of Tennessee (78 Fed., 712). See p. 631. Decree reversed and defendants perpetually enjoined by the Circuit Court of Appeals, Sixth Circuit (85 Fed., 271). See p. 772. This latter decree was modified and affirmed by the Supreme Court of the United States in the present case (175 U. S., 211).

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directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, thereby regulates interstate commerce to that extent, and thus trenches upon the power of the national legislature, and violates the statute.

The contracts considered in this case, set forth in the statement of facts and in the opinion of the court, relate to the sale and transportation to other States of specific articles, not incidentally or collaterally, but as a direct and immediate result of the combination entered into by the defendants; and they restrain the manufacturing, purchase, sale or exchange of the manufactured articles among the several States, and enhance their value, and thus come within the provisions of the "act to protect trade and commerce against unlawful restraints and monopolies."

[212] When the direct, immediate and intended effect of a contract or combination among dealers in a commodity is the enhancement of its price, it amounts to a restraint of trade in the commodity, even though contracts to buy it at the enhanced price are being made.

The judgment of the court below, which perpetually enjoined the defendants in the court below from maintaining the combination in cast-iron pipe as described in the petition, and from doing any business under such combination, is too broad, as it applies equally to commerce which is wholly within a State as well as to that which is interstate or international only.

Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce: nor does it acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate.[a]

[44 L. ed., 136.][b]

[The power of Congress to regulate interstate or foreign commerce includes the power to legislate upon the subject of private contracts in respect to such commerce.]

[The constitutional guaranty of liberty of the individual to enter into private contracts does not limit the power of Congress so as to prevent it from legislating upon the subject of contracts in restraint of interstate or foreign commerce.]

[a] The foregoing syllabus and the abstract of argument copyrighted, 1899, 1900, by The Banks Law Publishing Co.

[b] The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 44, p. 136. Copyrighted, 1900, by The Lawyers' Co-Operative Publishing Co.

Statement of the Case.

[An agreement or combination between corporations engaged in the manufacture, sale, and transportation of iron pipe, under which they enter into public bidding for contracts, not in truth as competitors, but under an arrangement which eliminates all competition between them for the contract, and permits one of their number to make his own bid, while the others are required to bid over him, is in violation of the anti-trust act of Congress of July 2, 1890, so far as it applies to sales for delivery beyond the state in which the sale is made.]

[A combination may illegally restrain trade by preventing competition for contracts and enhancing prices, although it does not prevent the letting of any particular contract.]

[A combination to restrain competition in proposals for contracts for the sale of certain articles which are to be delivered in the state in which some of the parties to the combination reside and carry on business is not, so far as those members are concerned, in violation of the anti-trust law of Congress, although the contract may be awarded to some party outside the state as the lowest bidder.]

THIS proceeding was commenced in behalf of the United States, under the so-called anti-trust act of Congress, of July 2, 1890, c. 647, 26 Stat. 209. It was undertaken for the purpose of obtaining an injunction perpetually enjoining the six corporations, who were made defendants, and who were engaged in the manufacture, sale and transportation of iron pipe at their respective places of business in the States of their residence, from further acting under or carrying on the combination alleged in the petition to have been entered into between them, and which was stated to be an illegal and unlawful one, under the act above mentioned, because it was in restraint of trade and commerce among the States, etc.

The trial court dismissed the petition, 78 Fed. Rep. 712, but upon appeal to the Circuit Court of Appeals the judgment of the court below was reversed with instructions to enter a decree for the United States perpetually enjoining defendants from maintaining the combination in cast-iron pipe as described in the petition, and from doing any business under such combination. 54 U. S. App. 723. The six defendants are The Addyston Pipe and Steel Company of Cincinnati, Ohio; Dennis Long & Company, of Louisville, Kentucky; The Howard-Harrison Iron Company, of Bessemer, Alabama; The Anniston Pipe and Foundry Company, of Anniston, Ala- **[213]** bama; The South Pittsburg Pipe Works, of South Pittsburg, Tennessee, and The Chattanooga Foundry

and Pipe Works, of Chattanooga, Tennessee; one company being in the State of Ohio, one in Kentucky, two in Alabama and two in Tennessee.

The following are in substance the facts upon which the judgment of the Circuit Court of Appeals rested, as stated in the record:

It was charged in the petition that on the 28th of December, 1894, the defendants entered into a combination and conspiracy among themselves, by which they agreed that there should be no competition between them in any of the States or Territories mentioned in the agreement, (comprising some thirty-six in all,) in regard to the manufacture and sale of cast-iron pipe, and that in obedience to such agreement and combination, and to carry out the same, the defendants had since that time operated their shops and had been selling and shipping the pipe manufactured by them into other States and Territories, under contracts for the manufacture and sale of such pipe with citizens of such other States and Territories. There was to be a "bonus" charged against the manufacture of the pipe, to the extent set forth in the agreements and to be paid as therein stated. The whole agreement was charged to have been entered into in order to enhance the price for the iron pipe dealt in by the defendants.

The petition prayed that all pipe sold and transported from one State to another, under the combination and conspiracy described therein, be forfeited to the petitioner and be seized and confiscated in the manner provided by law, and that a decree be entered dissolving the unlawful conspiracy of defendants and perpetually enjoining them from operating under the same and from selling said cast-iron pipe in accordance therewith to be transported from one State into another.

The defendants filed a joint and separate demurrer to the petition in so far as it prayed for the confiscation of goods in transit, on the ground that such proceedings under the anti-trust act are not to be had in a court of equity, but in a court of law. In addition to the demurrer, the defendants filed a joint and separate answer, in which they admitted the exist-

[214] ence of an association between them for the purpose of avoiding the great losses they would otherwise sustain, due to

ruinous competition between defendants, but denied that their association was in restraint of trade, state or interstate, or that it was organized to create a monopoly, and denied that it was a violation of the anti-trust act of Congress.

Testimony in the form of affidavits was submitted by petitioner and defendants, and by stipulation it was agreed that the final hearing might be had thereon.

From the minutes of the association, a copy of which was put in evidence by the petitioner, it appeared that prior to December 28, 1894, the Anniston Company, the Howard-Harrison Company, the Chattanooga Company and the South Pittsburg Company had been associated as the Southern Associated Pipe Works. Upon that date the Addyston Company and Dennis Long & Co. were admitted to membership, and the following plan was then adopted:

"First. The bonuses on the first 90,000 tons of pipe secured in any territory, 16" and smaller, shall be divided equally among six shops.

"Second. The bonuses on the next 75,000 tons, 30" and smaller, sizes to be divided among five shops, South Pittsburg not participating.

"Third. The bonuses of the next 40,000 tons, 36" and smaller, sizes to be divided among four shops, Anniston and South Pittsburg not participating.

"Fourth. The bonus on the next 15,000 tons, consisting of all sizes of pipe, shall be divided among three shops, Chattanooga, South Pittsburg and Anniston not participating.

"The above decision is based on the following tonnage of capacity:

South Pittsburg	15,000 tons.
Anniston	30,000 tons.
Chattanooga	40,000 tons.
Bessemer	45,000 tons.
Louisville	45,000 tons.
Cincinnati	45,000 tons.

[215] "When the 220,000 tons have been made and shipped and the bonuses divided as hereafter provided, the auditor shall set aside into a reserve fund all bonuses arising from the excess of shipments over 220,000 tons, and shall divide the same at the end of the year among the respective companies according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. It is also the intention of this proposition that the bonuses on all pipe larger than 36 inches in diameter shall be divided equally between the Addyston Pipe and Steel Company, Dennis Long & Co. and the Howard-Harrison Company.

"It was thereupon resolved:

"First. That this agreement shall last for two years from the date of the signing of same, until December 31, 1896.

"Second. On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote.

"Third. The Addyston Pipe and Steel Company shall handle the

business of the gas and water companies of Cincinnati, Ohio, Covington and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the parties to this agreement shall bid on such work such reasonable prices as they shall dictate.

"Fourth. Dennis Long & Company, of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville, Ind., and New Albany, Ind., furnishing all the pipe for gas and water works in above-named cities.

"Fifth. The Anniston Pipe and Foundry Company shall handle Anniston, Ala., and Atlanta, Ga., furnishing all pipe for gas and water companies in above-named cities.

"Sixth. The Chattanooga Foundry and Pipe Works shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in above-named cities.

"Seventh. The Howard-Harrison Iron Company shall handle Bessemer and Birmington, Ala., and St. Louis, Mo., furnishing all pipe for gas and water companies in the [216] above-named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo.

"Eighth. South Pittsburg Pipe Works shall handle Omaha, Neb., on all sizes required by that city during the year of 1895, conferring with the other companies and coöperating with them; thereafter they shall handle the gas and water companies of Omaha, Neb., on such sizes as they make.

"Note.—It is understood that all the shops who are members of this association shall handle the business of the gas and water companies of the cities set apart for them, including all sizes of pipe made by them.

"The following bonuses were adopted for the different States as named below: All railroad or culvert pipe or pipe for any drainage or sewerage purposes on 12" and larger sizes shipped into bonus territory shall pay a bonus of $1.00 per ton. On all sizes below 12" and shipped into 'bonus territory' for the purposes above named, there shall be a bonus of $2.00 per ton.

List of Bonuses.

Alabama	$3 00	S. D	$2 00	Ky	$2 00
B'gham, Ala	2 00	Florida	1 00	La	3 00
Anniston, Ala	2 00	Georgia	2 00	Miss	4 00
Mobile, Ala	1 00	Atlanta, Ga	2 00	Mo	2 00
Arizona Ter	3 00	Ga. coast p'ts	1 00	Montana	3 00
California	1 00	Idaho	2 00	Nebraska	3 00
Colorado	2 00	Nev	3 00	N. Mex	3 00
Ind. Ter	3 00	Oklahoma	3 00	S. C	1 00
North C	1 00	Wis	2 00	Minn	2 00
Tenn., east of C'land	2 00	Texas, interior	3 00		
Tenn., middle and west	3 00	Texas coast	1 00		
Illinois, except Madison and East St. Louis, as previously provided					2 00
Wyoming	4 00	Wash'ton Ter	1 00	Utah	4 00
Oregon	1 00	Michigan	1 50	Indiana	2 00
Ohio	1 50	West Va	1 00	Iowa	2 00
N. D	2 00	Kansas	2 00		

All other territory free.

"On motion of Mr. Llewellyn, the bonuses on all city work as specially reserved shall be $2.00 per ton."

[217] The States for sale in which bonuses had to be paid into the association were called "pay" territory as distinguished from "free" territory in which defendants were at liberty to make sales without restriction and without paying any bonus.

The by-laws provided for an auditor of the association, whose duty it was to keep account of the business done by each shop both in pay and free territory. On the 1st and 16th of each month he was required to send to each shop "a statement of all shipments reported in the previous half month, with a balance sheet showing the total amount of the premiums on shipments, the division of the same and debt credit balance of each company."

The system of bonuses as a means of restricting competition and maintaining prices was not successful. A change was therefore made by which prices were to be fixed for each contract by the association, and except in reserved cities, the bidder was determined by competitive bidding of the members, the one agreeing to give the highest bonus for division among the others getting the contract. The plan was embodied in a resolution passed May 27, 1895, in the words following:

"Whereas, the system now in operation in this association of having a fixed bonus on the several States has not in its operation resulted *in the advancement in the prices of pipe as was anticipated, except in reserved cities*, and some further action is imperatively necessary in order to accomplish the ends for which this association was formed: Therefore, be it resolved, that from and after the first day of June, that all competition on the pipe lettings shall take place among the various pipe shops prior to the said letting. To accomplish this purpose it is proposed that the six competitive shops have a representative board located at some central city to whom all inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the order shall have the protection of all the other shops."

In pursuance of the new plan it was further agreed "that all parties to this association having quotations out shall [218] notify their customers that the same will be withdrawn by June 1, 1895, if not previously accepted, and upon all business accepted on and after June 1st bonuses shall be fixed by the committee."

At the meeting of December 19, 1895, it was moved and carried that upon all inquiries for prices from "reserved cities" for pipe required during the year of 1896, prices and

bonuses should be fixed at a regular or called meeting of the principals.

At the meeting of December 20, 1895, the plan for division of bonuses originally adopted was modified by making the basis the total amounts shipped into "pay" territory rather than the totals shipped into "pay" and "free" territory.

To illustrate the mode of doing business the following excerpt from the minutes of the meetings of December 20, 1895, February 14, 1896, and March 13, 1896, is given:

"It was moved to sell the 519 pieces of 20" pipe from Omaha, Neb., for $23.40, delivered. Carried. It was moved that Anniston participate in the bonus and the job be sold over the table. Carried. Pursuant to the motion, the 519 pieces of 20" pipe for Omaha was sold to Bessemer at a premium of $8.

"Moved that 'bonus' on Anniston's Atlanta water works contract be fixed at $7.10, provided freight is $1.60 a ton. Carried."

An illustration of the manner in which "reserved" cities were dealt with may be seen in the case of a public letting at St. Louis. On February 4, 1896, the water department of that city let bids for 2800 tons of pipe. St. Louis was "reserved" to the Howard-Harrison Company of Bessemer, Alabama. The price was fixed by the association at $24 a ton, and the bonus at $6.50. Before the letting the vice president of this company wrote to the other members of the association under date of January 24, 1896, as follows:

"I write to say that in view of the fact that I do not as yet know what the drayage will be on this pipe, I prefer that if any of you find it necessary to put in a bid without going to St. Louis, please bid not less than $27 for the pipe, and 2½ [219] cents per pound for the specials. I would also like to know as to which of you would find it convenient to have a representative at the letting. It will be necessary to have two outside bidders."

The contract was let to the Howard-Harrison Company of Bessemer, at $24, who allowed the Shickle, Harrison and Howard Company, a pipe company of St. Louis, not in the association, but having the same president as the Howard-Harrison Company of Bessemer, to fill part of the order. The only other bidders were the Addyston Pipe and Steel Company, and Dennis Long & Co., the former bidding $24.37 and the latter $24.57. The evidence shows that the Chattanooga foundry could have furnished this pipe, delivered in St. Louis, at from $17 to $18, and could have made a profit on it at that price. The record is full of instances of a similar

kind, in which, after the successful bidder had been fixed by the "auction pool," or had been fixed by the arrangement as to "reserve" cities, the other defendants put in bids at the public letting as high as the selected bidder requested, in order to give the appearance of active competition between defendants.

In January, 1896, after the auction pool had been in operation for more than six months, the Chattanooga Company wrote a letter to its representative in the central committee. The letter is dated January 2, 1896, and is as follows:

"DEAR SIR: Referring to our policy for 1896, in bidding on pipe, we have had this matter under consideration for some time past, and from the information obtained from Mr. Thornton's statement as to the amount of business done last year in pay territory and from estimates that we have made for business, that will come into that territory for 1896, we have been able to determine to what point we could bid on work and take contracts, and if bonus is forced above this point, let it go and take the bonus. We note from your letter of yesterday that you have sized up the situation in its essential points, and it agrees exactly with our ideas on the subject. It is useless to argue that Howard-Harrison Iron Co., [220] Cincinnati, and other shops, who have been bidding bonuses of $6 or $8 per ton, can come out and make any money if they continue to bid such bonus. In the case of the Howard-Harrison Iron Co., people on Jacksonville, Fla. The truth of the business is they are losing money at the prices they bid for this work. If they take the contract at $19 delivered, it will only net $16 at the shop after they have paid pack the bonus of $4.75; if they should continue to buy all the pipe that goes up to such figures as they have paid for Jacksonville and other points, they would wreck their shop in a few months. However, they of course calculate this bonus will be returned to them on work taken by other shops. We are very much pleased with the bonus that has been paid and we only hope they will keep it up as it is only money in our pockets. As long as there is no money to us let them make the pipe, as we shall continue to do so.

"For the present you will adopt the following basis:

"On 16" and under standard weights, $14.25 at shop.

"On 18" and 36" standard weights, $13.

"On 16" and under light weights, $14.50 to $14.75 at shop.

"That is, you will bid all over $13, $14.25 and $14.50 on work. If we get work at these prices it will be satisfactory. If the others run bonus above this point let them take it, as it will be more money to us to take the bonus.

"We note Mr. Thornton's report of average premiums from June 1st to December, that the average was $3.63. The average bonuses that are prevailing to-day are $7 to $8. We cannot expect this to continue, and we think your estimate of $6 ton average bonus is high—as we do not believe the premiums of '96 will average that price, unless there is a decided change for the better in business. We find there were sold and shipped into pay territory from January 1, 1895, to date, including the 40,000 tons of old business that did not pay a bonus, about 188,000 tons, and we think a very conservative estimate of shipments into this territory will amount to fully 200,000 this year; more than that, probably overrun 240,000 tons, from the

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fact that the city of Chicago and several other places that annually use large quantities of pipe were not in the market [221] last year, or last season, from the fact that they were out of funds. On the basis as given you above, if the demand should reach 220,000 tons, which would give us our entire 40,000 tons, provided we did no business, then the association would pay us the average 'bonus,' which might be from $3.50 to $5 on our 40,000. If we cannot secure business in 'pay territory' at paying prices, we think we will be able to dispose of our output in 'free territory,' and of course make some profit on that.

"At the prices that Howard-Harrison people paid for Jacksonville, Des Plaines and one or two other points, they are losing from $2.50 to $3 per ton, that is, provided 'bonuses' would not be returned to them. Therefore when business goes at a loss, we are willing that other shops make it."

Another letter was written by the same company pending a trouble over a letting at Atlanta. The Anniston Company to whom Atlanta had been "reserved" made its bid so high ($24) that a Philadelphia pipe firm, R. D. Wood & Co., had been able to underbid the Anniston Company in spite of difference in freights. All the bids had been rejected as too high, and upon a second letting Anniston's bid was $1.25 a ton less, and the job was awarded to it. The charge was then made by Atlanta persons that there was a "trust" or "combine." This was vigorously denied. The letter of the Chattanooga Company evoked by this difficulty was dated February 25, 1896, and reads as follows:

"GENTLEMEN: We are in receipt of a carbon copy of your favor of the 24th instant to F. B. Nichols, V. P., in reference to Atlanta, Ga. We certainly regret that the matter has assumed its present shape, and that R. D. Wood & Company should make a lower bid by one dollar a ton than the southern shops. You know we have always been opposed to special customers and 'reserved cities,' we do not think that it is the right principle and we believe if the present association continues, that all special customers and 'reserved cities' should be wiped out; there is no good reason why we should be allowed to handle New Orleans, you Atlanta, Howard-Har- [222] rison Iron Co., St. Louis, or South Pittsburg, Omaha. We are not in the business to award special privileges to any foundry, and we believe that the result would be more benefit to all concerned if all business was made competitive. It is hardly right, and we believe if you will think over the matter carefully you will concede it, for us to be put into a position of being unable to make prices or furnish pipe for the city of Atlanta, when we have always heretofore had a large share of their trade. We cannot explain our position to the Atlanta people and we consider it is detrimental to our business, and think no combination should have the power to force us into such a position. The same argument will apply with you as to New Orleans, St. Louis and other places. We think this matter should be considered seriously and some action taken that will result in reëstablishing ourselves (I mean the four southern shops) in the confidence of the Atlanta people. Wistar, R. D. Wood & Company's man, has no doubt told them all about our association, or as much as he could guess, and has worked up a very bitter feeling against us. The very fact that you have been protected and have had all their business for the past two years is proof to them that such a 'combination' exists, and they state that if they find out positively that we are working together, they will never receive a bid from any one of us again. We cannot afford to leave these people under that impression, and something ought to be done that would disprove Mr. Wistar's statement to them. We believe that all business ought to be competitive. The fact that certain shops have certain cities 'reserved' is all based upon mere sentiment, and no good reason exists why it should be so. We believe that, as a general thing; we have had our prices entirely too high, and especially do we believe this has been the case as to prices in 'reserved cities. The prices made at St. Louis and Atlanta are entirely out of all reason, and the result has been and always will be, when high prices are named, to create a bad feeling and an agitation aginst the 'combination.' There is no reason why Atlanta, New Orleans, St. Louis or Omaha should be made to pay higher prices for their pipe than other places near [223] them, who do not use anything like the amount of pipe and whose trade is not as desirable for many other reasons. There is no sentiment existing with us in reference to Atlanta, as we would as soon sell our pipe anywhere else, only as stated above, it is wrong in principle that we should be forced to give up Atlanta or any other point for no good reason that we know of."

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It appears quite clearly from the prices at which the Chattanooga and the South Pittsburg Companies offered pipe in "free" territory that any price which would net them from $13 to $15 a ton at their foundries would give them a profit. Pipe was freely offered by the defendants in "free" territory more than five hundred miles from their foundries at less prices than their representative boards fixed prices for jobs let in cities in "pay" territory nearer to defendants' foundries by three hundred miles or more.

The defendants adduced many affidavits of a formal type, chiefly from persons who had been buying pipe from defendants and other companies, who testified in a general way that the prices at which the pipe had been offered by defendants all over the country had been reasonable, but in not one of the affidavits was any attempt made to give figures as to cost of production and freight, and in not a single case were the specific instances shown by the evidence for the petitioner disputed.

There was some evidence as to the capacity of the defendants' mills. The division of bonuses was based on an aggregate yearly output of 220,000 tons, but there are averments in the answer that indicate that this was not a statement of the actual limit of capacity, but was only taken as a standard of restricted output upon which to calculate an equitable

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division of bonuses. Nowhere in the large mass of affidavits is there any statement of the *per diem* capacity of the defendants' mills. Taking their aggregate capacity, however, as 220,000 tons, that of the other mills in the "pay" territory was 170,500 tons, and that of the mills in the "free" territory was 348,000 tons, according to the affidavit of the chief officer of one of the defendants. Of the non-association mills in the **[224]** "pay" territory one was at Pueblo, Colorado, another was in the state penitentiary at Waco, Texas, and a third in Oregon. Their aggregate annual capacity was 45,500 tons. Another non-association mill was the Shickle, Howard-Harrison mill of St. Louis, Missouri, with a capacity of 12,000 tons. John W. Harrison, who was president of this company, was also president of the Howard-Harrison mill at Bessemer, Alabama, which was a member of the association, and it appears that an order taken by the Bessemer mill at St. Louis was partly filled by the St. Louis mill. The other mills in the "pay" territory were one at Columbus, Ohio, with an annual capacity of 30,000 tons, one at Cleveland, Ohio, of 60,000 tons, one at New Comerstown, in northeastern Ohio, of 8000 tons, and one at Detroit, Michigan, of 15,000 tons, and their aggregate annual capacity was 113,000 tons. In the "free" territory there was one mill in eastern Virginia with an annual capacity of 16,000 tons, four mills in eastern Pennsylvania with a capacity of 87,000 tons, three mills in New Jersey with a capacity of 210,000 tons, and two mills at New York, one at Utica and another at Buffalo, with an aggregate capacity of 35,000 tons.

The evidence was scanty as to rates of freight upon iron pipes, but enough appeared to show that the advantage in freight rates which the defendants had over the large pipe foundries in New York, eastern Pennsylvania and New Jersey in bidding on contracts to deliver pipe in nearly all of the "pay" territory varied from $2.00 to $6.00 a ton, according to the location.

The defendants filed the affidavits of their managing officers, in which they stated generally that the object of their association was not to raise prices beyond what was reasonable, but only to prevent ruinous competition between defendants which would have carried prices far below a reasonable point;

Argument for Appellants.

that the bonuses charged were not exorbitant profits and additions to a reasonable price, but they were deductions from a reasonable price in the nature of a penalty or burden intended to curb the natural disposition of each member to get all the business possible and more than his due proportion; that the prices fixed by the association were always reasonable and **[225]** were always fixed, as they must have been, with reference to the very active competition of other pipe manufacturers for every job; that the reason why they sold pipe at so much cheaper rates in the "free" territory than in the "pay" territory was because they were willing to sell at a loss to keep their mills going rather than to stop them; that the prices at a city like St. Louis, in which the specifications were detailed and precise, were higher because pipe had to be made especially for the job and they could not use stock on hand.

Mr. Frank Spurlock (with whom was *Mr. Foster V. Brown* on his brief) and *Mr. John W. Warrington* for appellants, cited in their briefs: *Printing and Numerical Reg. Co.* v. *Sampson*, L. R. 19 Eq. 462, 465; *Rousillon* v. *Rousillon*, 14 Ch. Div. 351, 365; *National Benefit Co.* v. *Union Hospital Co.*, 45 Minnesota, 272; *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, 68; *Oakdale Manufacturing Co.* v. *Garst*, 18 R. I. 484; *Tode* v. *Gross*, 127 N. Y. 480; *Shrainka* v. *Scharringhausen*, 8 Mo. App. 522; *Beal* v. *Chase*, 31 Michigan, 490; *Dolph* v. *Troy Laundry Machinery Co.*, 28 Fed. Rep. 553; *S. C.*, 138 U. S. 617; *Kellogg* v. *Larkin*, 3 Pinney, (Wisconsin,) 123; *Dueber Watch Case Manufacturing Co.* v. *E. Howard Watch & Clock Co.*, 35 U. S. App. 16; *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Leslie* v. *Lorillard*, 110 N. Y. 519; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396; *United States* v. *Trans Missouri Freight Ass'n*, 166 U. S. 290; *Eastman* v. *Clark*, 53 N. H. 276; *Mayrant* v. *Marston*, 67 Alabama, 453; *Fay* v. *Davidson*, 13 Minnesota, 523; *Wickens* v. *Evans*, 3 Younge & Jervis, 318; *Nat. Benefit Co.* v. *Union Hospital Co.*, 45 Minnesota, 272; *Hubbard* v. *Miller*, 27 Michigan, 15; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Emert* v. *Missouri*, 156 U. S. 296; *Asher*

v. *Texas*, 128 U. S. 129; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *Brennan* v. *Titusville*, 153 U. S. 289, 307; *Hopkins* v. *United States*, 171 U. S. 578; *Bohn Manufacturing Co.* v. *Hollis*, 54 Minnesota, 223; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Brown* v. *Maryland*, 12 Wheat. 419; *State* **[226]** *Freight Tax case*, 15 Wallace, 232; *Coe* v. *Errol*, 116 U. S. 517; *Kidd* v. *Pearson*, 128 U. S. 1; *Welton* v. *Missouri*, 91 U. S. 275; *In re Greene*, 52 Fed. Rep. 104; *Paul* v. *Virginia*, 8 Wall. 168; *Civil Rights cases*, 109 U. S. 3; *In re Debs*, 158 U. S. 564; *Scudder* v. *Union Nat'l Bank*, 91 U. S. 406; *United States* v. *De Witt*, 9 Wall. 41; *License Tax cases*, 5 Wall. 462; *In re Rahrer*, 140 U. S. 545; *Patterson* v. *Kentucky*, 97 U. S. 501; *Barron* v. *Baltimore*, 7 Pet. 243; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *United States* v. *Joint Traffic Association*, 171 U. S 505; *Anderson* v. *United States*, 171 U. S. 604; *N. Y., Lake Erie & Western Railroad* v. *Pennsylvania*, 158 U. S. 431; *Pittsburgh & Southern Coal Co.* v. *Bates*, 156 U. S. 577; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *S. C.*, 166 U. S. 185; *Brennan* v. *Titusville*, 153 U. S. 289; *Pettibone* v. *United States*, 148 U. S. 197; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Railroad Co.* v. *Richmond*, 19 Wall. 584; *Munn* v. *Illinois*, 94 U. S. 113; *Dow* v. *Beidelman*, 125 U. S. 680; *Budd* v. *New York*, 143 U. S. 517; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Boyd* v. *United States*, 116 U. S. 616.

Mr. Solicitor General for the United States.

Mr. Justice Peckham, after stating the case, delivered the opinion of the court.

The foregoing statement, which has been mainly taken from that preceding the opinion of Circuit Judge Taft, delivered in this case in the Circuit Court of Appeals, comprises, as we think, all that is essential to the discussion of the questions arising in this case, and we believe the statement to be fully borne out as to the facts, by the evidence set forth in the record.

Assuming, for the purpose of the argument, that the contract in question herein does directly and substantially operate as a restraint upon and as a regulation of interstate commerce, it is yet insisted by the appellants at the threshold of the **[227]** inquiry that by the true construction of the Constitution, the power of Congress to regulate interstate commerce is limited to its protection from acts of interference by state legislation or by means of regulations made under the authority of the State by some political subdivision thereof, including also Congressional power over common carriers, elevator, gas and water companies, for reasons stated to be peculiar to such carriers and companies, but that it does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce.

This argument is founded upon the assertion that the reason for vesting in Congress the power to regulate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation; and the further assertion that the Constitution guarantees liberty of private contract to the citizen at least upon commercial subjects, and to that extent the guaranty operates as a limitation on the power of Congress to regulate commerce. Some remarks are quoted from the opinions of Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, and *Brown* v. *Maryland*, 12 Wheat. 419, and from the opinions of other justices of this court in the cases of *The State Freight Tax*, 15 Wall. 232, 275; *Railroad Company* v. *Richmond*, 19 Wall. 584, 589; *Welton* v. *Missouri*, 91 U. S. 275, 280; *Mobile County* v. *Kimball*, 102 U. S. 691, 697, and *Kidd* v. *Pearson*, 128 U. S. 1, 21, all of which are to the effect that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation. The further remark is quoted from *Railroad Company* v. *Richmond*, *supra*, that the power of Congress to regulate commerce was never intended to be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such commerce. It is added

that the proof herein shows that the contract in this case was not so designed.

It is undoubtedly true that among the reasons, if not the [228] strongest reason, for placing the power in Congress to regulate interstate commerce, was that which is stated in the extracts from the opinions of the court in the cases above cited.

The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself.

In *Gibbons* v. *Ogden*, (*supra*,) the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.

Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of life, liberty or property without due process of law. It has been held that the word "liberty," as used in the Constitution, was not to be confined to the more liberty of person, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *United States* v. *Joint Traffic*

Association, 171 U. S. 505, 572. But it has never been, and in our opinion ought not to be, held that the word included [229] the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States.

We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes or that it was intended to include a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts.

While unfriendly or discriminating legislation of the several States may have been the chief cause for granting to Congress the sole power to regulate interstate commerce, yet we fail to find in the language of the grant any such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those private contracts which would directly and substantially, and not as a mere incident, regulate interstate commerce.

If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had

enacted the provisions contained in them? The private contracts may in truth be as far reaching in their effect upon [230] interstate commerce as would the legislation of a single State of the same character.

In the *Debs case*, 158 U. S. 564, it was said by Mr. Justice Brewer, speaking for the court: "It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearing upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State, with its recognized power of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?"

What sound reason can be given why Congress should have the power to interfere in the case of the State, and yet have none in the case of the individual? Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried or among the States whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.

The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of Congress, because the direct results of such contracts might be the regulation of commerce among the States, possibly quite as effectually as if a State had passed a statute of like tenor as the contract.

The liberty of contract in such case would be nothing more than the liberty of doing that which would result in the regulation, to some extent, of a subject which from its general and great importance has been granted to Congress as the proper representative of the nation at large. Regulation, to any substantial extent, of such a subject by any other power than that of Congress, after Congress has itself acted thereon, even

[231] though such regulation is effected by means of private contracts between individuals or corporations, is illegal, and we are unaware of any reason why it is not as objectionable when attempted by individuals as by the State itself. In both cases it is an attempt to regulate a subject which, for the purpose of regulation, has been, with some exceptions, such as are stated in *Mobile County* v. *Kimball*, 102 U. S. 691, 697; *Morgan* v. *Louisiana*, 118 U. S. 455, 465; *Bowman* v. *Chicago & N. W. Railway*, 125 U. S. 465; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 655, exclusively granted to Congress; and it is essential to the proper execution of that power that Congress should have jurisdiction as much in the one case as in the other.

It is, indeed, urged that to include private contracts of this description within the grant of this power to Congress is to take from the States their own power over the subject, and to interfere with the liberty of the individual in a manner and to an extent never contemplated by the framers of the Constitution, and not fairly justified by any language used in that instrument. If Congress has not the power to legislate upon the subject of contracts of the kind mentioned, because the constitutional provision as to the liberty of the citizen limits, to that extent, its power to regulate interstate commerce, then it would seem to follow that the several States have that power, although such contracts relate to interstate commerce, and, more or less, regulate it. If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon the subject of or prohibit such contracts. This cannot be the case.

If it should be held that Congress has no power and the state legislatures have full and complete authority to thus far regulate interstate commerce by means of their control over private contracts between individuals or corporations, then the legislation of the different States might and probably would differ in regard to the matter, according to what each State might regard as its own particular interest. One State [232] might condemn all kinds of contracts of the class described, while another might permit the making of all of

them, while still another might permit some and prohibit others, and thus great confusion would ensue, and it would be difficult in many cases to know just what law was applicable to any particular contract regarding and regulating interstate commerce. At the same time contracts might be made between individuals or corporations of such extent and magnitude as to seriously affect commerce among the States. These consequences would seemingly necessarily follow if it were decided that the state legislatures had control over the subject to the extent mentioned.

It is true, so far as we are informed, that no state legislature has heretofore authorized by affirmative legislation the making of contracts upon the matter of interstate commerce of the nature now under discussion. Nor has it, in terms, condemned them. The reason why no state legislation upon the subject has been enacted has probably been because it was supposed to be a subject over which state legislatures had no jurisdiction. If it should be decided that they have, then the course of legislation of the different States on this subject would probably be as varied as we have already indicated.

On the other hand, if it be true that in no event could a state legislature enact a law affirmatively authorizing such contracts, (even if Congress had no jurisdiction over the subject,) because in so doing it would to a greater or less extent itself thereby, though indirectly, regulate interstate commerce, then the question whether such contracts were legal without legislative sanction would depend upon the decisions of the various state courts having jurisdiction in the cases, and in that event, as the same question might arise in different States, there would be great probability of inconsistent and contradictory decisions among the courts of the different States, and that, too, upon questions of contracts amounting to the regulation of interstate commerce. It is true that under our system of government there are numerous subjects over which the States have exclusive jurisdiction, resulting in the enact- **[233]** ment of different laws upon the same subject in various States, and also in varying and inconsistent judicial judgments in the different States upon the same subject. That condition has never been regarded

as an end in itself desirable. It undoubtedly results in some confusion as to the law applicable to the particular case, and in many instances thereby increases the cost and renders doubtful the result of the litigation arising under such circumstances. They are results and the necessary accompaniment of the division of sovereignty between the States on the one hand and the Federal Government on the other, and yet the enormous and inestimable benefits arising from the existence of separate, independent and sovereign States have completely submerged the comparatively minor evils of inconsistent judgments and different laws upon many of the subjects over which the States have exclusive jurisdiction. But upon the matter of interstate and foreign commerce and the proper regulation thereof, the subject being not alone national but international in its character, the great importance of having but one source for the law which regulates that commerce throughout the length and breadth of the land cannot in our opinion be overestimated. Each State in that event would have complete jurisdiction over the commerce which was wholly within its own borders, while the jurisdiction of Congress, under the provisions of the Constitution, over interstate commerce would be paramount, and would include therein jurisdiction over contracts of the nature we have been discussing.

The remark in *Railroad Company* v. *Richmond*, (*supra*,) that it was never intended that the power of Congress should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to interstate commerce, when read in connection with the facts stated in the report, is entirely sound. It therein appears that a contract had been made between the parties, as to the erection of an elevator and the business to be done by it, which contract was valid when made. Subsequently Congress passed acts relating to the construction of bridges over rivers and streams and authorizing railroads to carry pas- **[234]** sengers on their way from one State to another. The railroad company becoming tired of its contract with the elevator company, desired to take advantage of this legislation and contended that under it, the contract which it had theretofore made with the elevator company became void as

an obstacle to or a regulation of commerce. The court held that contracts which were valid when made continue valid and capable of enforcement, so long, at least, as peace lasts between the governments of the contracting parties, notwithstanding a change in the condition of business which originally led to their creating. It was then added that it never was intended that the power of Congress should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to interstate commerce.

There is no intimation in this remark that Congress has no power to legislate regarding those contracts which do directly regulate and restrain interstate commerce. The inference is quite the reverse, and it is plain that the case assumes if private contracts when entered into do directly interfere with and regulate interstate commerce, Congress had power to condemn them. If the necessary, direct and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and that regulation existing, it is unimportant that it was not designed.

Where the contract affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce is of no importance. We conclude that the plain language of the grant to Congress of power to regulate commerce among the several **[235]** States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power as claimed by the appellants. We therefore think the appellants have failed in their contention upon this branch of subject.

We are thus brought to the question whether the contract or combination proved in this case is one which is either a direct retraint or a regulation of commerce among the several States or with foreign nations contrary to the act of Congress. It is objected on the part of the appellants that even if it affected interstate commerce the contract or combination was only a reasonable restraint upon a ruinous competition among themselves, and was formed only for the purpose of protecting the parties thereto in securing prices for their product that were fair and reasonable to themselves and the public. It is further objected that the agreement does not come within the act because it is not one which amounts to a regulation of interstate commerce, as it has no direct bearing upon or relation to that commerce, but that on the contrary the case herein involves the same principles which were under consideration in *United States* v. *E. C. Knight Company*, 156 U. S. 1, and, in accordance with that decision, the bill should be dismissed.

Referring to the first of these objections to the maintenance of this proceeding, we are of opinion that the agreement or combination was not one which simply secured for its members fair and reasonable prices for the article dealt in by them. Even if the objection thus set up would, if well founded in fact, constitute a defence, we agree with the Circuit Court of Appeals in its statement of the special facts upon this branch of the case and with its opinion thereon as set forth by Circuit Judge Taft, as follows:

"The defendants being manufacturers and vendors of cast-iron pipe entered into a combination to raise the prices for pipe for all the States west and south of New York, Pennsylvania **[236]** and Virginia, constituting considerably more than three quarters of the territory of the United States, and significantly called by the associates 'pay' territory. Their joint annual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the 'pay' territory was 170,500 tons. Of this, 45,000 tons was the capacity of mills in Texas, Colorado and Oregon, so far removed from that part of the 'pay' territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in 'pay' territory and outside of the combination, one was at Columbus, Ohio, two in northern Ohio, and one in Michigan. Their aggregate possible

annual capacity was about one half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the 'pay' territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga and South Pittsburg, and Anniston and Bessemer were grouped much nearer to the centre of the 'pay' territory. The freight upon cast-iron pipe amounts to a considerable percentage of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which Eastern manufacturers would have to pay to deliver pipe in 'pay' territory, the defendants, by controlling two thirds of the output in 'pay' territory, were practically able to fix prices. The competition of the Ohio and Michigan mills of course somewhat affected their power in this respect in the northern part of the 'pay' territory, but the further south the place of delivery was to be, the more complete the monopoly over the trade which the defendants were able to exercise, within the limits already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from Atlan- **[237]** tic seaboard added, this is true, but within that limit they could fix prices as they chose. The most cogent evidence that they had this power is the fact everywhere apparent in the record that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below upon affidavits solely, and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact.

"The defendants were by their combination therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee and by allowing the highest bidder at the secret 'auction pool' to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. In *United States* v. *E. C. Knight Company*, 156 U. S. 1, 16, Chief Justice Fuller, in speaking for the court, said: 'Again all the authorities agree that in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.'

"It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in 'pay' territory were reasonable. A great many affidavits of purhasers of pipe in 'pay' territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that in their **[238]** opinion the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency

was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so. But if it were important we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry written to the other defendants and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed $15 a ton. It could have been delivered at Atlanta at $17 to $18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was $24.25. The same thing was true all through 'pay' territory to a greater or less degree, and especially at 'reserved' cities."

The facts thus set forth show conclusively that the effect of the combination was to enhance prices beyond a sum which was reasonable, and therefore the first objection above set forth need not be further noticed.

We are also of opinion that the direct effect of the agreement or combination is to regulate interstate commerce, and the case is therefore not covered by that of *United States* v. *E. C. Knight Company*, *supra*. It was there held that although the American Sugar Refining Company, by means of the combination referred to, had obtained a practical monopoly of the business of manufacturing sugar, yet the act of Congress did not touch the case, because the combination only related to manufacture and not to commerce among the States or with foreign nations. The plain distinction between manufacture and commerce was pointed out, and it was observed that a contract or combination which directly related to manufacture only was not brought within the purview of the act, although as an indirect and incidental result of such combina- **[239]** tion commerce among the States might be thereafter somewhat affected. Mr. Chief Justice Fuller, in delivering the opinion of the court, spoke of the distinction between the two subjects, and said:

"The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessity of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the General Government, in the exercise of the power to regulate commerce, may repress such monopoly directly and set aside the instruments which have created it.

"Doubtless, the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into

play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it.

* * * * *

"It will be perceived how far reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the General Government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.

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"There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we [240] have seen, that trade or commerce might be indirectly affected, was not enough to entitle complainants to a decree."

The direct purpose of the combination in the *Knight case* was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another State, was held to be immaterial and not to alter the character of the combination. The various cases which had been decided in this court relating to the subject of interstate commerce, and to the difference between that and the manufacture of commodities, and also the police power of the States as affected by the commerce clause of the Constitution, were adverted to, and the case wes decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other States of specific articles were proper subjects for regulation because they did form part of such commerce.

We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants.

While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of arti- [241] cles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?

If dealers in any commodity agreed among themselves that any particular territory bounded by state lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced, (as it naturally would be,) the character of the agreement would be still more clearly one in restraint of trade. Is there any substantial difference where, by agreement among themselves, the parties choose one of their number to make a bid for the supply of the pipe for delivery in another State, and agree that all the other bids shall be for a larger sum, thus practically restricting all but the member agreed upon from any attempt to supply the demand for the pipe or to enter into competition for the business? Does not an agreement or combination of that kind restrain interstate trade, and when Congress has acted by the passage of a statute like the one under consideration, does not such a contract clearly violate that statute?

As has frequently been said, interstate commerce consists of

intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196–203; *Kidd* v. *Pearson*, 128 U. S. 1, 20. If, therefore, an agreement or combination directly restrains not aione the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute. The power to regulate **[242]** such commerce, that is, the power to prescribe the rules by which it shall be governed is vested in Congress, and when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent trenches upon the power of the national legislature and violates the statute. We think it plain that this contract or combination effects that result.

The defendants allege, and it is true, that their business is not like a factory manufacturing an article of a certain kind for which there is at all times a demand, and which is manufactured without any regard to a particular sale or for a particular customer. In this respect as in many others the business differs radically from the sugar refiners. The business of defendants is carried on by obtaining particular contracts for the sale, transportation and delivery of iron pipe of a certain description, quality and strength, differing in different contracts as the intended use may differ. These contracts are, generally speaking, obtained at a public letting, at which there are many competitors, and the contract bid for includes, in its terms, the sale of the pipe and its delivery at the place desired, the cost of transportation being included in the purchase price of the pipe. The contract is one for the sale and delivery of a certain kind of pipe, and it is not generally essential to its performance that it should be manufactured for that particular contract, although sometimes it may be.

If the successful bidder had on hand iron pipe of the kind

specified, or if he could procure it by purchase, he could in most cases deliver such pipe in fulfilment of his contract just the same as if he manufactured the pipe subsequently to the making of the contract and for the specific purpose of its performance. It is the sale and delivery, of a certain kind and quality of pipe, and not the manufacture, which is the material portion of the contract, and a sale for delivery beyond the State makes the transaction a part of interstate commerce. Municipal corporations and gas, railroad and water companies **[243]** are among the chief customers for the pipe, and when they desire the article they give notice of the kind and quality, size, strength and purpose for which the pipe is desired, and announce that they will receive proposals for furnishing the same at the place indicated by them. Into this contest (and irrespective of the reserved cities) the defendants enter, not in truth as competitors, but under an agreement or combination among themselves which eliminates all competition between them for the contract, and permits one of their number to make his own bid and requires the others to bid over him. In certain sections of the country the defendants would have, by reason of their situation, such an advantage over all other competitors that there would practically be no chance for any other than one of their number to obtain the contract, unless the price bid was so exorbitant as to give others not so favorably situated an opportunity to snatch it from their hands. Under these circumstances, the agreement or combination of the defendants, entered into for that purpose and to directly obtain that desired result, would inevitably and necessarily give to the defendant, who was agreed upon among themselves to make the lowest bid, the contract desired and at a higher price than otherwise would have been obtained, and all the other parties to the combination would, by virtue of its terms, be restricted from an attempt to obtain the contract.

The combination thus had a direct, immediate and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction the resulting high prices for the pipe would not have been obtained. It is useless for the defendants to say

they did not intend to regulate or affect interstate commerce, They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement.

The cases of *Hopkins* v. *United States*, 171 U. S. 578, and *Anderson* v. *United States*, 171 U. S. 604, are not relevant. In the *Hopkins case* it was held that the business of the mem- **[244]** bers of the Kansas City Live Stock Exchange was not interstate commerce, and hence the act of Congress did not affect them; while in the *Anderson case* it was held that whether the members of the Traders' Live Stock Exchange were or were not engaged in the business of interstate commerce, was immaterial, as the agreement proved was not in restraint of trade, and did not regulate such commerce. It was said that when it is seen that the agreement entered into does not directly relate to and act upon and embrace interstate commerce, and that it was executed for another and entirely different purpose, and that it was calculated to attain it, the agreement would be upheld, if its effect upon that commerce were only indirect and incidental. The agreement involved in that case was held to be of such a character. The case we have here is of an entirely different nature, and is not covered or affected by the decisions cited.

It is also urged that as but one contract would be awarded for the work proposed at any place, and therefore only one person would secure it by virtue of being the lowest bidder, the selection by defendants of one of their number to make the lowest bid as among themselves could not operate as any restraint of trade; that the combination or agreement operated only to make a selection of that one who should have the contract by being the lowest bidder, and it did not in the most remote degree itself limit the number or extent of contracts, and therefore could not operate to restrain interstate trade. This takes no heed of the purpose and effect of the combination to restrain the action of the parties to it so that there shall be no competition among them to obtain the contract for themselves.

We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers

in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the **[245]** trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce.

If iron pipe cost one hundred dollars a ton instead of the prices which the record shows were paid for it, no one, we think, would contend that the trade in it would amount to as much as if the lower prices prevailed. The higher price would operate as a direct restraint upon the trade, and therefore any contract or combination which enhanced the price might in some degree restrain the trade in the article. It is not material that the combination did not prevent the letting of any particular contract. Such was not its purpose. On the contrary, the more contracts to be let the better for the combination. It was formed not for the object of preventing the letting of contracts, but to restrain the parties to it from competing for contracts, and thereby to enhance the prices to be obtained for the pipe dealt in by those parties. And when by reason of the combination a particular contract may have been obtained for one of the parties thereto, but at a higher price than would otherwise have been paid, the charge that the combination was one in restraint of trade is not answered by the statement that the particular contract was in truth obtained and not prevented. The parties to such a combination might realize more profit by the higher prices they would secure than they could earn by doing more work at a much less price. The question is as to the effect of such combination upon the trade in the article, and if that effect be to

destroy competition and thus advance the price, the combination is one in restraint of trade.

Decisions regarding the validity of taxation by or under state authority, involving sometimes the question of the point of time that an article intended for transportation beyond the [246] State ceases to be governed exclusively by the domestic law and begins to be governed and protected by the national law of commercial regulation, are not of very close application here. The commodity may not have commenced its journey and so may still be completely within the jurisdiction of the State for purposes of state taxation, and yet at that same time the commodity may have been sold for delivery in another State. Any combination among dealers in that kind of commodity, which in its direct and immediate effect, forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another State, would in our opinion be one in restraint of trade or commerce among the States, even though the article to be transported and delivered in another State were still taxable at its place of manufacture.

It is said that a particular business must be distinguished from its mere subjects, and from the instruments by which the business is carried on; that in most cases of a large manufacturing company it could only be carried on by shipping products from one State to another, and that the business of such an establishment would be related to interstate commerce only incidentally and indirectly. This proposition we are not called upon to deny. It is not, however, relevant. Where the contract is for the sale of the article and for its delivery in another State, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfil his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce, and not one relating only to manufacture.

It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of

the same nature as the manufacturing of refined sugar in the *Knight case*—that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at [247] some time to sell, and possibly to sell in another State; but such sale we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of or an illegal interference with interstate commerce. That principle is not affected by anything herein decided.

The views above expressed lead generally to an affirmance of the judgment of the Court of Appeals. In one aspect, however, that judgment is too broad in its terms—the injunction is too absolute in its directions—as it may be construed as applying equally to commerce wholly within a State as well as to that which is interstate or international only. This was probably an inadvertence merely. Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within a State and also that which is interstate.

In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation and delivery of the pipe by them under that contract would be a transaction wholly within the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some non-resident of the State eventually obtained it.

The fact that the proposal called for the delivery of pipe in the same State where some of the defendants resided and carried on their business would be sufficient, so far as the act

of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract [248] for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to some one outside the State as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own State could not be reached by the Federal power derived from the commerce clause in the Constitution.

To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own State, it is modified, and limited to that portion of the combination or agreement which is interstate in its character. As thus modified, the decree is

Affirmed.

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ACTIONS AND DEFENSES.

I. ACTIONS.

1. By private parties.

1. Private Individual can not Sue in Equity under the Statute—Remedy at Law.—The act "to protect trade and commerce against unlawful restraints and monopolies" (act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons, and the right to bring suits in equity being vested in the district attorneys of the United States. *Pidcock* v. *Harrington*, 64 F., 821. 1—377

2. Remedy, Action for Damages—No Recourse in Equity.—The Anti-Trust Law of July 2, 1890, does not authorize a court of equity to entertain a bill by a private party to enforce its provisions, his remedy being by an action at law for damages. *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. 1—862

3. A municipal corporation engaged in operating water, lighting, or similar plants, from which a revenue is derived, is, in relation to such matters, a business corporation and may maintain an action under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F., 23. 2—299

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6. **Where a member of a voluntary association has been suspended** by the directors for nonpayment of a fine for violation of the by-laws, **his action to be restored** to the privileges of membership **is founded upon the contract** between himself and the association, which he must either accept in its entirety or repudiate. He does not occupy the position of a stranger injured by the acts of co-trespassers. *Ib.*

7. **May Maintain Action to Set Aside Unlawful Transfer of Property.**—A **minority stockholder** in a corporation may maintain a suit in equity in behalf of himself and all other stockholders similarly situated to set aside an alleged unlawful transfer of the property of the corporation in pursuance of a conspiracy between its officers and the transferee in restraint of trade and commerce, where it is alleged that the corporation, on demand, has refused to bring such suit. *Metcalf* v. *Amer. School-Furniture Co.*, 108 F., 909. **2—75**

8. **Same—Multifariousness.**—**A bill** for such relief **which also seeks the recovery of treble damages** under the Anti-Trust Act of July 2, 1890, **is multifarious**, since such damages are only recoverable in an action at law by the plaintiff as an individual, and not as a stockholder, while the equitable relief prayed for is in behalf of the corporation, and, if granted, would inure to the benefit of all the stockholders. *Ib.*

9. **No Right of Action Against Trust to Recover Damages.**—Section 7 of the Anti-Trust Act (26 Stat., 209), giving to any person injured by any other person or corporation by reason of anything forbidden in the act the right to recover treble damages, does not authorize an action against an alleged trust corporation, by one who was a party to its organization and a stockholder therein, to recover damages resulting from the enforcement by defendant of rights given it by the alleged unlawful agreement. *Bishop* v. *Amer. Preservers Co.*, 105 F., 845. **2—51**

10. **Member of a Combination in Violation of Anti-Trust Law may Maintain Suit to Enjoin Infringement of Patent Owned by Complainant.**—That a complainant is a member of a combination in violation of the Anti-Trust Law of July 2, 1890 (26 Stat., 209), does not give third persons the right to infringe a patent of which complainant is owner, nor preclude complainant from maintaining a suit in equity to enjoin such infringement. *General Electric Co.* v. *Wise*, 119 F., 922. **2—205**

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11. **Recovery on Collateral Contract.**—**The act of July 2, 1890**, section 1 (26 Stat., 209), known as the "Sherman Anti-Trust Act," does not invalidate, or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination formed for the purpose of restraining interstate trade in such goods. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. **2—995**

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14. **Same.**—**Nor does the illegality, at common law, of such a combination** formed by corporations and persons in restraint of trade, **preclude** it from recovering the purchase price of goods sold in the course of business. *Ib.*

4. By the United States.

15. **The right to bring suits in equity** for violations of the Anti-Trust Act of July 2, 1890, **is vested in the district attorneys** of the United States. *Pidcock* v. *Harrington*, 64 F., 821. **1—377**

16. **The right to bring suits for injunction** under section 4 of the act of July 2, 1890 (26 Stat., 209), **is limited to suits instituted on behalf of the Government.** *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1—620**

17. **Same.**—The only party entitled to maintain a bill of **injunction** for an alleged breach of the Anti-Trust Act of 1890 is the United States, by its **district attorney**, on the authority of the **Attorney-General.** *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. **1—823**

18. **The intention of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), **was to limit direct proceedings in equity** to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among

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the several States and with foreign nations, to those instituted in the name of the United States, under section 4 of the act, by district attorneys of the United States, acting under the direction of the Attorney-General; thus securing the enforcement of the act, so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. 2—533

5. By States.

19. A State can not maintain an action in equity to restrain a corporation from violating the provisions of the act of July 2, 1890, on the ground that such violations by decreasing competition would depreciate the value of its public lands and enhance the cost of maintaining its public institutions, the damages resulting from such violations being remote and indirect and not such direct actual injury as is provided for in section 7 of the act. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. 2—533

20. Municipal Corporation may Maintain Action for Damages under Section 7, Act of 1890.—A municipal corporation engaged in operating water, lighting, or similar plants, from which a revenue is derived, is, in relation to such matters, a business corporation, and may maintain an action under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F., 23. 2—299

6. At common law—Damages.

21. Action for Damages Must Show that Plaintiff is Engaged in Interstate Commerce.—An action to recover damages alleged to have been caused by acts done in violation of the Anti-Trust Act (26 Stat., 209) can not be maintained when the complaint fails to show that plaintiff is engaged in interstate commerce, and no such showing is made by an averment that plaintiff is engaged in "manufacturing watch cases throughout all the States of the United States and in foreign countries." *Dueber Watch Case Mfg.* v. *Howard Watch, etc., Co.*, 55 F., 851. 1—178

Case affirmed, 66 F., 637 (1—421).

22. Same—Must Show Intention to Control Market, or a Large Portion of it.—An agreement by a number of manufacturers and dealers in watch cases to fix an arbitrary price on their goods, and not to sell the same to any persons buying watch cases of plaintiff, is not in violation of the statute; and a

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complaint which, on the last analysis, avers only these facts, without averring the absorption or the intention to absorb or control the entire market, or a large part thereof, states no cause of action. *Ib.*

23. Action Alleged to be in Violation of the Statutes of a State and of the United States Held to be Founded upon Act of July 2, 1890 (26 Stat., 290).—An action brought in the United States Circuit Court for southern New York by a manufacturing company against competitors in various States, alleging the formation of a combination and an attempt to create a monopoly, "in violation of the statutes of this State and the United States," whereby plaintiff's business was injured, and alleging the formation of the combination on and prior to November 16, 1887, but that, after the passage of the act of Congress of July 2, 1890, defendants ratified, renewed, and confirmed their previous contracts, combinations, etc., and judgment being demanded for treble damages "under and by virtue of the statute." *Held*, that the action must be deemed to be founded upon the said act of July 2, 1890. *Dueber Watch Case Mfg. Co.* v. *Howard Watch, etc., Co.*, 66 F., 637. 1—421

24. Same—A Cause of Action not Stated.—Where, in the above action, complaint alleged that previous to November 16, 1887, it sold all its goods to a great number of dealers "throughout the United States and Canada;" that prior to that date defendants had agreed with each other to maintain arbitrary and fixed prices for their watch cases; that, for the purpose of compelling plaintiff to join with them therein, defendants on said date mutually agreed that they would not thereafter sell any goods to persons who bought or sold goods manufactured by plaintiff; that they caused notice thereof to be served upon the many dealers in such goods throughout the United States and Canada, who had formerly dealt in plaintiff's goods, whereupon many of such dealers withdrew their patronage from plaintiff; that after the passage of the act of July 2, 1890, defendants ratified, renewed, and confirmed their previous agreements, and served notice of such ratification upon all said dealers in plaintiff's goods, whereby said dealers were compelled to refuse to purchase plaintiff's watch cases. *Held*, that the complaint failed to state a cause of action under the statutes. *Ib.*

25. Same—*Held*, that no monopolizing or combination to monopolize interstate commerce, contrary to the second section of the act, was shown, for the reason that the allegations did not preclude the inference that each defendant may have sold his entire product in the State where it was manufactured. *Ib.*

ACTIONS AND DEFENSES—Continued.

26. Same—*Held*, that **the contracts did not produce an unlawful restraint** of trade, under the first section, because the combination and agreement to fix arbitrary prices **did not** appear to **include all manufacturers of watch cases**, but was only a partial restraint in respect to an article not of prime necessity, and therefore came within the recognized limits of lawful contracts. *Ib.*

27. Same—*Held*, that the further **agreement not to sell** to customers of plaintiff was **a lawful means of enlarging and protecting the business** of the defendants. *Ib.*

Shipman, Cir. J., concurring, on the ground—

28. That the acts of the defendants, whether viewed as an attempt to create a monopoly or as a contract in restraint of trade, were **not shown to concern interstate commerce**, because there were **no allegations showing the residence of** any **dealers** who withdrew their patronage from complainant, and it therefore did not directly appear that any of them resided outside of the State where plaintiff's goods were manufactured. *Ib.*

Wallace, Cir., dissenting, on the ground—

29. That the **allegations** were **sufficient to show** that the **attempts** to monopolize and restrain **did operate upon interstate commerce.** *Ib.*

30. That, while the contracts might not be unlawful in themselves, yet the **purpose** for which they were alleged to be made, namely, to compel plaintiff to join in the agreement for fixing arbitrary prices, and to injure and destroy its business if it refused to do so, was **oppressive and unjust**, and rendered the acts of defendants unlawful under both sections of the statute. *Ib.*

31. The Only Remedy to Party other than the United States is a Suit for Damages.—Under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," the only remedy given to any other party than the Government of the United States, is a suit for threefold damages, costs, and attorney's fees. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. **1—823**

32. The **only remedy of a private individual** to restrain acts forbidden by the Anti-Trust Act of 1890 **is an action at law for damages.** *Pidcock* v. *Harrington*, 64 F., 821. **1—377**

33. The remedy of a private party under the Anti-Trust Act of 1890 **is an action** at law **for damages.** *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. **1—862**

34. By Direct Action.—A recovery of the treble damages authorized by the Sherman Anti-Trust Act of July 2, 1890, section 7 (26 Stat. L., 209, chap. 647), in case of injury sustained by violation of the act, can be had only by direct action, **and not by way of set-off in an action brought for the price of goods** by a company illegally formed in violation of the act—especially when the State practice does not permit the set-off of unliquidated damages. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540. **2—118**

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35. Municipal Corporation may Maintin Action for Damages under Section 7, Act of 1890.—A municipal corporation engaged in operating water, lighting, or similar plants, from which a revenue is derived, is, in relation to such matters, a business corporation, and may maintain an action under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F., 23. **2—299**

36. Statutory Limitations Governed by the Laws of the State in which Action is brought.—An **action under section 7** of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States, * * * and shall recover threefold the damages by him sustained," **is not an action for a penalty** or forfeiture, **within section 1047, Revised Statutes, prescribing a limitation of five years** for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but **one for the enforcement of** a **civil remedy for a private injury**, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, **and** such action is **governed as to limitation by the statutes of the State** in which it is brought. *City of Atlanta* v. *Chattanooga Foundry and Pipe Co.*, 101 F., 900. **2—11**

Affirmed by Circuit Court of Appeals, 127 F., 23 (**2—299**). The judgment of the circuit court was, however, reversed, but upon other grounds—a construction of section 4470, Tennessee Code.

Affirmed by Supreme Court (203 U. S., 390).

37. Same—Every Member of the Combination Liable for Damages.—Every member of an illegal combination in restraint of interstate trade or commerce in violation of the Anti-Trust Act is liable for the damages resulting to the business or property of a plaintiff by reason of such combination, and it is immaterial that there were no direct contract relations between plaintiff and defendant. *City of Atlanta* v. *Chattanooga Foundry and Pipe Works*, 127 F., 23. **2—299**

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38. Same—Measure of Recovery for Injury to Business.—If the effect of an illegal combination between manufacturers to prevent competition in the sale of a commodity which is a subject of interstate commerce be to enhance the price of such commodity to a purchaser, he is entitled to recover the **difference between the price paid and the reasonable price** under natural competitive conditions, as an injury to his business, **whether such business is interstate or not, provided the transaction** by which the purchase was made **was interstate.** *Ib.*

39. Conspiring to Injure Another in Business—Mailing Printed Circulars.—The action of an association of manufacturers in adopting a resolution denouncing a dealer in the product they manufactured, who bought and shipped such product to customers in other States and foreign countries, and in printing such resolution in circulars, and mailing the same to other manufacturers and customers of the dealer, whereby his business was injured, constituted an illegal combination or conspiracy in restraint of interstate and foreign commerce, and **gives the person injured a right of action** in a circuit court of the United States, under the Anti-Trust Law of 1890, to recover the damages sustained. *Gibbs* v. *McNeeley*, 102 F., 594. **2—25**

Verdict for defendant directed, 107 F., 210 (2—71), but

Reversed by Circuit Court of Appeals, 118 F., 120 (**2—194**).

40. Complaint Fatally Defective where it Fails to Show that Plaintiff Suffered Damage.—A complaint in a civil action, based on the Anti-Trust Law of 1890, alleging an illegal combination by defendants in restraint of trade, is fatally defective where it fails to show that plaintiff has suffered damage by reason of such combination. *Ib.*

41. Treble damages are recoverable under the Anti-Trust Act of 1890 **only in an action at law** by the plaintiff as an **individual** and not as a stockholder in a corporation violating that act. *Metcalf* v. *Amer. School Furniture Co.*, 108 F., 909. **2—75**

42. Where Manufacturer Refused to Sell because Complainant was not a Member of Trust Association.—A dealer in tiles, mantels, and grates in San Francisco, to whom a manufacturer in another State refused to sell tiles on the sole ground that he was not a member of an association to which he belonged, which association sought to control the output and regulate the prices thereof in California and adjoining States, *Held*, **entitled to damages** under section 7 of the Anti-Trust Act of 1890. *Montague* v. *Lowry*, 115 F., 27. **2—112**

Affirmed, 193 U. S., 38 (**2—327**).

See also *Bishop* v. *Amer. Preservers Co.*, 105 F., 845. **2—51**

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7. Equity—Injunctions, etc.

43. Private Individuals no Remedy in Equity under the Statute.—The Anti-Trust Act of July 2, 1890, confers no right upon private individuals to sue in equity for the restraint of acts forbidden by that statute. *Pidcock* v. *Harrington*, 64 F., 821. **1—377**

44. Private Party no Remedy in Equity.—The Anti-Trust Act of July 2, 1890, does not authorize a court of equity to entertain a bill by a private party to enforce its provisions. *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. **1—862**

45. The right to bring suits for injunction under section 4 of the act of July 2, 1890 (26 Stat., 209), **is limited to suits instituted on behalf of the Government.** *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1—620**

46. The only party entitled to maintain a bill of injunction for an alleged breach of the act of July 2, 1890 (26 Stat., 209), **is the United States,** by its district attorney, on the authority of the Attorney-General. *Gulf C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. **1—824**

47. Suit Enjoining Infringement Maintainable by Owner of Patent though Member of Illegal Combination.—Complainant, though a member of a combination in violation of the Anti-Trust Law of July 2, 1890, can maintain a suit in equity to enjoin an infringement of a patent owned by him. *General Electric Co.* v. *Wise*, 119 F., 922. **2—205**

8. Purchases from, or services rendered by, illegal corporations.

48. Can not Retain Goods and Recover Price Paid.—**One purchasing liquors from an illegal combination** of distillers, which controls the market and prices, though impelled thereto by business needs and policy, enters into the contract voluntarily, and can not retain the goods, and recover the price paid, or any part of it, either on the ground that the combination was illegal, or the price excessive. 77 Fed., 700, affirmed. *Dennehy* v. *McNulta*, 86 F., 825. **1—855**

49. Rebate vouchers issued by a distilling company to customers, by which it promised to refund a certain sum per gallon on their purchases at the end of six months, on condition of their purchasing exclusively from the company during that time, **can not be enforced,** either at law or in equity, **where the condition has not been performed, though such condition be illegal,** as in restraint of trade; there being no other consideration for the promise. 77 Fed., 700, affirmed. *Ib.*

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50. Must Pay Reasonable Value of Services—Towage.—One who requests and accepts the services of a tug for towage purposes can not escape paying the reasonable value of the services rendered on the ground that the tug owners are members of an association which is illegal under the act of July 2, 1890, relating to trusts and monopolies. *The Charles E. Wisewall*, 74 F., 802. 1—608

Affirmed, 86 F., 671 (1—850).

9. Patents—Actions for infringement.

51. Third Party can not Enjoin Combination from Bringing Suit for Infringement of its Patents.—The fact that a corporation owning letters patent upon a particular kind of machinery has entered into a combination with other manufacturers thereof to secure a monopoly in its manufacture and sale, and to that end has acquired all the rights of other manufacturers for the exclusive sale and manufacture of such machines under patents, will not entitle a stranger to the combination to enjoin the corporation from bringing any suits for infringement against him or his customers. *Strait* v. *National Harrow Co.*, 51 F., 819. 1—52

See also *National Folding Box & Paper Co.* v. *Robertson*, 99 F., 985 (2—4); and *Otis Elevator Co.* v. *Geiger*, 107 F., 131 (2—66).

52. Owner of Patent, though Member of Illegal Combination, can Maintain Action for Infringement.—That a complainant is a member of a combination in violation of the Anti-Trust Law of July 2, 1890, does not give third persons the right to infringe a patent of which he, the complainant, is owner, nor preclude complainant from maintaining a suit in equity to enjoin such infringement. *General Electric Co.* v. *Wise*, 119 F., 922. 2—205

53. Combination Organized to Receive Assignments of Patents can not Maintain Action for Infringement against Assignor.—A combination among manufacturers of spring-tooth harrows, whereby a corporation, organized for the purpose, becomes the assignee of all patents owned by the various manufacturers, and executes licenses to them, so as to control the entire business and enhance prices, is void both as to the assignments and licenses, so that the corporation can not maintain a suit against one of its assignors who violates the agreement, for infringement. *National Harrow Co.* v. *Hench.*, 84 F., 226. 1—746

See also *National Harrow Co.* v. *Quick*,, 67 F., 130 (1—443).

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10. Generally.

54. What must be Shown.—To vitiate a combination, such as the Anti-Trust Act condemns, it need not be shown that the combination, in fact, results, or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show **that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce,** and to deprive the public of the advantages that flow from free competition. *Northern Securities Co.* v. *United States*, 193 U. S., 197. (Harlan, Brown, McKenna, Day.) 2—340

55. Same.—In order to maintain this suit the Government is not **obliged to show that the agreement in question was entered into for the purpose of restraining trade** or commerce, **if such restraint is its necessary effect.** *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—649

See also PLEADING AND PRACTICE.

56. A suit brought by the Attorney-General of the United States to declare the Northern Securities Co. combination illegal under the act of July 2, 1890, is **not an interference with the control of the States** under which the railroad companies and the holding company were, respectively, organized. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (Brewer, concurring). 2—342

57. No Right of Action Growing out of Suits against Plaintiff which have not been Decided.—The Anti-Trust Act of July 2, 1890 (26 Stat., 209), which gives a right of action to any person injured by acts in violation of its provisions, does not authorize suit where the only cause of action is the bringing of two suits which have not been decided. *Bishop* v. *Amer. Preservers' Co.*, 51 F., 272. 1—49

See also INDICTMENTS.

II. DEFENSES.

1. Indefiniteness, duplicity.

58. Indefiniteness.—In an action by a corporation for the infringement of elevator patents, an answer alleging as a defense that the plaintiff is an unlawful combination in restraint of trade and in violation of the Sherman Anti-Trust Law (26 Stat., 209), but **which fails to state who are in the combination** in the agreement characterized as unlawful, **and does not disclose fully and in detail that the combination was entered into after the act took effect,** and all the facts necessary to show its illegality, is insufficient for indefiniteness. *Otis Elevator Co.* v. *Geiger*, 107 F., 131. 2—66

ACTIONS AND DEFENSES—Continued.

II. DEFENSES—Continued.

59. Duplicity.—A declaration in an action brought under section 7 of the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat., 210) to recover damages for a violation of section 1 of the act, **which alleges in a single count that defendant entered into a "contract, combination, and conspiracy"** in restraint of trade, is **bad for duplicity.** *Rice* v. *Standard Oil Co.*, 134 F., 464. **2—633**

60. Same.—The Anti-Trust Act of 1890 makes a **distinction between a contract and a combination or conspiracy** in restraint of trade. *Ib.*

MULTIFARIOUSNESS. *See* PLEADING AND PRACTICE.

2. Contract in violation of Anti-Trust Act, or of an act of Congress.

61. The defense that a contract is in violation of the act of Congress **of July 2, 1890** (26 Stat., 209), to protect trade and commerce against unlawful restraints and monopolies, which makes illegal every contract violative of its provisions, may be set up by a private individual when sued thereon, and, if proved, constitutes a **good defense** to the action. *Bement* v. *National Harrow Co.*, 186 U. S., 70. **2—170**

62. Same.—Anyone sued upon a contract **may set up** as a defense **that it is a violation of an act of Congress.** *Ib.* (169)

3. Illegal combination—Purchases from, services.

63. Payment for Services can not be Avoided because Performed by a Trust—Towage.—One who requests and accepts the services of a tug for towage purposes can not escape paying the reasonable value of the services rendered on the ground that the tug owners are members of an association which is illegal under the act of July 2, 1890, relating to trusts and monopolies. *The Charles E. Wisewall*, 74 F., 802. **1—608**
Affirmed, 86 F., 671 **(1—850).**

64. Payment of Note for Goods Purchased can not be Avoided because Bought from a Trust.—A note made for a balance due on goods bought from a corporation can not be avoided merely because the latter is a trust organized to create and carry out restrictions in trade contrary to the Anti-Trust Act of July 2, 1890, as that only covers contracts which are themselves in restraint of trade, and does not affect those which "merely indirectly, remotely, incidentally, or collaterally regulate, to a greater or less degree, interstate commerce between the States." *Union Sewer-Pipe Co.* v. *Connelly*, 99 F., 354. **2—1**
Affirmed, 184 U. S., 540 **(2—118).**
See also *Dennehy* v. *McNulta*, 86 F., 825 **(1—885).**

ACTIONS AND DEFENSES—Continued.

II. DEFENSES—Continued.

65. A contract for the sale of merchandise is not rendered illegal by the fact that the selling corporation is a trust or monopoly organized in violation of law, either Federal or State; the contract of sale being collateral and having no direct relation to the unlawful scheme or combination. *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 F., 491. **2—1027**
See also *Continental Wall Paper Co.* v. *Lewis Voight & Sons Co.*, 148 F., 940.

66. Recovery on Collateral Contract by Member of Combination in Restraint of Interstate Trade.—The act of July 2, 1890, section 1 (26 Stat., 209) does not invalidate or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination formed for the purpose of restraining interstate trade in such goods. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. **2—995**

4. Patents—Illegal combination.

67. Infringement of Patent—No Defense that the Owner is an Illegal Corporation under Anti-Trust Law.—The fact that the owner of a patent is a corporation alleged to have been formed in violation of the Anti-Trust Law, and that the patent is alleged to have been assigned to it in furtherance of the illegal purpose to create a monopoly and control the price of an article of commerce, is not available to an infringer of such patent to defeat a suit for the infringement. *National Folding-Box & Paper Co.* v. *Robertson*, 99 F., 985. **2—4**

68. Same.—In an action by a corporation for the infringement of elevator patents, a private defendant was not entitled to urge as a defense that plaintiff was a corporation organized merely for the purpose of holding the legal title to various elevator patents alleging to have been infringed, for the purpose of controlling sales and enhancing prices of elevators and apparatus, without itself engaging in the manufacture and sale of such appliances, in violation of the Sherman Anti-Trust Law (26 Stat., 209), since until the United States has acted and sought to prosecute the plaintiff for violation of such act an infringer of the plaintiff's patent will not be permitted to raise such issue as a defense thereto. *Otis Elevator Co.* v. *Geiger*, 107 F., 131. **2—66**

69. Infringement Suit can not be Maintained by Combination of Patent Owners against Assignor.—A combination among manufacturers of spring-tooth harrows, whereby a corporation, organized for the purpose, becomes the assignee of all patents owned by the various manufacturers, and executes licenses to them, so as to control the entire business and en-

ACTIONS AND DEFENSES—Continued.

II. DEFENSES—Continued.

hance prices, is void both as to the assignments and licenses, so that the corporation can not maintain a suit against one of its assignors who violates the agreement, for infringement. *National Harrow Co.* v. *Hench*, 84 F., 226. 1—746

See also *National Harrow Co.* v. *Quick*, 67 F., 130 (1—443); and ACTIONS AND DEFENSES 51–53.

5. Agreement not to engage in business.

70. **Suit to enforce.**—In a suit to enjoin a defendant from violating a contract by which for a valuable consideration he covenanted not to engage in business for himself or another in competition with that of complainant for a term of years, and to enjoin a codefendant from employing his services in a competing business, it is **no defense that his codefendant hired him in ignorance of the contract**, and will suffer damage if deprived of his services. *A. Booth & Co.* v. *Davis*, 127 F., 875. 2—319

Affirmed, 131 F., 31 (2–526).

See also *Robinson* v. *Suburban Brick Co.*, 127 F., 804 (2—312).

6. Generally.

71. **That Combination has not been Injurious to the Public.**—It is no defense to a suit to dissolve a combination as illegal, under the Anti-trust Law, that it has not been productive of injury to the public or even that it has been beneficial, by enabling the combination to compete for business in a wider field. *U. S.* v. *Chesapeake & O. Fuel Co.*, 105 F., 93. 2—34

Affirmed, 115 F., 610 (2—151).

72. **That Combination is in the Form of a Corporation or Holding Company.**—The fact that the purpose of an illegal combina- between stockholders of two railroad companies operating parallel and competing interstate lines, to secure unity of interest and control of such companies, and to prevent competition, has been accomplished by the formation of a corporation which has acquired the ownership of a majority of the stock of each of the companies, **can not be urged to defeat a suit by the United States to restrain** the exercise of **the power so illegally acquired** by the corporation through such combination, as imposing a restraint upon interstate commerce in violation of the Anti-Trust Law (act July 2, 1890, 26 Stat., 209). *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

73. **Same—Questions of Benefit to the Public—Public Policy.**—Where the effect of a combination is to directly prevent competition between two parallel and naturally competing lines

ACTIONS AND DEFENSES—Continued.

II. DEFENSES—Continued.

of railroad engaged in interstate business, it is in restraint of interstate commerce, and a violation of the Anti-Trust Act (act July 2, 1890, 26 Stat., 209), and the court, in a suit to enjoin it as such, can not consider the question whether the combination may not be of greater benefit to the public than competition would be; that being a question of public policy, to be determined by Congress. *Ib.*

Affirmed, 193 U. S., 197 (2—338).

74. The **pendency of a suit in a court can not be pleaded in abatement** of an action in a circuit court of the United States to recover treble damages under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), since the State court is without jurisdiction to enforce the remedy given by said section, and therefore the same case can not be depending in both courts. *Lowe* v. *Lawlor*, 130 F., 633. 2—563

AGREEMENTS NOT TO ENGAGE IN BUSINESS. *See* ACTIONS AND DEFENSES, 70; COMBINATIONS, ETC., 152–159.

AGREEMENTS NOT TO COMPETE IN BIDDING. *See* COMBINATIONS, ETC., 39–52.

ALLEGATIONS AND PROOF. *See* PLEADING AND PRACTICE, 12–15.

ANTICIPATED PROFITS. *See* DAMAGES, 3.

APPEAL. *See* COURTS, 23, 36, 38, 40, 42, 43.

APPORTIONMENT, DIVISION, OR RESTRICTION OF TERRITORY. *See* COMBINATIONS, ETC., 39, 136, 137, 166.

ATTACHMENT.

Grounds for Dissolution—Prior Attachment in State Court.—Where the State statute provides for successive attachments of the same property, a prior attachment in a State court affords no ground for the discharge of an attachment in a Federal court. *Lowe* v. *Lawlor*, 130 F., 633. 2—563

ATTORNEY-GENERAL. *See* ACTIONS AND DEFENSES, 17, 18, 55; PARTIES, 7.

ATTORNEY'S FEES. *See* COSTS.

AVOIDANCE OF PAYMENT. *See* ACTIONS AND DEFENSES, 63, 64.

BAILMENT. *See* SALE, 4.

BIDDING, AGREEMENTS NOT TO COMPETE. *See* COMBINATIONS, ETC., 39–52.

BILL. *See* EQUITY, 2, 4; PLEADING AND PRACTICE, 1, 2, 6–9, 15–17, 19, 20.

BOOKSELLERS. *See* COMBINATIONS, ETC., 28, 96.

BOYCOTT. *See* COMBINATIONS, ETC., 124, 213.

BURDEN OF PROOF. *See* EVIDENCE, 3, 4.

CARRIERS.

1. **Common Carriers Not Included Within the Statute.**—It was not the intention of Congress to include common carriers subject to the act of February 4, 1887, within the provisions of the act of July 2, 1890, which is a special statute, relating to combinations in the form of trusts and conspiracies in restraint of trade. *U. S.* v. *Trans-Mo. Ft. Assn.*, 53 F., 440. Case reversed, 166 U. S., 290 (1—648). 1—80
2. **May Demand Prepayment of Freight from One Connecting Carrier and Not from Another.**—A common carrier engaged in interstate commerce may at common law, and under the interstate commerce law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, **and may advance freight charges** to one connecting carrier without advancing such charges to another connecting carrier. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. 1—823
3. **Same—Through Transportation—Joint Rates and Billing.**—Such carrier may enter into a contract with one connecting carrier for through transportation, through joint traffic, through billing, and for the division of through rates, without being obligated to enter into a similar contract with another connecting carrier. *Ib.*
4. **Not Required to Receive Goods Without Prepayment of Charges.**—The rules of the common law do not require a carrier to receive goods for carriage, either from a consignor or a connecting carrier, without prepayment of its charges if demanded, **nor to advance the charges of a connecting carrier** from which it receives goods in the course of transportation; **nor** can it be required **to extend such credit** or make such advances **to one connecting carrier because it does so to another.** *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. 1—862
5. **Same—Express Companies.**—The interstate commerce act does not apply to independent express companies not operating railway lines. *Ib.*

See also COMBINATIONS, ETC., 100–111, 189–200.

CERTIORARI. *See* COURTS, 48.

COAL. *See* COMBINATIONS, ETC., 25–27, 59.

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC., IN RESTRAINT OF TRADE AND COMMERCE.

I. IN GENERAL.

1. Distinction.

1. **Distinction Between a Contract and a Combination or Conspiracy in Restraint of Trade.**—Section 1 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations," makes a distinction between a contract and a combination or conspiracy in restraint of trade. *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633
2. **Declaration which Made no such Distinction Bad for Duplicity.**—A declaration in a suit based on section 7 (26 Stat., 210) to recover damages resulting to plaintiff from a violation of such provision, which alleges in a single count that defendant entered into a "contract, combination, and conspiracy" in restraint of trade, is bad for duplicity. *Ib.*

2. Legality—How determinable—Test.

3. **The test of the validity of contracts or combinations** in restraint of trade **is not the existence of restriction upon competition** imposed thereby, but **the reasonableness of that restriction under the facts and circumstances of each particular case.** Public welfare is first considered, and, if the contract or combination appears to have been made for a just and honest purpose and the restraint upon trade is not specially injurious to the public and is not greater than the protection of the legitimate interests of the party in whose favor the restraint is imposed reasonably requires, the contract or combination is not illegal. Shiras, District Judge, dissenting, on the ground that this rule is not applicable to corporations charged with public duties. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186
Case reversed, 166 U. S., 290 (1—648).
4. **Provisions Apply to all Contracts in Restraint—Not Merely to Unreasonable Restraints.**—The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation, and are not confined to those in which the restraint is unreasonable. *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S., 290. 1—649
5. **Any restraint of interstate trade** or commerce, **if it be accomplished** by a **conspiracy**, is unlawful. *U. S.* v. *Debs*, 64 F., 724. 1—322
6. In a suit to restrain alleged violations of the law of July 2, 1890, against trusts and monopolies affecting interstate com-

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

I. In General—Continued.

merce, the existence of an illegal combination among the defendants is to be **determined not alone from what appears on the face of the preamble, rules, and by-laws of their association, but from the entire situation, and the practical working and results** of their methods of doing business, as disclosed by the evidence. *U. S.* v. *Hopkins*, 82 F., 529. 1—725

7. **The only question in each case** where the validity of a contract or combination under the law is involved **is whether or not its necessary effect is to restrain interstate commerce.** *Chesapeake & O. Fuel Co.* v. *U. S.*, 115 F., 610. 2—151

8. In determining whether or not a combination is in violation of the Federal Anti-Trust Law, as in restraint of interstate commerce, it is immaterial that such is not its ultimate object, which is in most cases to increase the trade and profits of the parties to such combination; nor is it material to ascertain what proportion the resulting restraint of interstate commerce bears to other results. **The true inquiry is whether it tends directly to appreciably restrain interstate trade,** and, if it does, it is within the statute, although such effect may not be so considerable as its other effects. *Ellis* v. *Inman, Poulsen & Co.*, 131 F., 182. 2—577

9. **The test** of the violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), by a contract or combination **is its effect upon competition in commerce among the States. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls** under the ban of the law, **but if it promotes or only incidentally or indirectly restricts** competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law. *Phillips* v. *Iola Portland Cement Co.*, 125 F., 593. 2—284

10. To render a combination unlawful under the Anti-Trust Act of 1890 it **need not be one which by its terms refers to interstate commerce,** but it is **sufficient if its purpose and effect** are necessarily to restrain interstate trade. *Gibbs* v. *McNeeley*, 118 F., 120. 2—194

11. **Act Includes every Combination which Directly and Substantially Restricts Interstate Commerce.**—The generality of the language used in the Anti-Trust Act of 1890 (26 Stat., 209), declaring illegal "every contract, combination, or conspiracy in restraint of trade or commerce among the several States or with foreign nations," indicates the purpose of Congress to include in the prohibition every combination which directly and substantially restricts interstate commerce, whatever its form. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

I. In General—Continued.

12. **Same—Applies to Interstate Carriers.**—The Anti-Trust Act (act July 2, 1890, 26 Stat., 209) applies to interstate carriers of freight and passengers, **and any contract or combination which directly and substantially restricts the right of such a carrier to fix its own rates** independently of its natural competitors places a direct restraint upon interstate commerce, in that it tends to prevent competition, and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable. *Ib.*

Decree affirmed, 193 U. S., 197 (2—338).

13. **Same.**—The act is **not limited to restraints** of interstate and international trade or commerce **that are unreasonable** in their nature, **but embraces all direct restraints, reasonable or unreasonable,** imposed by any combination, conspiracy, or monopoly upon such trade or commerce. *U. S.* v. *Northern Securities Co.*, 193 U. S., 197. 2—340

14. **When the direct, immediate, and intended effect of a contract or combination** among dealers in a commodity **is the enhancement** of its **price,** it amounts to a restraint of trade in the commodity, even though contracts to buy it at the enhanced price are being made. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211. 1—1010

15. It **does not matter that a combination embraces restraint of trade within a single State if it also embraces** and is directed against **commerce among the States.** *Swift & Co.* v. *United States*, 196 U. S., 375. 2—641

See also *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 824.

3. Contracts not enforceable.

16. **Contracts that were in unreasonable restraint of trade at common** law were not unlawful in the sense of being criminal, or as giving rise to an action for damages to one prejudicially affected thereby, but **were simply void and not enforceable.** *U. S.* v. *Addyston Pipe and Steel Co.*, 85 F., 271. 1—772

17. **A contract** made in pursuance of a combination of manufacturers seeking to restrict the production and keep up the prices of wooden dishes throughout the country, **whereby a manufacturer was guarantied a certain sum as dividends** on his stock in the central company, **in consideration of the closing of his factory** for a year, *held* to be contrary to pubpublic policy, and therefore unlawful, and **not enforceable by the courts.** *Cravens* v. *Carter-Crume Co.*, 92 F., 479. 1—983

18. **Can not Enforce Sale of a Business Which was to Constitute Part of an Illegal Combination or Trust.**—Defendant and his partner sold their bakery business to complainant corporation, receiving payment in its stock, and defendant leased to it the premises where the business was conducted and con-

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

I. In General—Continued.

tracted to carry it on as the purchaser's agent, for a salary. After operating under this arrangement for a time, he **repudiated the sale, resumed possession under the old firm name,** and refused to account to complainant. The bill was brought to enjoin him from asserting a hostile claim, for an accounting, and a receiver. Defendant, and his partner as intervenor, filed a cross-bill for rescission of the sale for fraudulent representations, and tendered back the stock. Complainant was practically a "trust," organized to monopolize the business, and had already secured control of 35 leading bakeries in 12 different States. *Held*, that, while a case was made for a receiver, pending litigation between ordinary parties, the prayer would be denied, as **equity would not encourage a combination in restraint of trade,** and probably illegal, under act of Congress, July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," and act of Louisiana, July 5, 1890, for the same purpose. *Amer. Biscuit & Mfg. Co.* v. *Klotz*, 44 F.. 721. **1—2**

19. **A railroad company,** belonging to an illegal combination **in violation of the Anti-Trust Law, can not invoke the aid of a Federal court** of equity for the **protection of its rights** claimed **under contracts** which were the direct result and evidence of such unlawful combination. *Delaware, L. & W. R. Co.* v. *Frank*, 110 F., 689. **2—82**

20. **Illegal Condition as Consideration—Effect of Nonperformance.—Rebate vouchers** issued by a distilling company to customers, by which it promised to refund a certain sum per gallon on their purchases at the end of six months, on condition of their purchasing exclusively from the company during that time, can not be enforced, either at law or in equity, where the condition has not been performed, though such condition be illegal, as in restraint of trade, there being no other consideration for the promise. 77 Fed.. 700, affirmed. *Dennehy* v. *McNulta*, 86 F., 825. **1—855**

4. What constitutes monopolizing, unlawful combination, etc.

21. To constitute the offense of "**monopolizing,** or attempting to monopolize," trade or commerce among the States, within the meaning of section 2 of the Anti-Trust Act of 1890, it is necessary **to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engagaing therein.** *In re Greene*, 52 F., 104. **1—55**

22. **Unlawful Combination.**—To render a combination unlawful under the Anti-Trust Act of 1890 it need not be one which by its terms refers to interstate commerce, but it is **sufficient if its purpose and effect are necessarily to restrain interstate trade.** *Gibbs* v. *McNeeley*, 118 F., 120. **2—194**

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

I. In General—Continued.

23. **Combination of Lawful Elements of an Unlawful Scheme.**—Even if the separate elements of a scheme are lawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize interstate commerce the plan **may make the parts unlawful.** *Swift & Co.* v. *United States*, 196 U. S., 375. **2—641**

5. Liability.

24. **Liability of Members of Combination.**—Every member of an illegal combination in restraint of interstate trade or commerce in violation of the Anti-Trust Act is liable for the damages resulting to the business or property of a plaintiff by reason of such combination, and it is immaterial that there were no direct contract relations between plaintiff and defendant. *City of Atlanta* v. *Chattanooga Foundry & Pipe Works*, 127 F., 23. **2—299**

Enforcement of Contracts and Collection of Debts. *See* Actions and Defenses.

Recovery. *See* Actions and Defenses.

Defenses. *See* Actions and Defenses, II.

II. Prohibited.

1. Agreements, contracts, or combinations to establish, maintain, raise, or control the prices, production, or output of articles or commodities.

25. **Coal—Agreement Between Mining Companies and Coal Dealers to Control the Price of Coal.**—An agreement *between coal-mining companies* operating chiefly *in one State and dealers in coal* in a city *in another State*, creating a coal exchange to advance the interests of the coal business, to treat all parties to the business in a fair and equitable manner, and to *establish the price of coal, and change the same from time to time*, by which it was agreed that the price of the coal at the mines should be 4½ cents, the freight being 4 cents, and the margin of the dealer should be 4½ cents, making the price to the consumer 13 cents, and that, whenever the price of the coal is advanced beyond an advance in freights, one-half the advance shall go to the mine owner and the other half to the dealer, and a penalty was provided by fine of any member selling coal at a less price than the price fixed by the exchange, and by which it was *forbidden for owners or operators* of mines *to sell coal to any person other than members* of the organization, and for dealers to purchase of miners who were not members, but *exempting coal used for manufacturing and steamboat purposes* from the prices prescribed until all the mines tributary to that market should come into the exchange, or until the exchange

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

could control the prices of coal used by manufacturers, **is within the** language of **act of July 2, 1890,** declaring "every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States," and also the monopolizing, or combination with another to monopolize, trade or commerce among the several States a misdemeanor. *U. S.* v. *Jellico Mtn. Coal & Coke Co.*, 46 F., 432. **1—9**

26. A combination between importers of coal from other States and foreign countries **with a local coal dealers' association, regulating** arbitrarily **the retail prices of coal** and providing against free competition, is one in restraint of interstate commerce within the meaning of the act of 1890. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. **1—749**

27. Contract Between a Fuel Company and a Combination of Coal Producers who Sought to Regulate the Production and Price of Coal.—A contract by which a corporation agrees to take the entire product of a number of independent persons, firms, and corporations engaged in mining coal and making coke in a certain district, which is intended for "western shipment" over a leading route of transportation, to sell the same at not less than a minimum price, to be fixed by an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds above a fixed sum per ton to be retained as "compensation," the stated purpose being to "enlarge the western market," and under which the shipments are made into other States, **is illegal** under the Anti-Trust Law, as in restraint of interstate commerce, and as tending to create a monopoly. *U. S.* v. *Chesapeake & Ohio Fuel Co.*, 105 F., 93. **2—34**

Affirmed, 115 F., 610 (**2—151**).

28. Copyrighted Books—Combination of Publishers and Booksellers Throughout the United States for the Purpose of Maintaining Prices on Copyrighted Books.—The organization and combination of the publishers and booksellers of the United States into two membership associations, one known as the "American Publishers' Association" and the other as the "American Booksellers' Association," whereby they together controlled the publication and sale of at least 90 per cent of all copyrighted books, the object being to compel owners and dealers of such books to purchase them of the members of the combination at an arbitrary price fixed by it, regardless of the actual value of the books as determined by a demand in an open market, or the condition of the books, **and to compel all publishers and dealers of such books to come into the combination,** be controlled by it, and sell books at prices fixed by it, regardless of the value of the books or

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

of the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books through a **system of blacklisting,** etc., the effect of which would be to cripple the business of any publisher or bookseller outside of the combination—was **in violation of the Anti-Trust Law** of July 2, 1890 (26 Stat., 209). *Bobbs-Merrill Co.* v. *Straus*, 139 F., 155. **2—755**

29. Drugs—Combination of Separate Associations of the Manufacturers, Wholesalers, and Retailers of Drugs, to fix Arbitrarily the Prices of Such Articles.—Where three voluntary associations, composed of the manufacturers, wholesalers, and retailers, respectively, of drugs, proprietary medicines, etc., were organized to arbitrarily fix a minimum retail price for such articles, which were of universal consumption and were of absolute and daily necessity, and then restricted the sale of such articles to such retailers only as conducted their retail business in accordance with the arbitrary standard of prices, such combination **was in restraint of interstate commerce in the drug trade in so far as it excluded "aggressive cutters"** of prices and those who dealt with them, **and was in violation of act of July 2, 1890** (26 Stat., 209), prohibiting monopolies in restraint of interstate trade and commerce, etc. *Loder* v. *Jayne*, 142 F., 1010. **2—976**

Judgment reversed by the Circuit Court of Appeals (149 F., 21), but upon other grounds than above.

30. Lumber—Combination of Local Lumber Dealers Seeking to Raise and Maintain Price of Lumber by Refusing to Sell to Consumers who Bought from Outside Parties, some of such Mills being Located in a Neighboring State.—A complaint alleged that plaintiff was a builder doing business in Portland, Oreg.; that in such business he purchased large quantities of rough lumber from mills located at Vancouver, Wash., which was 7 miles from Portland, but that such mills did not manufacture finished or kiln-dried lumber; that defendants, who comprised all the manufacturers and dealers in Portland, combined to fix exorbitant prices on all lumber sold by them, and to compel all consumers in Portland to pay such prices by refusing to sell any finished lumber at any price to such consumers as bought lumber of any kind from other dealers, except on condition that such consumer pays to defendants the difference between the price he paid for lumber so bought from others and the price charged therefor by defendants and promises to buy all his lumber thereafter from defendants; that the purpose and effect of such combination was to prevent plaintiff and other consumers from buying lumber at Washington mills, and to obtain a monopoly of the trade in Portland at unreasonable and

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

exorbitant prices. *Held*, that the combination charged constituted a **violation of the Federal Anti-Trust Act**, its effect being to directly restrain interstate commerce, and that the complaint stated a cause of action thereunder for the recovery of damages alleged to have resulted to plaintiffs. *Ellis* v. *Inman, Poulsen & Co.*, 131 F., 182. **2—577**

Reversing, 124 F., 956 (**2—268**).

31. **Same.—In determining whether or not a combination is in violation of the Federal Anti-Trust Law**, as in restraint of interstate commerce, it is immaterial that such is not its ultimate object, which is in most cases to increase the trade and profits of the parties to such combination; nor is it material to ascertain what proportion the resulting restraint of interstate commerce bears to other results. **The true inquiry is whether it tends directly to appreciably restrain interstate trade**, and, if it does, it is within the statute, although such effect may not be so considerable as its other effects. *Ib.*

32. **Red Cedar Shingles.—An association of manufacturers of and dealers in red cedar shingles** in the State of Washington formed for the purpose of controlling the production and the price of such shingles, which are made only in that State, but are **principally sold and used in other States**, and which, by its action in closing the mills of its members, has **reduced the production, and** has also **arbitrarily increased** the **prices** at which the product is sold, is a combination in restraint of interstate commerce, and unlawful under the Anti-Trust Law of July 2, 1890. *Gibbs* v. *McNeeley*, 118 F., 120. **2—194**

33. **Tiles—Combinations to Raise Prices of Tiles, etc., and Control Output.**—A complaint alleging that members of an association have conspired and combined to raise the prices of tiles, mantels, and grates, to control the output, and to regulate the prices thereof, with the intent to monopolize the trade and commerce **between the other States and California** in regard thereto, as well as to arbitrarily fix their prices independently of their natural market value, brings the case within the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Lowry* v. *Tile, Mantel & Grate Assn. of Cal.*, 98 F., 817. **1—995**

34. **Same—Combination of Tile Manufacturers in California and Adjoining States Agreeing not to Sell to or Purchase from Dealers not Members.**—The Tile, Mantel and Grate Association of California was organized by defendants, who were dealers in tiles and similar articles, for the declared purpose of uniting "all acceptable dealers" in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles), and all American manufacturers of tiles and fireplace fixtures. The articles prescribed that other local dealers who had an established business and carried a stock of a stated value, and who were "acceptable," might, on motion of a member, be permitted to join, and that all manufacturers of tiles in the United States might become members by signing the constitution and paying an entrance fee. The local members were bound by the articles not to buy goods from any manufacturer who was not a member nor to sell goods to other dealers not members at less than list price, which was about double the market price, and the manufacturing members were bound not to sell to any dealer within the prescribed territory who was not a member. *Held*, That **such association was a combination in restraint of trade** among the States, **illegal under section 1** of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), **and also an attempt to monopolize** a part of the trade and commerce among the States, **within** the prohibition of **section 2**, by shutting out from such trade all local dealers who were not members, and that **defendants** were **liable in damages**, under section 7 of the act, to such a dealer to whom a manufacturer in another State refused to sell tiles, as it had previously done, on the sole ground that such dealer was not a member of the association. *Montague* v. *Lowry*, 115 F., 27. **2—112**

Affirming *Lowry* v. *Tile, Mantel and Grate Assn. of Cal.*, 106 F., 38 (**2—53**).

35. **Same—An Association of Dealers in Tiles Agreeing Not to Purchase from Nonmembers or to Sell to Them Except at an Advance of 50 per cent on Price to Members.**—An association of wholesale dealers in tiles, mantels, and grates in California and vicinity, and manufacturers in other States, of tiles and fireplace fixtures, in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tile to nonmembers for less than list prices, which are more than 50 per cent higher than prices to members, while the manufacturers agree not to sell their products or wares to nonmembers at any price, under penalty of forfeiture of membership, **is an agreement or combination in restraint of trade** within the meaning of the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Montague & Co.* v. *Lowry*, 193 U. S., 38. **2—327**

36. **Same—Where the Sales were Made within the State.**—Although the sales in question were within the State of California and although such sales constituted a very small portion of the trade involved, the **agreement of manufacturers without the State not to sell to anyone but members** was **part of**

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

a scheme which included the enhancement of the price of unset tiles by the dealers within the State, and the whole thing was so bound together that the transactions within the State were inseparable and became a part of a purpose which when carried out amounted to, and was, a combination in restraint of interstate trade and commerce. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211, followed; *Hopkins* v. *United States*, 171 U. S., 578; *Anderson* v. *United States*, 171 U. S., 604, distinguished. *Ib.*

37. **Same.—The parties aggrieved**, being a firm of dealers in tiles, mantels, and grates, in San Francisco, whose members had never been asked to join the association and who had never applied for admission therein, and which did not always carry $3,000 worth of stock, as required by the rules of the association as one of the conditions of membership, **are entitled to recovery under section 7** of the act of July 2, 1890. *Ib.*

38. **Wooden Dishes.—A contract made in pursuance of a combination** of manufacturers, seeking to **restrict the production and keep up the prices** of wooden dishes throughout the country, **whereby a manufacturer was guaranteed a certain sum as dividends on his stock** in the central company in consideration of the closing of his factory for a year, was contrary to public policy and therefore unlawful, and **would not be enforced by the courts.** *Cravens* v. *Carter-Crume Co.*, 92 F., 479. 1—983

WALL PAPER. *See* CONTINENTAL WALL PAPER CO. *v.* LEWIS VOIGHT & SONS CO., 148 F., 939.

LICORICE PASTE. *See* U. S. *v.* MACANDREWS & FORBES CO., 149 F., 824.

2. *Combinations, contracts, etc., eliminating competition in bidding.*

39. **Combination of Manufacturers—Dividing Territory and Allotting Contracts by Pretended Bids.**—The formation of a combination by a number of companies manufacturing iron pipe in different States, whereby the territory in which they operate (comprising a large part of the United States) is divided into "reserved" cities and "pay" territory, the reserved cities being allotted to particular members of the combination, free of competition from the others, though provision is made for pretended bids by the latter at prices previously arranged, and when all offers to purchase pipe in the pay territory are submitted to a committee, which determines the price, and then awards the contract to that member of the combination which agrees to pay the largest "bonus," to be divided among the others, is **unlawful, both at common law and under the act of 1890**, against trusts and

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

monopolies. *U. S.* v. *Addyston Pipe and Steel Co.*, 85 F., 271. 1—772

Reversing, 78 Fed., 712 (1—631).

40. **Combinations to Enter into Public Bidding for Contracts, but Where only One of the Combination Really Bids, the Others Being Required to Bid Above Him.**—An agreement or combination between corporations engaged in the manufacture, sale, and transportation of **iron pipe**, under which they enter into public bidding for contracts, not in truth as competitors, but under an arrangement which eliminates all competition between them for the contract and permits one of their number to make his own bid, while the others are required to bid over him, **is in violation of the Anti-Trust Act of July 2, 1890**, so far as it applies to sales for delivery beyond the State in which the sale is made. *Addiston Pipe and Steel Co.* v. *U. S.*, 175 U. S., 211. 1—1009

Affirming 85 F., 271 (1—772).

41. **Same.**—A combination may illegally restrain trade by preventing competition for contracts and enhancing prices, although it does not prevent the letting of any particular contract. *Ib.*

42. **Same—Where Goods are to be Delivered in the State.**—A combination to restrain competition in proposals for contracts for the sale of certain articles which are to be delivered in the State in which some of the parties to the combination reside and carry on business **is not**, so far as those members are concerned, **in violation of the Anti-Trust Law**, although the **contract may be awarded to some party outside the State** as the lowest bidder. *Ib.*

43. **Same.**—Any agreement or **combination which directly operates**, not alone upon the manufacture, but **upon the sale, transportation, and delivery of an article of interstate commerce**, by preventing or restricting its sale, thereby regulates interstate commerce to that extent, and thus trenches upon the power of the national legislature, and **violates the statute.** *Ib.*

44. **Same.—When the direct, immediate, and intended effect** of a contract or combination among dealers in a commodity is **the enhancement of its price**, it amounts to a restraint of trade in the commodity, even though contracts to buy it at the enhanced price are being made. *Ib.*

45. **Same.—The contracts** considered **in this case**, set forth in the statement of facts and in the opinion of the court, relate to the sale and transportation to other States of specific articles, not incidentally or collaterally, but as a direct and immediate result of the combination entered into by the defendants; and they restrain the manufacturing, purchase, sale, or exchange of the manufactured articles among the several

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

States, and enhance their value, and **thus come within the provisions of the "act** to protect trade and commerce against unlawful restraints and monopolies." *Ib.*

46. Same.—The judgment of the court below, which perpetually enjoined the defendants in the court below from maintaining the combination in cast-iron pipe as described in the petition, and from doing any business under such combination, **is too broad, as it applies** equally to **commerce** which is **wholly within a State** as well as to that which is interstate or international only. *Ib.*

47. Agreement Between Live-Stock Buyers not to Bid Against Each Other, etc.—An agreement between corporations and individuals, etc., engaged in buying live stock at **divers points throughout the United States**, to refrain from bidding against each other in the purchase of cattle is combination in restraint of trade; so **also** their agreement **to bid up prices to stimulate shipments**, intending to cease from bidding when the shipments have arrived, and the same result follows from the combination of defendants to fix prices upon and restrict the quantities of meat shipped to their agents or their customers. Being restriction upon competition, such agreements are combination in restraint of trade. *U. S.* v. *Swift & Co.*, 122 F., 529. 2—237

48. Same.—Restraint of trade is not dependent upon any consideration of **reasonableness or unreasonableness** in the combination averred, nor is it to be tested by the prices that result from the combination. The **statute has no concern with prices, but looks solely to competition** and to the giving of competition full play by making illegal any effort at restriction upon competition. *Ib.*

49. Same.—A combination of a dominant proportion of the **dealers in fresh meat throughout the United States not to bid against**, or only in conjunction with, **each other** in order to regulate prices in and induce shipments to the live-stock markets in other States, to restrict shipments, establish uniform rules of credit, make uniform and improper rules of cartage, and to get less than lawful rates from railroads to the exclusion of competitors with intent to monopolize commerce among the States, is an **iliegal** combination within the meaning and prohibition of the act of July 2, 1890 (26 Stat., 209), **and can be restrained and enjoined** in an action by the United States. *Swift & Co.* v. *United States*, 196 U. S., 375. 2—641

50. Same.—It does not matter that a combination of this nature embraces **restraint and monopoly** of trade **within a single State if it also embraces** and is directed against **commerce among the States.** *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

51. Same.—The effect of such a combination upon interstate commerce is direct and not accidental, secondary, or remote as in *United States* v. *E. C. Knight Co.*, 156 U. S., 1. *Ib.*

52. Same.—Even if the separate elements of such a scheme are lawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize interstate commerce the plan may make the parts unlawful. *Ib.*

53. Same.—When cattle are sent for sale from a place in one State, with the expectation they will end their transit, after purchase, **in another State, and when in effect they do so**, with only the interruption necessary to find a purchaser at the stock yards, and when this is a constantly recurring course, it constitutes interstate commerce, and the purchase of the cattle is an incident of such commerce. *Ib.*

3. Contracts, etc., in restraint of interstate trade or commerce.

54. Contracts, Combinations, etc., Against Public Policy and Void Under the Common Law.—The contracts, combinations in the form of trust or otherwise, and conspiracies in restraint of trade **declared to be illegal in the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), are the contracts, combinations, and conspiracies in restraint of trade that **had been declared** by the courts to be against public policy and **void under the common law** before the passage of that act. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186

Case reversed, 166 U. S., 290 (1—648).

55. Same.—The test of the validity of such contracts or combinations is not the existence of restriction upon competition imposed thereby, but **the reasonableness of that restriction under the facts and circumstances of each particular case.** Public welfare is first considered, and, if the contract or combination appears to have been made for a just and honest purpose, and the restraint upon trade is not specially injurious to the public, and is not greater than the protection of the legitimate interests of the party in whose favor the restraint is imposed reasonably requires, the contract or combination is not illegal. Shiras, district judge, dissenting on the ground that this rule is not applicable to corporations charged with public duties. *Ib.*

56. Agreements Legal when Made which Violate Act of 1890.—The agreement of the Trans-Missouri Freight Association, in regard to establishing and maintaining railroad rates, though legal when made, became illegal on the passage of the act of July 2, 1890, and acts done under it after that statute became operative were done in violation of it. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

57. Contracts in Restraint of Trade—At Common Law.—Contracts that were in unreasonable restraint of trade at common law

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

were not unlawful in the sense of being criminal, or as giving rise to an action for damages to one prejudicially affected thereby, but **were simply void and not enforceable.** *U. S.* v. *Addyston Pipe and Steel Co.*, 85 F., 271. **1—772**

58. Same.—The effect of the Anti-Trust Law of 1890 is to render such contracts, as applied to interstate commerce, unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and also to create a right of civil action for damages in favor of persons injured thereby, and a remedy by injunction in favor both of private persons and the public against the execution of such contracts and the maintenance of such trade restraints. *Ib.*

59. Contracts or combinations which impose any restraints whatever upon interstate commerce are unlawful under the Anti-Trust Law of July 2, 1890; and it is **immaterial whether or not** the **restraint is a fair and reasonable** one, or whether it has actually resulted in increasing the price of the commodity dealt in. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. **1—749**

60. Contracts which operate as a restraint upon the soliciting of orders for, and the sale of, **goods in one State, to be delivered from another**, are contracts in restraint of interstate commerce, within the meaning of the act of July 2, 1890. *U. S.* v. *E. C. Knight Co.*, 15 Sup. Ct., 249; 156 U. S., 1, distinguished. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F., 271. **1—772**

61. To render a combination unlawful under the Anti-Trust Act of 1890 it need not be one which by its terms refers to interstate commerce, but **it is sufficient if its purpose and effect are necessarily to restrain interstate trade.** *Gibbs* v. *McNeeley*, 118 F., 120. **2-194**

62. Every Contract, Combination, or Conspiracy, in Whatever Form, of Whatever Nature, and Whoever May be Parties to it, which Directly or of Necessity Operates in Restraint of Interstate Trade or Commerce.—Although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it embraces and declares to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (Harlan, Brown, McKenna, Day). **2—339**

63. Same.—The act is not limited to restraints of interstate and international trade or commerce **that are unreasonable** in

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

their nature, but embraces all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy, or monopoly upon such trade or commerce. *Ib.*

64. Railroad carriers engaged in interstate or international trade or commerce are **embraced** by the act. *Ib.*

65. Combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained, or commerce are **embraced** by the act. *Ib.*

66. Every combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act. *Ib.*

67. The natural effect of competition is to increase commerce, and an **agreement whose direct effect is to prevent this play of competition** restrains instead of promotes trade and commerce. *Ib.*

68. The Northern Securities Company combination **is a "trust"** within the meaning of the act of Congress of July 2, 1890, known as the Anti-Trust Act; **but if not, it is a combination in restraint of interstate and international commerce,** and that is enough to bring it under the condemnation of the act. *Ib.*

69. Every contract, combination, or conspiracy, the necessary effect of which is to stifle or to directly and substantially **restrict competition in commerce among the States,** is in restraint of interstate commerce and violates section 1 of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. **2—271**

70. Same.—Every attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially **restrict competition** in commerce among the States, violates section 2 of the act of July 2, 1890, c. 647 (26 Stat., 209). *Ib.*

For what acts and combinations do not violate the act, *see* same case, and COMBINATIONS, ETC., III.

71. Monopolies Prohibited are Those Engaged in Interstate Commerce—Not Merely Because the Commodity is a Necessity of Life.—The monopoly and restraint denounced by the act of July 2, 1890 (26 Stat., 209) "to protect trade and commerce against unlawful restraints and monopolies," are a monopoly in interstate and international trade or commerce, and not a monopoly in the manufacture of a necessary of life. *U. S.* v. *E. C. Knight*, 156 U. S., 1. **1—379**

72. Any Restraint of Interstate Trade or Commerce if Accomplished by Conspiracy.—The **act of July 2, 1890** (26 Stat., 209), section 1, declaring illegal "every contract, combina-

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

tion in the form of trust, or otherwise, or conspiracy" in restraint of trade or commerce among the States, or with foreign nations, **is not aimed at capital merely and combinations of a contractual nature,** which by force of the title, "An act to protect trade and commerce against unlawful restraints and monopolies," are limited to such as the courts have declared unlawful, the words "in restraint of trade" having, in connection with the words "contract," and "combination," their common-law significance, but the term "conspiracy" is used in its well-settled legal meaning, so that any restraint of trade or commerce, if to be accomplished by conspiracy, is unlawful. *U. S.* v. *Debs*, 64 F., 724. **1—322**

73. Same—Construction.—The construction of the statute is not affected by the use of the phrase "**in restraint of trade,**" rather than one of the phrases "to injure trade" or "to restrain trade." *Ib.*

74. Same.—The word "commerce," in the statute, is **not synonymous with "trade,"** as used in the common-law phrase "restraint of trade," but has the meaning of the word in that clause of the Constitution which grants to Congress power to regulate interstate and foreign commerce. *Ib.*

75. Supreme Court does not Dissent from Above Conclusions.—The court enters into no examination of the act of July 2, 1890 26 Stat., 209), on which the Circuit Court mainly relied to sustain its jurisdiction; but it must not be understood that it dissents from the conclusions of that court in reference to the scope of that act, but simply that it prefers to rest its judgment on the broader ground discussed in its opinion, believing it important that the principles underlying it should be fully stated and fully affirmed. *In re Debs*, 158 U. S., 564. **1—565**

76. A contract by which a corporation agrees to take the entire product of a number of persons, firms, and corporations engaged in mining **coal and** making **coke in a certain district,** which is **intended for "western shipment,"** to sell the same at not less than a minimum price, to be fixed by an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds above a fixed sum per ton, to be retained as "compensation"—the stated purpose being "to enlarge the western market"—and under which the shipments are made into other States, **is one affecting interstate commerce,** and is subject to the provision of the Anti-Trust Law. *U. S.* v. *Chesapeake & O. Fuel Co.*, 105 F., 93. **2—34**

Affirmed, 115 F., 610 (**2—151**).

77. Effect of Illegal Provisions—Divisibility.—Stipulations in a

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

contract which are invalid as in restraint of trade, if capable of being construed divisibly, do not affect the validity of other provisions. *U. S. Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 F., 364. **2—288**

See also CONTRACTS.

4. Live-stock associations, and exchanges, etc.

78. An Association of Commission Merchants.—An association of men engaged in receiving, buying, selling, and handling, as commission merchants, **live stock received at the Kansas City stock yards from, and sold for shipment to, various States and Territories,** which yards furnished the only available public market for that purpose for an exceedingly large area, and which by its rules **fixed a minimum rate of commissions to be charged by members** of the association, and prohibited the employment by any commission firm or corporation of more than three persons to travel and solicit business, and prohibited the sending of prepaid telegram or telephone messages quoting the markets, and **shut out all dealings and business intercourse between members and nonmembers, and boycotted** and **blacklisted** persons attempting to carry on business without joining the exchange, thus effectually preventing them from securing or transacting business, *held* to be **an illegal combination** to restrict, monopolize, and control that class of trade and commerce. *U. S.* v. *Hopkins*, 82 F., 529. **1—725**

Reversed, 171 U. S., 578 (**1—941**).

79. Same—Reasonableness of Restraints.—The act of Congress is aimed against all restraints of interstate commerce, and its purpose is to permit commerce between the States to flow in its natural channels, unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever. The reasonableness of the restrictions in a given case is immaterial. *Ib.*

80. Agreement Between Live-Stock Buyers Not to Bid Against Each Other, etc.—An agreement between corporations and individuals, etc., engaged in buying live stock at divers points throughout the United States, to refrain from bidding against each other in the purchase of cattle is combination in restraint of trade; so also their **agreement to bid up prices** to stimulate shipments, **intending to cease from bidding when the shipments have arrived,** and the same result follows from the **combination** of defendants **to fix prices** upon and restrict the quantities of meat shipped to their agents or their customers. Being restriction upon competition, such agreements are combination in restraint of trade. *U. S.* v. *Swift & Co.*, 122 F., 529. **2—237**

Affirmed, 196 U. S., 375 (**2—641**).

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

81. Same.—Restraint of trade is not dependent upon any consideration of **reasonableness or unreasonableness** in the combination averred, nor is it to be tested by the prices that result from the combination. The **statute has no concern with prices,** but looks solely to competition and to the giving of competition full play by making illegal any effort at restriction upon competition. *Ib.*

82. A **combination** entered into **by independent meat dealers to secure less than lawful freight rates,** with the intent to monopolize commerce in fresh meat among the several States, is forbidden by the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Swift & Co.* v. *United States,* 196 U. S., 375. **2**—643

5. Conspiracy to injure in business.

83. Printing and Mailing Circulars.—The action of **an association of manufacturers in adopting a resolution denouncing a dealer** in the product they manufactured (shingles), who bought and shipped such product to customers in other States and foreign countries, **and in printing such resolution in circulars and mailing the same** to other manufacturers and customers of the dealer, whereby his business was injured, constituted an illegal combination or conspiracy in restraint of interstate and foreign commerce, and gives the person injured a right of action in a circuit court of the United States, under the Anti-Trust Law of 1890, to recover the damages sustained. *Gibbs* v. *McNeeley,* 102 F., 594. **2**—25

6. Stockholding companies or corporations.

84. Holding Companies to Vote Stock in the Interests of a Railroad Combine.—Where one company (The Georgia Company of North Carolina) acquired a majority of the stock of the Central Railroad Company of Georgia, which it deposited with a trust company of New York, and transferred to the Terminal Company, a system composed of several competing lines of railroads, which latter company and the Georgia Company relinquished to the trust company any right they might have to vote such stock. *Held,* That **the trust company** was a **mere stakeholder** and that the relinquishment did not entitle it to a vote. *Clarke* v. *Central R. R. & Banking Co. of Ga.,* 50 F., 338. **1**—17

85. Same—Disqualifying Interests.—The fact that the Terminal Company has no appreciable interest in the stock of the Central Railroad Company, because of a mortgage on the railroad executed by the Terminal Company, does not remove the objection to its voting in person or by representative in the election of the directors of that railroad company, in view of the fact that it has large pecuniary interests in two directly competing lines of railroad. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

86. Same—Anti-Trust Law.—Transactions of this character are within the spirit, if not within the letter, of the "Sherman Anti-Trust Law," act of July 2, 1890 (26 Stat., 209). *Ib.*

87. Northern Securities Co.—Any contract or combination by which **a majority of the stock of two railroad companies owning** and operating **parallel and competing interstate lines** of road **is transferred to a corporation organized for the purpose of holding and voting the same** and receiving the dividends thereon, to be divided pro rata among the stockholders of the two companies so transferring their stock, directly and substantially restricts interstate trade and commerce, and **is in violation of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), since it **destroys any motive for competition** between the two roads; and it is immaterial that each company has its own board of directors, which nominally directs its operations and fixes its rates. *U. S.* v. *Northern Securities Co.,* 120 F., 721. **2**—215

88. Northern Securities Company—Corporation Organized to Hold Majority of Stock of two Competing and Parallel Lines of Railroad for the Purpose of Preventing Competition.—Stockholders of the Great Northern and Northern Pacific Railway companies—corporations having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound—combined and conceived the scheme of organizing a corporation, under the laws of New Jersey, which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation. Pursuant to such combination the Northern Securities Company was organized as the holding corporation through which that scheme should be executed; and under that scheme such holding corporation became the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies, who delivered their stock, receiving, upon the agreed basis, shares of stock in the holding corporation. *Held,* That the arrangement was **an illegal combination in restraint of interstate commerce** and fell within the prohibitions and provisions of the act of July 2, 1890, and it was **within the power of the Circuit Court,** in an action, brought by the Attorney-General of the United States after the completion of the transfer of such stock to it, **to enjoin the holding company** from voting such stock and from exercising

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

any control whatever over the acts and doings of the railroad companies, **and also to enjoin the railroad companies from paying any dividends to the holding corporation** on any of their stock held by it. *Northern Securities Co.* v. *United States*, 193 U. S., 197. **2**—338

89. Same.—Necessarily, the **constituent companies ceased**, under this arrangement, **to be in active competition** for trade and commerce along their respective lines, and became, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. *Ib.*

90. Same.—A combination by stockholders in two competing interstate railway companies to form a stockholding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, **violates the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), which declares illegal every combination or conspiracy in restraint of interstate commerce, and forbids attempts to monopolize such commerce or any part of it. (48 L. ed., 679.) **2**—342

91. Same.—Where no individual investment is involved, but there is a combination by several individuals separately owning stock in two competing railroad companies engaged in interstate commerce, to place the control of both in a single corporation, which is organized for that purpose expressly and as a mere instrumentality by which the competing railroads can be combined, the resulting combination is a **direct restraint** of trade by destroying competition, and is illegal within the meaning of the act of July 2, 1890. (Brewer, concurring.) **2**—341

7. Patent and copyright monopolies—Illegal combinations and contracts.

92. A **corporation organized for the purpose of securing assignments of all patents relating to "spring-tooth harrows,"** to grant licenses to the assignors to use the patents upon payment of a royalty, **to fix and regulate the price** at which such harrows shall be sold, and to take charge of all litigation and prosecute all infringements of such patents, **is an illegal combination**, whose purposes are contrary to **public policy**, and which a court of equity should not aid by entertaining infringement suits brought in pursuance thereof. *National Harrow Co.* v. *Quick*, 67 F., 130. **1**—443

93. Corporation Organized to Receive Assignments of Patents.—A combination among manufacturers of spring-tooth harrows, by which each manufacturer assigns to a corporation

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

organized for the purpose the patents under which he is operating, and **takes back an exclusive license to make and sell the same style of harrows previously made by him**, and no other, all the **parties being bound to sell at uniform prices**, *held* to be an unlawful combination for the enhancement of prices and in restraint of trade. *National Harrow Co.* v. *Hench*, 76 F., 667. **1**—610

Affirmed, 83 F., 36 (**1**—742).

94. Same.—Though the fact that several patentees are exposed to litigation justifies them in composing their differences, they can not make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage. *Ib.* **1**—743

95. A combination among manufacturers of spring-tooth harrows, whereby a **corporation organized for the purpose becomes the assignee of all patents** owned by the various manufacturers, and **executes licenses** to them, so as to **control the entire business and enhance prices, is void both as to the assignments and licenses**, so that the corporation **can not maintain a suit** against one of its assignors, who violates the agreement, **for infringement.** *National Harrow Co.* v. *Hench*, 84 F., 226. **1**—746

96. An **agreement by the members of a publishers' association** controlling 90 per cent of the book business of the country, under which all agreed **not to sell to anyone who would cut prices on copyrighted books**, nor to anyone who should be known to have sold to others who cut prices, etc., was an agreement relating to interstate trade or commerce **within the Anti-Trust Act** of July 2, 1890 (26 Stat., 209. *Mines* v. *Scribner*, 147 F., 927. **2**—1035

97. Same—Conspiracy—Restraint of Trade.—Defendants became members of an association of book publishers controlling 90 per cent of the book business of the country, which association adopted a rule that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others at cut prices. A blact list was kept containing the names of such persons, and no one on the black list could not buy any books of anybody in the scheme. *Held*, That such scheme constituted a conspiracy in restraint of interstate trade or commerce. *Ib.*

98. Same—Copyright—Effect—Extent of Rights Acquired.—The rights acquired by publishers of copyrighted books under the copyright law did not justify them in combining and agreeing that their books should be subject to the rules laid down by the united owners, one of which was that no member of the association should sell any books to a blacklisted purchaser who was known to cut prices. *Ib.*

99. License Contracts by Patentee in District where Patent De-

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

clared Illegal and in Creating a Fund to Crush Competition.—License contracts entered into by the owner of patent on a rubber tire, which patent had been adjudged invalid by the Circuit Court of Appeals for the Sixth Circuit, with all of the large manufacturers of such tires in the United States, all of whom were engaged in interstate commerce, to manufacture the same on a royalty and to sell at prices above the then market price, and providing for a system of rebates, and for the appointment of a board to receive one half of the royalties, to be used in purchasing said tires and selling them at prices deemed to be for the best interest of all. *Held*, that **such contracts went beyond the rights of complainant under its patent monopoly in raising and maintaining prices** in the States composing the sixth Federal circuit, in which the monopoly had no practical existence, **and in creating a fund to be used to crush competition** by outside manufacturers, as well in the sixth circuit as elsewhere, and were **illegal and void** as creating a combination in restraint of interstate trade and commerce, in violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 142 F., 531.

See also COMBINATIONS, ETC., 183–188. 2—855

8. Railroads—Rates, etc.

100. Anti-Trust Act Applicable to Railroads.—The provisions respecting contracts, combinations, and conspiracies in restraint of trade or commerce among the several States or with foreign countries, contained in the act of July 2, 1890 (26 Stat., 209), "to protect trade and commerce against unlawful restraints and monopolies," apply to and cover common carriers by railroad. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

101. Contracts Between Railroads Affecting Rates.—A contract between railroads in restraint of interstate trade or commerce **is prohibited**, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property. *Ib.*

102. Same—No Authority Therefor Under Act to Regulate Commerce.—The act of February 4, 1887, "to regulate commerce," is not inconsistent with the of July 2, 1890, as it does not confer upon competing railroad companies power to enter into a contract in restraint of trade and commerce, like the one which forms the subject of this suit. *Ib.*

103. Right to Deviate from Rates Prescribed.—The right of a railroad company in a joint traffic association to deviate from the rates prescribed, provided it acts on a resolution of its board of directors and serves a copy thereof on the managers

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

of the association, who, upon its receipt, are required to "act promptly for the protection of the parties hereto," does not relieve the association from condemnation as an illegal restraint of competition, as the privilege of deviating from the rates would be exercised upon pain of a war of competition against it by the whole association. *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505. 1—869

Reversing 76 F., 895 (1—615).

104. An agreement of railroad companies **which directly and effectually prevents competition** is, under the statute, in restraint of trade, notwithstanding the possibility that a restraint of trade might also follow unrestricted competition, which might destroy weaker roads and give the survivor power to raise rates. *Ib.*

105. The statute applies only to contracts whose direct and immediate effect is a restraint upon interstate commerce, and **not to contracts** made **to promote legitimate business**, though they may **indirectly or incidentally** affect such commerce. *Ib.*

106. Similar to Trans-Missouri Case.—So far as the establishment of rates and fares is concerned there is no substantial difference between the agreement in this case and the one set forth in the *Trans-Missouri case*. *Ib.*

107. Congress, with regard to the interstate commerce, and in the course of regulating it in the case of railroad corporations, **has the power to say that no contract or combination shall be legal, which shall restrain trade and commerce**, by shutting out the operation of the general law of competition. *Ib.*

108. Any contract or combination between interstate carriers which directly and substantially restrict the right of such a **carrier to fix its own rates** independently of its natural competitors places a direct restraint upon interstate commerce in that it tends to prevent competition and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

109. Contract or Combination Prescribing Rates to be Maintained.—Any contract or arrangement between railroad companies for the purpose and having the effect of preventing competition by fixing rates to be maintained by the parties is in violation of the provisions of the Minnesota anti-trust act of 1899, which is substantially the same language as the Sherman Anti-Trust Act of 1890. *Minnesota* v. *Northern Securities Co.*, 123 F., 692. 2—246

110. Agreements Between Railroads to Raise Rates upon Certain Class of Shipments.—When a number of railroads, acting

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

under articles of organization, by concert of agreement and action advance the rates upon shipments of a particular class throughout all the territory to which their organization and influence with similar organizations extend, and when they actually advance such rates and exact the same of shippers, it is of no consequence that they have a stipulation in such articles that each and all members can at will and at any time withdraw from the agreement. Such a combination is in restraint of trade. *Tift* v. *Southern Railway Co.*, 138 F., 753. **2—734, 746**

See also CARRIERS.

111. Combinations of Railroads to Prevent Competition, Pooling Passenger Receipts—No Relief in Equity Against Ticket Brokers.—In a suit by a railroad company to enjoin the defendants, who were ticket brokers, from dealing in special tickets issued by complainant on account of the Pan-American Exposition, which were by their terms nontransferable, it appeared from the showing made on a motion for a preliminary injunction that complainant was a member of a combination known as the "Trunk Line Association," formed by a number of railroads operating in different States for the purpose of preventing competition; that the passenger receipts of all such roads were pooled and divided on an agreed basis; and that the special rates made on account of the exposition were fixed, and the terms of the tickets which were the basis of the suit were prescribed, by such association through its passenger committee. *Held*, That such combination was illegal, as in violation of the Federal Anti-Trust Law (26 Stat., 209), and that complainant could not invoke the aid of a Federal court of equity for the protection of rights claimed under contracts which were the direct result and evidence of such unlawful combination. *Delaware, L. & W. R. Co.* v. *Frank*, 110 F., 689. **2—82**

112. A combination to secure less than lawful freight rates, entered into by independent meat dealers **with the intent to monopolize commerce in fresh meat among the several States,** is forbidden by the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Swift & Co.* v. *United States*, 196 U. S., 375. **2—643**

9. Labor combinations.

113. Anti-Trust Act Applies to Combinations of Laborers.—The act declaring illegal "every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several States or with foreign nations," (26 Stat., 209) applies to combinations of laborers as well as of capitalists. *U. S.* v. *Workingmen's Amalg. Council*, 54 F., 994. Case affirmed, 57 F., 85 **(1—184).** **1—110**

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

114. Same—Lawful Combinations Turned to Unlawful Purposes.—The fact that a combination of men is in its origin and general purposes innocent and lawful is no ground of defense when the combination is turned to the unlawful purpose of restraining interstate and foreign commerce. *Ib.*

115. Same—Labor Strikes.—A combination of men to secure or compel the employment of none but union men becomes a combination in restraint of interstate commerce, within the meaning of the statute, when, in order to gain its ends, it seeks to enforce, and does enforce, by violence and intimidation, a discontinuance of labor in all departments of business, including the transportation of goods from State to State, and to and from foreign nations. *Ib.*

116. Same—Injunction—When Granted.—Where an injunction is asked against the interference with interstate commerce by combinations of striking workmen, the fact that the strike is ended and labor resumed since the filing of the bill is no ground for refusing the injunction. The invasion of rights, especially where the lawfulness of the invasion is not disclaimed, authorizes the injunction. *Ib.*

117. Railroad Employees—Agreements not to Handle Property of Railroad Against which Action is Taken.—Rule 12 of an association of locomotive engineers, styled the "Brotherhood of Locomotive Engineers," which provides "that hereafter, when an issue has been sustained by the grand chief, and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of obligations if a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad run in connection with or adjacent to said road, to handle the property belonging to said railroad or system in any way that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues or differences of any nature or kind have been amicably settled"—**is plainly** a rule or agreement in restraint of trade or commerce, and **violative of section 1 of the act** of Congress of **July 2, 1890.** *Waterhouse* v. *Comer*, 55 F., 149. **1—119**

118. Same—Conspiracy—Section 5440 R. S.—Construing several clauses of the interstate-commerce law recited in the opinion with section 5140 of the Revised Statutes, it follows that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate-commerce law, inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade or commerce of the country, will be obnoxious to the penalties therein prescribed. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

119. Same—Receivers—Advice of Court.—In this case, the movants having avowed their purpose, in open court, to submit to the construction to be made by the court relating to rule 12 of the Brotherhood, the receiver is directed to enter into an appropriate contract with them, subject to the general operation of this decision with reference to said rule. *Ib.*

120. A combination of labor organizations **whose professed object is to arrest the operation of** the **railroads** whose lines extend from a great city into adjoining States **until such roads accede to certain demands** made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, **is an unlawful conspiracy** in restraint of trade and commerce among the States, within the act of July 2, 1890, and acts threatened in pursuance thereof **may be restrained by injunction**, under section 4 of the act. *U. S.* v. *Elliott*, 62 F., 801. 1—262

Demurrer overruled, 64 F., 27 (1—311).

121. Same—Interference with Mails and Interstate Commerce.—A combination by railroad employees to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads, **is within section 1 of the act of July 2, 1890**, and is illegal. *U. S.* v. *Elliott*, 64 F., 27. 1—311

122. Combination of Railroad Employees Interfering with Operation of Railroad in Hands of a Receiver—Instigating Strike.—Maliciously **inciting employees of a receiver**, who is operating a railroad under order of the court, **to leave his employ**, in pursuance of an unlawful combination to prevent the operation of the road, thereby inflicting injuries on its business, for which damages would be recoverable if it were operated by a private corporation, **is a contempt of the court.** *Thomas* v. *Cin., N. O. & T. P. Ry. Co.*, 62 F., 803. 1—266

123. Same—Combination to Compel Breach of Contract.—A combination to inflict pecuniary injury on the owner of cars, operated by railway companies under contracts with him, by compelling them to give up using his cars, in violation of their contracts, and, on their refusal, to inflict pecuniary injury on them by inciting their employees to quit their service, and thus paralyze their business, the existence of the contracts being known to the parties so combining, is an unlawful conspiracy. *Ib.*

124. Same—Boycott.—A combination by employees of railway companies to injure in his business the owner of cars operated by the companies by compelling them to cease using his

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

cars by threats of quitting and by actually quitting their service, thereby inflicting on them great injury, where the relation between him and the companies is mutually profitable, and has no effect whatever on the character or reward of the services of the employees so combining, is a boycott and an unlawful conspiracy at common law. *Ib.*

125. Same—A combination to incite the employees of all the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their employment, thus paralyzing utterly all railway traffic, in order to starve the railroad companies and the public into compelling an owner of cars used in operating the roads to pay his employees more wages, they having no lawful right so to compel him, is an unlawful conspiracy by reason of its purpose, whether such purpose is effected by means usually lawful or otherwise. *Ib.*

126. Same—Restraint of Interstate Commerce.—Such combination, its purpose being to paralyze the interstate commerce of the country, is an unlawful conspiracy, within the act of July 2, 1890, declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several States. *U. S.* v. *Patterson*, 55 Fed., 605, disapproved. *Ib.*

127. Same—Obstructing Mails.—Such combination, where the members intend to stop all mail trains, as well as other trains, and do delay many, in violation of Revised Statutes, section 3995, punishing any one willfully and knowingly obstructing or retarding the passage of the mails, is an unlawful conspiracy, although the obstruction is effected by merely quitting employment. *Ib.*

128. Combination or Conspiracy to Prevent Passage of Trains—Obstruction of Interstate Commerce.—Any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in interstate commerce is in violation of act July 2, 1890, declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the States. *In re Grand Jury*, 62 F., 840. 1—301

129. Mail—Obstructing Passage of Mail Trains.—It is a violation of section 995, Revised Statutes, declaring it an offense to knowingly and willfully obstruct or retard the passage of the mail, for one to prevent the running of a mail train as made up ,though he is willing that the mail car shall go on, and his purpose is other than to retard the mails. *Ib.*

130. Same.—The railway is a great public highway, and the duty of the railroad company as a common carrier is first to the public. **The road must be kept in operation for the acommodation of the public,** if it is possible to do so with the force and

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

appliances within reach. Any negligence in this respect is not excused by temporary difficulties capable of being promptly removed. *Ib.*

131. Same.—Where the transportation of the mails and interstate commerce has long been interrupted by the refusal of the employees of the railway company to move trains carrying Pullman cars, it is the **duty of the railway** company to use every effort **to move the mails and interstate commerce, without regard to the make-up of regular trains;** and any willful failure to perform this duty is a violation of the statute. *Ib.*

132. Railway Employees—Strikes for the Purpose of Injuring a Third Party.—It is **unlawful** for the employees of railway companies to combine and quit work for the purpose of compelling their employer to withdraw from his relations with a third party, for the purpose of injuring that third party. They **have, however, a right to organize for mutual benefit and protection,** and for the purpose of securing the highest wages and the best conditions they can command. They may appoint officers, who shall advise them as to the course to be taken in their relations with their employer, and they may, if they choose, repose in their officers authority to order them, or any of them, on pain of expulsion from their union, peaceably to leave the employment because the terms thereof are unsatisfactory. *Thomas* v. *Railway Co.*, 62 F., 817, followed. *U. S.* v. *Cassidy*, 67 F., 698. **1—452**

133. Strike—Obstruction of Mails—Restraint of Interstate Trade or Commerce.—A strike, or a preconcerted quitting of work, by a combination of railroad employees is, in itself, unlawful if the concerted action is knowingly and willfully directed by the parties to it for the purpose of obstructing and retarding the passage of the mails, or in restraint of trade and commerce among the States. *Ib.*

III. NOT PROHIBITED.

1. Agreements, combinations, etc., only incidentally affecting interstate commerce.

134. Agreements to Raise Prices of Lumber, Not Involving an Absorption of the Entire Traffic.—An agreement between a number of lumber dealers in different States to raise the price of lumber 50 cents per thousand feet in advance of the market price can not operate as a restraint upon trade within the meaning of the act of Congress "to protect trade and commerce against unlawful restraint and monopolies" (26 Stat., 209) unless such agreement involves an absorption of the entire traffic and is entered into for the purpose of monopolizing trade in that commodity with the object of extortion. *U. S.* v. *Nelson*, 52 F., 646. **1—77**

But see COMBINATIONS, ETC., 8–15.

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

135. A combination between all the lumber manufacturers of a city to raise and maintain the price of lumber to local consumers, and to refuse to sell lumber to consumers who purchase any part of their supply from outside mills, **some of such mills supplying the local market being situated in another State,** is not in violation of the Sherman Anti-Trust Law, as in restraint of interstate commerce, its **effect** on such commerce **being indirect and incidental only.** *Ellis* v. *Inman, Poulsen & Co.*, 124 F., 956. **2—268**

Reversed, 131 F., 182 (**2—577**).

136. Apportionment of Territory—Agreements Not to Compete—Iron Pipe.—The combination of several corporations engaged in the manufacture of cast-iron pipe whereby they agree not to compete with each other in regard to work done or pipe furnished in certain States and Territories, and, to make effectual the objects of the association, agree to charge a bonus upon all work done and pipe furnished within those States and Territories, which bonus was to be added to the real market price of the pipe sold by those companies, was not a violation of the Anti-Trust Act, **as it affected interstate commerce only incidentally.** *U. S.* v. *Addyston Pipe and Steel Co.*, 78 F., 712. **1—631**

Reversed, 85 F., 271 (**1—772**); 175 U. S., 211 (**1—1009**). *See* COMBINATIONS, ETC., 39–46.

137. Same.—In the examination of such a contract, fraud and illegality are not to be presumed, but must be proved, as in all other cases. *Ib.*

138. Acts, contracts, and combinations which promote, or only incidentally or indirectly **restrict competition** in commerce among the States, while their **main purpose** and chief effect are **to foster the trade** and increase the business of those who make and operate them, are not in restraint of interstate commerce, or violative of section 1 of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. **2—271**

139. Same.—Attempts to monopolize a part of commerce among the States which promote, or only incidentally or indirectly restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were **not,** made illegal or **punishable by section 2 of the Anti-Trust Act** of July 2, 1890, chapter 647 (26 Stat., 209), because **such attempts** are **indispensable to the existence of any competition** in commerce among the States. *Ib.*

140. Combination to Monopolize Refining and Selling Sugar by Buying up all Competitors not a Violation of the Statute.—A combination whose object is to enable a single company to

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

monopolize and control the business of refining and selling sugar, by buying up all competing concerns in the United States, is not in violation of Federal Anti-Trust Act of July 2, 1890, for it **constitutes no restriction upon**, or monopoly of, **commerce between the States**, but, at most, **only makes it possible for the promoters** of the combination **to restrict or monopolize such commerce**, should they so desire. *U. S.* v. *E. C. Knight Co.*, 60 F., 306. 1—250

141. **Same.—The purchase of stock of sugar refineries for the purpose of acquiring control** of the business of refining and selling sugar in the United States **does not involve monopoly**, or **restraint of interstate** or foreign **commerce**, within the meaning of the act of July 2, 1890. *U. S.* v. *E. C. Knight Co.*, 60 F., 934. 1—258

142. **Purchase of Similar Establishments in other States and thus Securing a Monopoly Bears no Direct Relation to Interstate or Foreign Commerce.**—Although the *American Sugar Refining Company*, a corporation existing under the laws of the State of New Jersey, obtained through the purchase of stock in four Philadelphia refineries such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business, *Held*, that the acquisition of those refineries by the New Jersey corporation, and the business of sugar refining in Pennsylvania, bear no direct relation to commerce between the States or with foreign nations; and that the result of the transaction was the creation of a monopoly in the manufacture of a necessary of life, which could not be suppressed under the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *U. S.* v. *E. C. Knight Co.*, 156 U. S., 1. 1—379

143. **Corporate Rights as Regards Acquisition of Property to an Extent which Gives Control of Traffic Therein Among the States Not Prohibited.**—Congress has no authority, under the commerce clause or any other provision of the Constitution, to limit the right of a corporation created by a State in the acquisition, control, and disposition of property in the several States, and it is immaterial that such property, or the products thereof, may become the subjects of interstate commerce. It is apparent that by the act of July 2, 1890, in relation to monopolies, Congress did not intend to declare that the acquisition by a State corporation of so large a part of any species of property as to enable the owners to control the traffic therein among the several States, constituted a criminal offense. *In re Greene*, 52 F., 104. 1—55

144. **Contract by which Stockholders of a Corporation Agree Not to Enter Into Competition With Purchaser of the Business of the Company.**—The Anti-Trust Act of July 2, 1890 (26 Stat., 209) has **no application** to a contract by which the stock-

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

holders of a corporation engaged in dealing in **fish** at different places, in consideration of the purchase of the business and good will of the company by another, agreed not to enter into competition with him in such business for the term of ten years. *A. Booth & Co.* v. *Davis*, 127 F., 85. 2—318

145. **Same.—Such a covenant** by the stockholders **rests upon a good consideration and is lawful**, and the right of the purchaser to enforce it can not be affected by the question whether he has conducted the business lawfully since his purchase. *Ib.*

146. **Same—Suit to Enforce—Defenses.**—In a suit to enjoin a defendant from violating such a contract and to enjoin a codefendant from employing his services in a competing business, it is no defense that his codefendant hired him in ignorance of the contract, and will suffer damage if deprived of his services. *Ib.*

147. **Same—Corporation Selling Out Assets and Good Will and Thereby Incidentally or Remotely Affecting Interstate Commerce.**—Where a corporation engaged in the business of buying and selling fish sold out its assets and good will to plaintiff's assignor, and the seller no longer retained any interest in the property, so that the sale was not a mere combination of owners and properties under one management, the sale was not in violation of the Federal Anti-Trust Act of July 2, 1890 (26 Stat., 209), though the contract might incidentally or in some remote degree injuriously affect interstate commerce. *Davis* v. *A. Booth & Co.*, 131 F., 31. 2—566

148. **Same.—An agreement ancillary to such sale** of a corporation's business, by which the stockholders, who received the purchase price, agreed **that**, in order to protect the good will of the business so sold, **they would not either directly or indirectly engage in the same business within certain distinct limits** for a perod of ten years, was not void, as an unreasonable restraint of competition in trade, **at common law.** *Ib.*

149. **Contract for Entire Product.**—A contract with an independent manufacturer of wooden ware for the entire product of his plant is **not in itself** a contract in **illegal restraint of trade.** *Carter-Crume Co.* v. *Perrung*, 68 F., 439. 1—845

150. **Same.—If** an independent **manufacturer** contracts to sell his entire product, **without knowledge of similar contracts** made by the buyer with other manufacturers, and without any knowledge of the fact that such contract was intended by the buyer as one step in a general scheme for monopolizing the trade in that article and controlling prices, such independent manufacturer **can not be held to have conspired** against the freedom of commerce, or to have made a contract in illegal restraint of trade. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

151. Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, **such agreement will be upheld** as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the **effect** of its formation and enforcement upon interstate trade or commerce is in any event but **indirect and incidental,** and not its purpose or object. *Anderson* v. *United States,* 171 U. S., 604. **1—967**

See also COMBINATIONS, ETC., 9, 105, 174, 176, and STATUTES, 7, 8, 14, 44, 49.

2. Agreements not to engage in business.

152. Agreements Not to Engage in Business within a Radius of 50 Miles.—A covenant in a contract by which the owners of brickmaking plants conveyed them to a corporation in exchange for its stock, binding the sellers not to engage in competing business within a radius of 50 miles from the place of business of the corporation for a term of ten years, is valid, and may be enforced in a court of equity by a suit to enjoin its violation. *Robinson* v. *Suburban Brick Co.,* 127 F., 804. **2—312**

153. Same.—Such a covenant is personal, and is not brought within the statutes of a State other than that in which the contract was made by the fact that the property sold was situated in such State. *Ib.*

154. A contract for sale of vessels, even if they are **engaged in interstate commerce, is not** necessarily **void because the vendors agree,** as is ordinary in case of sale of a business and its good will, **to withdraw from business** for a specified period. *Cincinnati, etc., Packet Co.* v. *Bay,* 200 U. S., 179. **2—868**

155. Contract by which Stockholders of a Corporation Agree Not to Enter into Competition with a Purchaser of the Business of the Company.—A covenant by the stockholders of a corporation which sold its property, business, and good will, that, in consideration of such sale and as an inducement thereto, they would not directly or indirectly engage in the same or like kind of business as that carried on by the company in the same territory or in the immediate vicinity of such territory for ten years after the sale, **rests upon a good consideration and is lawful,** and the right of the purchaser to enforce it can not be affected by the question whether he has conducted the business lawfully since his purchase. *A. Booth & Co.* v. *Davis,* 127 F., 875. **2—318**

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

156. Same—Suit to Enforce—Defenses.—In a suit to enjoin a defendant from violating a contract by which for a valuable consideration he covenanted not to engage in business for himself or another in competition with that of complainant for a term of years, and to enjoin a codefendant from employing his services in a competing business, it is no defense that his codefendant hired him in ignorance of the contract, and will suffer damage if deprived of his services. *Ib.*

157. An agreement by which the stockholders of a corporation, on selling its assets to complainant's assignor, **agreed not to again engage in a similar business in specified localities** for a period of ten years, or do any act tending to impair the good will of the business sold, was not contrary to public policy. *Davis* v. *A. Booth & Co.,* 131 F., 31. **2—566**

158. Same—Construction.—Where such contract ancillary to the sale provided that the stockholders of the seller would not again engage in a similar business for a period of ten years in the territory, or the immediate vicinity of the territory, dealt in by the corporation, or operated in by it or its agents, or the immediate vicinity of such territory, **the localities guarded against** were **restricted to those in which the selling company had establishments for doing business, and the immediate vicinity thereof,** and **did not include all parts** or every one of **the United States** in which a former customer resided, or into which the corporation's correspondence had extended, or through which an agent of the company had traveled. *Ib.*

159. Assignment of Patent—Agreements to Remain out of Business.—A contract recited that plaintiff, who was the patentee of an invention relating to brake beams, for the consideration of $10,000 to be paid him, had assigned to defendant, which was a corporation engaged in the manufacture of brake beams, a certain patent and a pending application for a second and provided that plaintiff during the life of the patent should not become connected with any company manufacturing or selling brake beams in the United States either as officer, employee, or shareholder, but reserved to him the right to terminate such part of the contract at any time by refunding the consideration paid him by defendant. *Held,* That **such agreement** to remain out of the brake-beam business **did not render the contract unlawful** as one in restraint of trade and competition or creating a monopoly and that plaintiff could maintain an action thereon to recover the stipulated consideration. *American Brake Beam Co.* v. *Pungs,* 141 F., 923. **2—826**

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. Not Prohibited—Continued.

3. Manufacturer's right to regulate prices and restrict sale of his own products.

160. Contracts Made by Manufacturer with Wholesale Dealers to Sell Proprietary Medicines at a Certain Price Only.—A system of contracts made by the manufacturer of a proprietary medicine between him and wholesale dealers, to whom alone he sold his medicine, by which they were bound to sell only at a certain price and to retail dealers designated by him, and between him and the retail dealers by which, in consideration of being so designated, they agreed to sell to consumers only at a certain price, is not unlawful as in restraint of trade, but is a reasonable provision for the protection of the manufacturer's trade, and he is entitled to an injunction to restrain a defendant from inducing other parties to such contracts to violate the same. *Hartman* v. *John D. Parks & Sons Co.*, 145 F., 358. **2—1000**

See also *Dr. Miles Medical Co.* v. *Jaynes Drug Co.*, 149 F., 838.

161. Agreement for Rebate if Price is Maintained, where Purchaser was not Bound in any way.—An arrangement whereby a distillery company promised persons who purchased from its distributing agents that if for the ensuing six months they would purchase their distillery products exclusively from such agents and would not resell the same at prices less than those fixed by the company, then, on being furnished with a certificate of compliance therewith, it would pay a certain rebate on the amount of such purchases, did not constitute a contract in restraint of trade, within the meaning of section 1 of said act, since the purchaser was not in any way bound to the performance of the conditions named; nor did such arrangement operate to "monopolize," or "as an attempt to monopolize," trade and commerce, within the meaning of section 2 of said act. *In re Greene*, 52 F., 104. **1—56**

162. Same—No Offense even after Compliance with the Conditions.—Nor was there any offense under the statute, even after the purchaser complied with the conditions of the promise, and thereby became entitled to the rebate, for such compliance had no retroactive effect to create a valid contract between the parties prior thereto. *Ib.*

163. Same.—Even if the promise could be considered as a binding contract between the parties, the restraint thereby imposed was only partial and reasonable in the protection of defendant's business, and was not of the general character necessary to constitute an unlawful contract in restraint of trade. *Mogul S. S. Co.* v. *McGregor* [1892], App. Cas., pt. 1, p. 25, approved. *Ib.*

164. A manufacturer, a corporation, **and its employee restricted the sales of its products to those who refrained from dealing in**

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. Not Prohibited—Continued.

the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but refused to refrain from handling the goods of the corporation's competitors, and sued it for damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again. *Held*, The restriction of their own trade by the defendants to those purchasers who declined to deal in the goods of their competitors was **not violative of the Anti-Trust Act.** *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. **2—271**

165. Sales.—The owner of goods may dictate the prices at which he will sell them, and the damages which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit **constitute no legal injury**, and are **not actionable**, because they are not the result of any breach of duty or of contract by the owner. *Ib.*

166. Contracts Restricting Territory within Which Purchasers may Sell.—A contract of sale by a manufacturer to jobbers of some of its product, **to be shipped across State lines** to the latter, whereby the parties agree that the purchasers shall **not sell, ship, or allow** any of the product thus purchased **to be shipped outside of a certain State**, is not in restraint of trade or illegal under the act of July 2, 1890. *Phillips* v. *Iola Portland Cement Co.*, 125 F., 593. **2—284**

4. Live-stock associations and commission merchants.

167. A combination of commission merchants at stock yards, by which they **refuse to do business with those who are not members of** their association, even if it is illegal, **is not subject to the act** of Congress of July 2, **1890**, to protect trade and commerce, since their **business is not interstate commerce.** *Hopkins* v. *U. S.*, 171 U. S., 578. **1—941**

Reversing 82 F., 529 (1—725).

168. Same.—In order to come within the provisions of the statute. **the direct effect of an agreement or combination must be in restraint of trade or commerce** among the several States or with foreign nations. *Ib.*

169. Same.—A by-law of the Kansas City Live-Stock Exchange. **which regulates the commissions to be charged** by members of that association for selling live stock **is not** in restraint of interstate commerce or **a violation of the act** of July 2, 1890, to protect commerce from unlawful restraints. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. Not Prohibited—Continued.

170. Same.—A commission agent who sells cattle at their place of destination, which are **sent from another State** to be sold, is **not engaged in interstate commerce;** nor is his agreement with others in the same business, as to the commissions to be charged for such sales, void as a contract in restraint of that commerce. *Ib.*

171. Same.—The business of agents in soliciting consignments of cattle to commission merchants in another State for sale is not interstate commerce; and a **by-law** of a stock exchange **restricting the number of solicitors to three** does not restrain that commerce or violate the act of Congress. *Ib.*

172. Live-Stock Exchange—Agreement not to do Business with Other Yard Traders who are not Members of the Exchange.— An agreement among persons engaged in the common business, as yard trader, of buying at a city stock yard cattle which came from different States, that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, **or buy cattle from those who also sell to yard traders who are not members** of the association, is not in violation of the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies. *Anderson* v. *U. S.*, 171 U. S., 604. 1—967

173. Same.—A rule of a live-stock exchange **that** its **members shall not recognize any yard trader who is not also a member of the exchange** is not in restraint of, or an attempt to monopolize, trade, where the exchange does not itself do any business, and there is nothing to prevent all yard traders from being members of the exchange and no one is hindered from having access to the yards or having all their facilities, except that of selling to members of the exchange. *Ib.*

174. Same.—Rules to enforce the purpose and object of such exchange, if reasonable and fair, can not, except remotely, affect interstate trade and commerce, and are not void as violations of the act of July 2, 1890. *Ib.*

175. Same.—In order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States or with foreign nations. *Ib.*

176. Same.—Where the subject-matter of the agreement **does not directly relate to and act upon and embrace interstate commerce,** and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, **such agreement will be upheld** as not within the

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. Not Prohibited—Continued.

statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the **effect** of its formation and enforcement upon interstate trade or commerce is in any event but **indirect and incidental,** and not its purpose or object. *Ib.*

5. Stock exchanges—Contract for distribution of quotations.

177. A **contract between a board of trade,** having a property right in the quotations made on its exchange, **and a telegraph company relating to the transmission and distribution of** such **quotations** by the latter is **not in violation** of the Anti-Trust Act of 1890 (26 Stat., 209), as in restraint of trade and commerce, because of a provision that the quotations shall only be furnished to persons who sign an agreement to the effect that they shall not be used in the conduct of a bucket shop. *Board of Trade* v. *Christie Grain & Stock Co.*, 121 F., 608. 2—333

178. Contracts under which the Chicago Board of Trade furnishes telegraph companies with its quotations, which it could refrain from communicating at all, **on condition that they will only be distributed** to **persons in contractual relations with,** and approved by, **the board,** and not to what are known as bucket shops, **are not void** and against public policy as being in restraint of trade **either at common law or under the Anti-Trust Act** of July 2, 1890. *Board of Trade* v. *Christie Grain and Stock Co.*, 198 U. S., 236. 2—717

179. Same—Property Right in Quotations—Entitled to Protection.— In a suit brought by the Chicago Board of Trade to restrain parties from using the quotations obtained and used without authority of the board, defendants contended that as the board of trade permitted, and the quotations related to, transactions for the pretended buying of grain without any intention of actually receiving, delivering, or paying for the same, that the board violated the Illinois bucket-shop statute and there were no property rights in the quotations which the court could protect, and that the giving out of the quotations to certain persons makes them free to all. *Held,* That even if such pretended buying and selling is permitted by the board of trade it is **entitled to have its collection of quotations protected** by the law and to keep the work which it has done to itself, nor does it lose its property rights in the quotations by communicating them to certain persons, even though many, in confidential and contractual relations to itself, and strangers to the trust may be restrained from obtaining and using the quotations by including a breach of the trust. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

180. Same—Entitled to Protection Though it Concerns Illegal Acts.—A collection of information, otherwise entitled to protection, does not cease to be so because it concerns illegal acts, and statistics of crime are property to the same extent as other statistics, even if collected by a criminal who furnishes some of the data. *Ib.*

6. Stockholding corporations—Minnesota.

181. Anti-Trust Law of Minnesota Should Receive Same Construction as Sherman Anti-Trust Law.—The anti-trust law of Minnesota (Laws 1899, p. 487, ch. 359), making unlawful any contract or combination in restraint of trade or commerce within the State, is in substantially the same language as the Anti-Trust Act of July 2, 1890 (26 Stat., 209), and must receive a similar construction. *Minnesota* v. *Northern Securities Co.*, 123 F., 692. **2—246**

Reversed, 194 U. S., 38. Circuit Court had no jurisdiction (**2—533**).

182. Same—Stockholding Corporation.—A holding corporation organized by individual stockholders of two railroad companies owning and operating substantially parallel and competing lines of railroad within the State of Minnesota, for the sole purpose of acquiring, by the exchange of its own stock therefor, stock of the two companies, and holding and voting the same, but having no power or franchise to operate a railroad, is **not in violation of the Minnesota anti-trust law** (Laws 1899, p. 487, ch. 359), which provides that "any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust or otherwise * * * which is in restraint of trade or commerce within this State * * * is hereby prohibited and declared to be unlawful," where the purpose of its promoters was thereby to acquire and retain in the same hands a majority of the stock of one or both companies, to insure uniformity of policy and stability of management, although it in fact acquired the controlling interest in both, **in the absence of any evidence that it ever exercised its power to prevent competition** between the two roads, or to interfere in any manner with the fixing of rates by either company. *Ib.*

7. Patents—Combinations, etc., to keep up the monopolies.

183. Holding Company.—Contracts by which a number of patents covering similar inventions are conveyed by the several owners to one of the parties, which grants licenses under all to the others, are not void as against public policy or as in violation of the Sherman Anti-Trust Law, **because of provisions intended to protect and keep up the patent monopoly** by requiring the licensor to prosecute all infringers, limiting the licenses to be granted to such licensees as shall be agreed on, and imposing conditions on each licensee as to the use and ownership of the patented machines, and prohibiting him from using any others. *U. S. Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 F., 364. **2—288**

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

184. Conditions imposed by the patentee in a license of the right to manufacture or sell the patented article, **which keep up the monopoly** or fix prices, do not violate the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints or monopolies. *Bement* v. *National Harrow Co.*, 186 U. S., 70. **2—170**

185. Reasonable and legal conditions imposed by the patentee in a license of the right to manufacture and sell the patented article, **restricting the terms** upon which the article manufactured under such license may be used **and the price** to be demanded therefor, do not constitute such a restraint on commerce as is forbidden by the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints and monopolies. *Ib.*

186. The agreement of the licensee of a patent for improvements relating to float spring-tooth harrows **not to manufacture or sell any other such harrows** than those which it had made under its patents before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by such licensor, **is not void** as an unlawful restraint on trade or commerce forbidden by the act of Congress of July 2, 1890 (26 Stat., 209), since the plain purpose of this provision is to prevent the licensee from infringing on the rights of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows. *Ib.*

187. An agreement by the licensor of a patent for improvements relating to harrows **not to license any other person** than the licensee to manufacture or sell any harrow of the peculiar style and construction then used or sold by such licensee does not violate the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints and monopolies. *Ib.*

188. The very **object of these laws is monopoly**, and the rule is, with few exceptions, that **any conditions which are not in their very nature illegal** with regard to this kind of property, imposed by the patentee and agreed to by the licensee for

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

the right to manufacture or use or sell the article, **will be upheld by the courts.** The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal. *Bement* v. *National Harrow Co.*, 186 U. S., 70, 91. **2—189**

See also COMBINATIONS, ETC., 92–99.

8. Railroads—Rates—Contracts, etc., favoring particular roads or individuals.

189. Combinations to Maintain Railroad Rates, but not Preventing or Illegally Limiting Competition, not a Violation of Section 1 of Statute.—An agreement between several competing railway companies and the formation of an association thereunder for the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the several lines, without preventing or illegally limiting competition, is not an agreement, combination, or conspiracy in restraint of trade in violation of the act of July 2, 1890, section 1. *U. S.* v. *Trans-Missouri Freight Assn.*, 53 F., 410. **1—80**

Reversed, 166 U. S., 290 (1—648).

190. Same—Not a Violation of Section 2 as Tending to a Monopolization, etc.—Nor is such an agreement in violation of section 2 of such act tending to the monopolization of trade and commerce. *Ib.*

191. Same—Separate Organizations, etc.—Where each company, by such agreement, maintains its own organization as before, elects its own officers, **delegates no powers to the association to govern** in any respect the operations or methods of transacting the routine business of the several competing lines, **but simply** requires that each company shall charge just and reasonable rates, and **provides for certain regulations in regard to changes in such rates,** such contract or agreement is not forbidden by public policy as amounting to a transfer of the franchises and corporate powers of such companies. *Ib.*

192. Same.—A contract between railroad companies forming a freight association that they will establish and maintain such rates, rules, and regulations on freight traffic between competitive points as a committee of their choosing shall recommend as reasonable; that these rates, rules, and regulations shall be public; that there shall be monthly meetings of the association, composed of one representative from each railroad company; that each company shall give five days' notice before some monthly meeting of every reduction of

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

rates or deviation from the rules it proposes to make; that it will advise with the representatives of the other members at the meeting relative to the proposed modification, will submit the question of its proposed action to a vote at that meeting, and, if the proposition is voted down, that it will then give ten days' notice that it will make the modification notwithstanding the vote before it puts the proposed change into effect; that no member will falsely bill any freight, or bill any at a wrong classification; and that any member may withdraw from the association on a notice of thirty days, appears to be a **contract tending to make competition fair and open,** and **to induce steadiness of rates,** and is in accord with the policy of the Interstate Commerce Act. Such agreement can not be adjudged to be a contract or conspiracy in restraint of trade under the Anti-Trust Act **when it is admitted that the rates** maintained under the same **have been reasonable and** that the **tendency has been to diminish** rather than to enhance **rates,** and there is no other evidence of its consequences or effect. Shiras, district judge, dissenting. 53 Fed. Rep., 440, affirmed. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. **1—186**

Reversed, 166 U. S., 290 (1—648).

193. Same.—No monopoly of trade or attempt to monopolize trade within the meaning of the Anti-Trust Act is proved by such a contract. *Ib.*

194. Same.—The railroad companies who are parties to such a contract do not thereby substantially disable themselves from the discharge of their public duties. *Ib.*

195. A contract by which a railroad company arranges with another, to the exclusion of still others, for the **interchange of passengers and freight by through tickets and bills of lading** is not a contract in unlawful restraint of trade, within the meaning of the act of July 2, 1890. *Prescott & A. C. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 73 F., 438. **1—604**

196. Contract Between Railroad Company and Individual Giving to Latter Exclusive Control of Shipment of Milk Over its Lines, Including the Fixing of Rates.—Defendant railroad company entered into a contract with plaintiff for a term of years to build up, develop, and conduct the business of the transportation of milk on its lines of road. Plaintiff was to have full charge of such business and was to receive as compensation a percentage of the freights earned therein. It was **provided that he should charge rates not in excess of those charged by competitive roads,** and should be granted the exclusive privilege of transporting milk over defendant's lines "so far as it was permitted to do so by law." In the execution of the contract all rates were made by defendant, and

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

plaintiff was not given a monopoly of the milk traffic. ***Held.*** That such contract was not ultra vires nor void as contrary to public policy, especially as practically construed by the parties in its execution; **nor was it in violation of the Anti-Trust Act of July 2, 1890** (26 Stat., 209). *Delaware, L. & W. R. Co.* v. *Kutter*, 147 F., 51. **2—1022**

197. Contracts or combinations between railroad companies which do not directly and necessarily affect transportation or rates therefor are not in restraint of trade or commerce, nor within the Minnesota anti-trust law of 1899, which is in substantially the same language as the Sherman Anti-Trust Law of 1890, even though they may remotely and indirectly appear to have some probable effect in that direction. *Minnesota* v. *Northern Securities Co.*, 123 F., 692. **2—246**

198. Joint Traffic Associations—Proportionate Rates and Division of Traffic.—A combination of railroad companies into joint traffic associations, under articles of agreement by which each road carries the freight it may get over its own line, at its own rates, and has the earnings to itself, though providing proportional rates or proportional division of traffic, is not a pooling of traffic on freights or division of net proceeds of earnings, within the prohibitions of the Interstate Commerce Law, nor of the act of 1890 (26 Stat., 209), against unlawful restraints and monopolies. *U. S.* v. *Joint Traffic Assn.*, 76 F., 895. **1—615**

Reversed, 171 U. S., 505 (1—869).

199. Through Transportation—Prepayment of Freight.—A common carrier engaged in interstate commerce may at common law and under the Interstate Commerce Law demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. **1—823**

200. Same—Joint Rates and Billing.—Such carrier may enter into a contract with one connecting carrier for through transportation, through joint traffic, through billing, and for the division of through rates, without being obligated to enter into a similar contract with another connecting carrier. *Ib.*

201. Same—Remedy not by Injunction, but by Suit for Damages.—The remedy of a party injured by such an agreement is not by bill of injunction, but by a suit for threefold damages under the act of 1890, the only party entitled to maintain a bill of injunction under that act being the Government of the United States. *Ib.*

See also CARRIERS.

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

9. Combinations, etc., operating within a State.

202. A combination or trust between the owners of tugs operating entirely within the confines of **a State** is not a combination in restraint of trade or commerce among the several States or with foreign nations, so as to come within the condemnation of the statutes of the United States, although most of the owners held coasting licenses. *The Charles E. Wiswall*, 86 F., 671. **1—850**

203. A contract for the purchase of certain river craft to run between certain points in the same State, where the vessels necessarily pass over the soil of adjoining States, **which provides for the maintenance of existing traffic rates,** and the vendors agree to withdraw from competition for five years, is not a contract in restraint of interstate trade under the Anti-Trust Act of July 2, 1890 (26 Stat., 209), and the purchaser is not relieved from his obligation to pay the purchase price. *Cincinnati, etc., Packet Co.* v. *Bay*, 200 U. S., 179. **2—867**

204. Same.—A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it. *Ib.*

205. Same.—Even if there is some interference with interstate commerce, a contract is **not necessarily void** under the Sherman Act if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law. *See U. S.* v. *Trans-Mo. Ft. Assn.*, 166, U. S., 290, 329; *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505, 568; and *Bement* v. *National Harrow Co.*, 186 U. S., 70, 92. *Ib.*

206. Same.—A contract for sale of vessels, even if they are engaged in interstate commerce, is **not necessarily void because the vendors agree,** as is ordinary in case of sale of a business and its good will, **to withdraw from business for a specified period.** *Ib.*

207. The Anti-Trust Act of July 2, 1890 (26 Stat., 209), **does not apply to a contract or combination relating to the business** of manufacturing **within a State.** *Robinson* v. *Suburban Brick Co.*, 127 F., 804. **2—312**

208. Agreements not to Engage in Business—Contracts in Partial Restraint of Trade.—A covenant in a contract by which the owners of brickmaking plants conveyed them to a corporation in exchange for its stock, binding the sellers not to engage in competing business **within a radius of 50 miles** from the place of business of the corporation for a term of ten years, is valid, and may be enforced in a court of equity by a suit to enjoin its violation. *Ib.*

209. A combination to restrain competition in proposals for contracts for the sale of certain articles which are to be de-

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

livered in the State in which some of the parties to the combination **reside** and carry on business is not, so far as those members are concerned, in violation of the Anti-Trust Law of Congress, **although the contract** may be **awarded to some party outside the State** as the lowest bidder. *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S., 211. 1—1009

210. Same—Jurisdiction of Congress.—Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce; **nor does it acquire any jurisdiction** over that part of a combination or agreement which relates to commerce wholly within a State **by reason of the fact that the combination also covers and regulates commerce which is interstate.** *Ib.*

211. An association of manufacturers of shingles within a particular State, formed for the purpose of securing concerted action between its members to prevent overproduction and establish uniform prices and grading, is not an illegal combination in restraint of interstate or foreign commerce, within the meaning of the Anti-Trust Law of 1890, or subject to Federal control; and **the fact that** through the action of the association the **mills** of its members **were closed** for a certain time, **and the price of shingles** was **raised,** but not to an extent alleged to be unreasonable or exorbitant, **does not give a dealer in shingles for export a right of action** against it or its members under such law. *Gibbs* v. *McNeeley*, 102 F., 594. 2—25

212. A combination controlling not only the manufacture of an article in the State, but also the sale of the manufactured article, **is not one in restraint of interstate commerce,** so as to give a right of action against it, under the Anti-Trust Law of July 2, 1890, to one injured by a resolution passed and circulated by it denouncing him for cutting prices, its sales being within the State, and any transportation and sale of the article in other States being by other agencies. *Gibbs* v. *McNeeley*, 107 F., 210. 2—71

Reversed by Circuit Court of Appeals, 118 F., 120 (2—194).

10. Labor combinations.

213. Combination Between Local Labor Union and Labor Organization Covering Many States—Boycott on Goods Sent to Other States.—The action of the members of a labor union in attempting to compel a hat manufacturer to unionize his factory by leaving his employment and preventing others from taking employment therein, and also, with the assistance of the members of affiliated organizations, by declaring a boycott upon his goods in other States into which such goods

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

have been shipped for sale at retail, does not have such relation to interstate commerce as to constitute a combination or conspiracy in restraint of such commerce in violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Loewe* v. *Lawlor*, 148 F., 924. (Decision not in print when body of this book went to press.)

See also COMBINATIONS, ETC., 112–133.

11. Municipal contracts—State monopolies.

214. Contract Limiting Character of Material to be Used to that Controlled by a Single Corporation.—Where the contract for the paving of a street with asphalt limited the kind of asphalt to be used to **Trinidad asphalt,** such fact, and the further fact that such asphalt was controlled by a single corporation was not violative of the commerce clause of the Constitution or of the Federal anti-trust statutes, and did not affect the validity of the contract. *Field* v. *Barber Asphalt Pav. Co.*, 117 F., 925. 2—193

215. Same.—The **specification in an ordinance** by a municipal council **that Trinidad Lake asphalt shall be used for street improvement,** does not violate the commerce clause of the Federal Constitution or the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209), notwithstanding this particular kind of asphalt is the product of a foreign country and competitive bidding was thereby rendered impossible. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. 2—555

216. Same.—The **necessity for an improvement of streets is a matter of which the proper municipal authorities are the exclusive judges** and their judgment is not to be interfered with except in cases of fraud or gross abuse of power. *Ib.*

217. State Monopoly of Liquor Traffic.—The act of July 2, 1890 (26 Stat., 209) is not applicable to the case of a State which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors (act S. C., Jan. 2, 1895). A State is neither a "person" nor a "corporation," within the meaning of the act of Congress. *Lowenstein* v. *Evans*, 69 F., 908. 1—598

COMMERCE. *See* INTERSTATE COMMERCE.

COMMON CARRIERS. *See* CARRIERS.

COMMON LAW.

1. Common-Law Offenses—Definitions.—There are no common-law offenses against the United States, and the offenses cognizable in the Federal courts are only such as the Federal statutes define, provide a punishment for, and confer jurisdiction to try; but when Congress adopts or creates a common-law offense the courts may properly look to the common law for the true meaning and definition thereof, in the absence of a clear definition in the act creating it. *In re Greene*, 52 F., 104. 1—55

COMMON LAW—Continued.

2. **Common-Law Offense Adopted by Congress—Presumption—Interpretation.**—Where Congress adopts or creates a common-law offense, and in doing so uses terms which have acquired a well-understood meaning by judicial interpretation, the presumption is that the terms were used in that sense, and courts may properly look to prior decisions interpreting them for the meaning of the terms and the definition of the offense where there is no other difinition in the act. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186
Case reversed, 166 U. S., 290 (1—648).

3. **Common-Law Rule.**—The ground on which certain classes of contracts and combinations in restraint of trade were held illegal at common law was that they were against public policy. *Ib.*

4. **Public Policy—How Determined.**—The public policy of the nation must be determined from its Constitution, laws, and judicial decisions. *Ib.*

5. **Railroad Companies—Arrangements for Through Billing.**—There is **no principle of common law which forbids** a single railroad corporation, or two or more of such corporations, from selecting, from two or more other corporations, one which they will employ as the agency by which they will send freight beyond their own lines, on through bills of lading, or as their agent to receive freight, and transmit it on through bills to their own lines, and without breaking bulk; and the right to **make such selection is not taken away by the Interstate Commerce Law.** *New York & N. Ry. Co.* v. *New York & N. E. R. Co.*, 50 F., 867, explained. *Prescott & A. C. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 73 F., 438. 1—604

6. **Prepayment of Freight.**—**A common carrier** engaged in interstate commerce **may at common law**, and under the Interstate Commerce Law, demand prepayment of freight charges, when **delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier**, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. 1—823

7. **Same.**—**The rules of the common law do not require a carrier to receive goods for carriage, either from a consignor or a connecting carrier, without prepayment of its charges** if demanded, **nor to advance the charges of a connecting carrier** from which it receives goods in the course of transportation; nor can it be required to extend such credit or make such advances to one connecting carrier because it does so to another. *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. 1—862

COMMON LAW—Continued.

8. **Contracts in Restraint of Trade—At Common Law.**—Contracts that were in unreasonable restraint of trade at common law were **not unlawful in the sense of being criminal**, or as giving rise to an action for damages to one prejudicially affected thereby, but were **simply void, and not enforceable.** *U. S.* v. *Addyston Pipe and Steel Co.*, 85 F., 271. 1—772

9. **Same.**—**No contractual restraint of trade is enforceable at common law unless** the covenant embodying it is merely ancillary to some lawful contract (involving some such relations as vendor and vendee, partnership, employer and employee), and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard for determining the reasonableness and validity of the restraints. **But where the sole object** of both parties in making the contract **is merely to restrain competition,** and enhance and maintain prices, the **contract is void.** *Ib.*
See also CONTINENTAL WALL PAPER CO. *v.* LEWIS VOIGHT & SONS CO., 148 F., 939.

10. **The illegality, at common law, of a combination** formed by corporations and persons in restraint of trade, **does not preclude it from recovering the purchase price** of goods sold in the course of business. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540. 2—118

11. **Note to Trust—Avoidance.**—A note made for a balance due on goods bought from a corporation **can not be avoided** merely **because the latter is a trust** organized to create and carry out restrictions in trade **contrary to the common law.** *Union Sewer Pipe Co.*, 99 F., 354. 2—1
Affirmed, 184 U. S., 540 (2—118).

COMPETITION. *See* STATUTES, 22, 23, 31.

CONGRESS.

1. **Debates in Congress** are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

2. **Power to Prohibit Combinations to Establish and Maintain Railroad Rates.**—Congress has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad companies to establish and maintain **interstate rates and fares** for the transportation of freight and passengers on any of the railroads parties to the

CONGRESS—Continued.

contract or combination, **even though the rates** and fares **thus established are reasonable.** *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505. **1—869**

3. **Same—Combinations by Means of Which Competition is Prevented.**—Congress has the power to forbid any agreement or combination among or between competing railroad companies for interstate commerce, by means of which competition was prevented. *Ib.*

4. The **Anti-Trust Law is a legitimate exercise of the power of Congress** over interstate commerce, and a valid regulation thereof. *Ib.*

5. **Power to Legislate Upon the Subject of Private Contracts in Respect to Interstate Commerce.**—The power of Congress to regulate interstate or foreign commerce includes the power to legislate upon the subject of private contracts in respect to such commerce. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211. **1—1009**

6. **Same.—Congress may** enact such legislation as shall **declare void and prohibit the performance of any contract** between individuals or corporations **where the natural and direct effect of such a contract shall be**, when carried out, **to** directly and not as a mere incident to other and innocent purposes, **regulate to any substantial extent interstate or foreign commerce.** *Ib.*

7. **Same.—The power of Congress to regulate interstate commerce comprises** the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate, to a greater or less degree, commerce among the States. *Ib.*

8. **Same—No Jurisdiction Over Commerce Wholly Within a State.**—Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce; nor does it acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. *Ib.*

9. **Congress did not exceed its power** under the commerce clause of the Federal Constitution **in enacting the Anti-Trust Act of July 2, 1890** (26 Stat., 209), declaring illegal every combination or conspiracy in restraint of interstate commerce, and forbidding attempts to monopolize such commerce or any part of it, **although such statute is construed to embrace a combination of stockholders of two competing interstate**

CONGRESS—Continued.

railway companies to form a stock-holding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (48 L. ed., 279). **2—342**

10. **Had Power to Enact Anti-Trust Law.**—Under its powers to regulate commerce among the several States and with foreign nations Congress had authority to enact the Anti-Trust Act of July 2, 1890. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (Harlan, Brown, McKenna, Day). **2—340**

See United States v. *E. C. Knight Co.*, 156 U. S., 1; *United States* v. *Trans-Missouri Freight Association*, 166 U. S., 290; *United States* v. *Joint Traffic Association*, 171 U. S., 505; *Hopkins* v. *United States*, 171 U. S., 578; *Anderson* v. *United States*, 171 U. S., 604; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211; *Montague & Co.* v. *Lowry*, 193 U. S., 38.

11. **The constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition** for those engaged in interstate and international commerce. *Ib.*

12. **Congress may protect the freedom of interstate commerce by any means** that are **appropriate** and that are lawful and not prohibited by the Constitution. *Ib.*

13. If in **the judgment of Congress** the public convenience or the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, that **must be**, for all, **the end of the matter**, if this is to remain a government of laws, and not of men. *Ib.*

14. When **Congress** declared contracts, combinations, and conspiracies in restraint of trade or commerce to be illegal, it **did nothing more than apply to interstate commerce a rule that had been long applied by the several States** when dealing with combinations that were in restraint of their domestic commerce. *Ib.*

15. **The power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce, subject**, of course, to such restrictions as are imposed by the Constitution upon the exercise of all power. *Ib.*

16. **No State can, by merely creating a corporation**, or in any other mode, project its authority into other States, so as to **prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce**, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce; nor can any State give a cor-

CONGRESS—Continued.

poration created under its laws authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. *Ib.*

17. Whilst every instrumentality of domestic commerce is subject to State control, **every instrumentality of interstate commerce may be reached and controlled by national authority,** so far as to compel it to respect the rules for such commerce lawfully established by Congress. *Ib.*

18. **Congress has the power to establish rules by which interstate and international commerce shall be governed,** and by the Anti-Trust Act has prescribed the rule of free competition among those engaged in such commerce. *Ib.*

19. **Congress may Prohibit Private Contracts which Restrain Interstate Commerce.**—Congress may, in the exercise of the power conferred by the commerce clause of the Constitution, prohibit private contracts which operate to directly and substantially restrain interstate commerce. *U. S.* v. *Northern Securities Co.*, 120 F., 721. **2**—216

20. It is the **declared policy of Congress,** which accords with the principles of the common law, **to promote individual competition in relation to interstate commerce,** and to prevent combinations which restrain such competition between their members; and it is **no defense** to an action to dissolve such a combination as illegal under the Anti-Trust Law **that it has not in fact been productive of injury to the public,** or even that it has been beneficial, by enabling the combination to compete for business in a wider field. *U. S.* v. *Chesapeake & O. Fuel Co.*, 105 F., 93. **2**—34

Affirmed, 115 F., 610 (**2**—151).

21. **Authority over State Corporation.**—Congress **has no authority,** under the commerce clause or any other provision of the Constitution, **to limit the right of a corporation created by a State in the acquisition, control, and disposition of property in the several States,** and it is **immaterial that such property, or the products** thereof, **may become the subjects of interstate commerce;** and it is apparent that by the act of July 2, 1890, in relation to monopolies, Congress did not intend to declare that the acquisition by a State corporation of so large a part of any species of property as to enable the owners to control the traffic therein among the several States constituted a criminal offense. *In re Greene*, 52 F., 104. **1**—55

22. While Congress may not have general visitatorial **power over State corporations,** its powers **in vindication of its own laws** are the same as if the corporation had been created by an act of Congress. *Hale* v. *Henkel*, 201 U. S., 43. **2**—847

CONGRESS—Continued.

23. **Franchises of a corporation chartered by a State are,** so far as they involve questions of interstate commerce, exercised **in subordination to the power of Congress to regulate such commerce.** *Ib.*

See also INJUNCTIONS, 16.

CONSENT OF PARTIES. *See* COURTS, 14.

CONSPIRACY.

1. **A conspiracy consists** in an agreement to do something; but in the sense of the law, and therefore in the sense of the act of 1890, it must be an agreement between two or more to do, by concerted action, something criminal or unlawful, or, it may be, to do something lawful by criminal or unlawful means. A conspiracy, therefore, is in itself unlawful, and, in so far as this statute is directed against conspiracies in restraint of trade among the several States, it is not necessary to look for the illegality of the offense in the kind of restraint proposed. Any proposed restraint of trade, though it be in itself innocent, if it is to be accomplished by conspiracy, is unlawful. *U. S.* v. *Debs*, 64 F., 724, 748. **1**—352

See also *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 823, 831.

2. **Conspiracy to Commit Offenses Against the United States—Revised Statutes, Section 5440.**—The statute relating to conspiracies to commit offenses against the United States (Rev. Stat., sec. 5440) contains three elements, which are necessary to constitute the offense. These are: (1) The act of two or more persons conspiring together; (2) to commit any offense against the United States; (3) the overt act, or the element of one or more of such parties doing any act to effect the object of the conspiracy. *U. S.* v. *Cassidy*, 67 F., 698. **1**—449

3. **Same—Conspiracy Defined.**—A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. *Pettibone* v. *U. S.*, 148 U. S., 203, cited. *Ib.*

4. **Same—Manner of Conspiring.**—The common design is the essence of the charge; but it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or the means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. *Ib.*

CONSPIRACY—Continued.

5. **Same—Parties to Conspiracy.**—Where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part any one was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. *Ib.*

6. **Same.**—Anyone who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally conconspired. *U. S.* v. *Babcock*, Fed. Cas. No. 14487, 3 Dill., cited. *Ib.*

7. **Same—Evidence—Acts of One Party.**—Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the conspiracy. *Ib.*

8. **Same—Declarations by Parties.**—Any declaration made by one of the parties during the pendency of the illegal enterprise, is not only evidence against himself, but against all the other conspirators, who, when the combination is proved, are as much responsible for such declarations, and the acts to which they relate, as if made and committed by themselves. This rule applies to the declaration of a co-conspirator, although he may not himself be under prosecution. *Ib.*

9. **Same—Conspiracy as Distinct Offense.**—The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy to commit crime requires an additional restraint to those provided for the commission of the crime itself. It therefore makes criminal the conspiracy itself, with penalties and punishments distinct from those it attaches to the crime which may be the object of the conspiracy. *Ib.*

10. **Same—Means Contemplated—Allegations and Proofs.**—It is not incumbent upon the prosecution to prove that all the means set out in the indictment were in fact agreed upon to carry out the conspiracy, or that any of them were actually used or put in operation. It is sufficient if it be shown that one or more of the means described in the indictment were to be used to execute that purpose. *Ib.*

11. **Same—Overt Acts.**—While at common law it was not necessary to aver or prove an overt act in furtherance of a conspiracy, yet, under the statute relating to conspiracies to commit an offense against the United States, the doing of some act in

CONSPIRACY—Continued.

pursuance of the conspiracy is made an ingredient of the crime, and must be established as a necessary element thereof, although the act may not be in itself criminal. *U. S.* v. *Thompson*, 31 F., 331, 12 Sawy., 155, cited. *Ib.*

12. **Same.**—It is not necessary, however, to a verdict of guilty, that the jury should find that each and every one of the overt acts charged in the indictment was in fact committed; but it is sufficient to show that one or more of these acts was committed, and that it was done in furtherance of the conspiracy. *Ib.*

13. A combination of labor organizations whose professed object is to arrest the operation of the railroads whose lines extend from a great city into adjoining States until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of trade and commerce among the States, within the act of July 2, 1890, and acts threatened in pursuance thereof may be restrained by injunction, under section 4 of the act. *U. S.* v. *Elliott*, 62 F., 801. 1—262

14. A combination to incite the employees of all the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their employment, thus paralyzing utterly all railway traffic, in order to starve the railroad companies and the public into compelling an owner of cars used in operating the roads to pay his employees more wages, they having no lawful right so to compel him, is an unlawful conspiracy by reason of its purpose, whether such purpose is effected by means usually lawful or otherwise. *Thomas* v. *Cin., N. O. & T. P. Ry. Co.*, 62 F., 803. 1—266

15. **Same.—Such combination**, its purpose being to paralyze the interstate commerce of the country, **is an unlawful conspiracy, within the act of July 2, 1890,** declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several States. *U. S.* v. *Patterson*, 55 F., 605, disapproved. *Ib.*

16. **Same—Obstructing Mails.**—Such combination, where the members intend to stop all mail trains as well as other trains, and do delay many, in violation of Revised Statutes, section 3995, punishing anyone willfully and knowingly obstructing or retarding the passage of the mails, **is an unlawful conspiracy, although the obstruction is effected by merely quitting employment.** *Ib.*

17. Any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in interstate commerce is in violation of act of July 2, 1890, declaring illegal every contract,

CONSPIRACY—Continued.

combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the States. *In re Grand Jury*, 62 F., 840. 1—301

18. **A combination of persons**, without regard to their occupation, **which will have the effect to defeat the provisions of the interstate commerce law**, inhibiting discriminations in the transportation of freight and passengers, **and further to restrain the trade or commerce of the country, will be obnoxious to** the penalties prescribed in **section 5440, Revised Statutes, relating to conspiracy.** *Waterhouse* v. *Comer*, 55 F., 149. 1—120

19. The term "conspiracy," in section 1 of the act of July 2, 1890 (26 Stat., 209), is used in its well-settled legal meaning, and **any restraint of trade or commerce, if** to be **accomplished by conspiracy, is unlawful.** *U. S.* v. *Debs*, 64 F., 724. 1—322

20. **Conspiracy to Injure in Business.**—The action of an association of manufacturers in adopting a resolution denouncing a dealer in the product they manufactured, who bought and shipped such product to customers in other States and foreign countries, and in printing such resolution in circulars, and mailing the same to other manufacturers and customers of the dealer, whereby his business was injured, constituted an illegal combination or conspiracy in restraint of interstate and foreign commerce, and gives the person injured a right of action in a circuit court of the United States, under the Anti-Trust Law of 1890, to recover the damages sustained. *Gibbs* v. *McNeeley*, 102 F., 594. 2—25

See also STATUTES, 40.

CONSTITUTION.

1. **Constitutional Guaranty of Right of Assembly and Free Speech.**—Inciting the employees of a receiver, who is operating a railroad under the order of a court, to leave his employ, in order to carry out an unlawful conspiracy, is not protected by constitutional guaranties of the right of assembly and free speech, and is not less a contempt because effected by words only, if the obstruction to the operation of the road by the receiver is unlawful and malicious. *Thomas* v. *Cin., N. O. & T. P. Ry. Co.*, 62 F., 803. 1—266

2. The **constitutional freedom of contract** as to the use and management of property does **not include the right of railroad companies to combine** as one consolidated and powerful association **for the purpose of stifling competition** among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition, even if their rates and charges are reasonable. *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505. 1—869

CONSTITUTION—Continued.

3. **Legislation which renders unlawful contracts, the direct effect of which is to shut out from interstate commerce the operation of the general law of competition, is not an interference with** the general liberty of contract possessed by the citizen under the fifth amendment to the Constitution. *Ib.*

4. **The constitutional guaranty** of liberty of the individual to enter into private contracts **does not limit the power of Congress** so as **to prevent it from legislating upon the subject of contracts in restraint of interstate or foreign commerce.** *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S., 211. 1—1009

5. **The provision** in the Constitution regarding the liberty of the citizen **is to some extent limited by the commerce clause**; and the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate, to a greater or less degree, commerce among the States. *Ib.*

6. **Constitutional Right of Private Contract Limited by Interstate Commerce Clause.**—The constitutional guaranty of liberty to the individual to enter into private contracts is limited to some extent by the commerce clause of the Constitution, and Congress may, in the exercise of the power conferred by such clause, prohibit private contracts which operate to directly and substantially restrain interstate commerce. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

7. **The constitutional guaranty** of liberty of contract **does not prevent Congress from prescribing the rule of free competition** for those engaged in interstate and international commerce. *Northern Securities Co.* v. *United States*, 193 U. S., 197. (Harlan, Brown, McKenna, Day.) 2—340

8. **Same.**—The constitutional guaranty of liberty of contract is **not infringed by a Federal court decree enjoining the Northern Securities Co.**, a corporation formed in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, **from exercising the powers acquired** by such corporation **by virtue of its acquisition of such stock.** (*48 L. ed., 679.*) 2—342

9. **Only such acts as directly interfere** with the freedom of interstate commerce **are prohibited to the States** by the Constitution. *Field* v. *Barber Asphalt Co.*, 194 U. S., 618. 2—555

10. **Article IV—Has Nothing to do with the Conduct of Individuals or Corporations.**—Article IV of the Constitution of the United States only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the **faith and credit to be given** by the court to **the public acts, records,** and **judicial proceed-**

CONSTITUTION—Continued.

ings of a State other than that in which the court is sitting. It has nothing to do with the conduct of individuals or corporations. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. 2—533

11. Fourth Amendment. *See* IMMUNITY, 14, 15; WITNESSES, 8, 20; SEARCH, 2–4; CORPORATIONS, 14, 25; and COURTS, 22.

12. Fifth Amendment. *See* IMMUNITY, 1, 3, 7, 9, 16; and WITNESSES, 1, 2, 4, 11–13, 15, 16, 20, 23.

13. Fourteenth Amendment.—It is **not the purpose** of the fourteenth amendment **to prevent the States from classifying the subjects of legislation** and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. 2—555

14. Same.—A State statute which provides that certain improvements are not to be made if a majority of resident owners of property liable to taxation protest, is not unconstitutional because it gives the privilege of protesting to them and not to nonresident owners. *Ib.*

15. Same.—Discrimination in favor of agricultural products. *See Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540. 2—119

CONTEMPT.

1. Interference with Receiver—Impeding Operation of Railroad.—Any willful attempt, with knowledge that a railroad is in the hands of the court, to prevent or impede the receiver thereof appointed by the court from complying with the order of the court in running the road, which is unlawful, and which, as between private individuals, would give a right of action for damages, is a contempt of the order of the court. *Thomas* v. *Cin., N. O. & T. P. R. Co.*, 62 F., 803. 1—266

2. Same—Instigating Strike—Unlawful Combination.—Maliciously inciting employees of a receiver, who is operating a railroad under order of the court, to leave his employ, in pursuance of an unlawful combination to prevent the operation of the road, thereby inflicting injuries on its business, for which damages would be recoverable if it were operated by a private corporation, is a contempt of the court. *Ib.*

3. Same—Constitutional Guaranty of Right of Assembly and Free Speech.—Such inciting to carry out an unlawful conspiracy is not protected by constitutional guaranties of the right of assembly and free speech, and is not less a contempt because effected by words only, if the obstruction to the operation of the road by the receiver is unlawful and malicious. *Ib.*

4. Contempt—Proceeding in Equity—Conclusiveness of Answer.—In proceedings for contempt in equity, a sworn answer, however full and unequivocal, is not conclusive, even in the case

CONTEMPT—Continued.

of a stranger to the bill for the injunction which has been violated. *U. S.* v. *Debs*, 64 F., 724. 1—322

5. Same—Justification—Irregularities.—Where a court had jurisdiction of an injunction suit, and did not exceed its powers therein, no irregularity or error in the procedure or in the order can justify disobedience of the writ. *Ib.*

6. Same.—In a proceeding for contempt in disobeying an injunction, the sufficiency of the petition for the injunction, in respect to matters of form and averment merely can not be questioned. *Ib.*

7. Contempt—Trial by Court.—Though the same act constitute a contempt and a crime, the contempt may be tried and punished by the court. *Ib.*

8. Contempt—Violation of Injunction—Conspiracy.—Where defendants, directors, and general officers of the American Railway Union, in combination with members of the union, engaged in a conspiracy to boycott Pullman cars, in use on railroads, and for that purpose entered into a conspiracy to restrain and hinder interstate commerce in general, and, in furtherance of their design, those actively engaged in the strike used threats, violence, and other unlawful means of interference with the operations of the roads, and, instead of respecting an injunction commanding them to desist, persisted in their purpose, without essential change of conduct, they were guilty of contempt. *Ib.*

9. Same—Interference with Receiver.—Any improper interference with the management of a railroad in the hands of receivers is a contempt of the court's authority in making the order appointing the receivers, and enjoining interference with their control. *Ib.*

10. The **order of the Circuit Court finding the petitioners guilty of contempt,** and sentencing them to imprisonment, was **not a final judgment** or decree. *Ir re Debs*, 158 U. S., 564. 1—565

11. Violation of Injunction—Contempt.—An injunction having been issued and served upon the defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been disobeyed, to proceed under Revised Statutes, section 725, and to enter the order of punishment complained of. *Ib.*

12. Same—Habeas Corpus.—The Circuit Court having full jurisdiction in the premises, its findings as to the act of disobedience are not open to review on *habeas corpus* in this or any other court. *Ib.*

13. Witness—Incriminating Evidence.—Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on *habeas corpus*

CONTEMPT—Continued.

because some of the questions might be safely answered. *Foot* v. *Buchanan*, 113 F., 156. **2**—104

14. Although the subpœna duces tecum may be too broad in its requisition, where the witness has refused to answer any question, or to produce any books or papers, this **objection would not go to the validity of the order committing him for contempt.** *Hale* v. *Henkel*, 201 U. S., 43. **2**—874

CONTRACTS.

1. Contract for Entire Product.—A contract with an independent manufacturer for the entire product of his plant **is not in itself** a contract **in illegal restraint of trade.** *Carter-Crume Co.* v. *Perrung*, 68 F., 439. **1**—845

2. Same.—If an independent **manufacturer** contracts to sell his entire product, **without knowledge of similar contracts** made by the buyer with other manufacturers, and without any knowledge of the fact that such contract was intended by the buyer as one step in a general scheme for monopolizing the trade in that article and controlling prices, such independent manufacturer **can not be held to have conspired** against the freedom of commerce, or to have made a contract in illegal restraint of trade. *Ib.*

3. Purchase of Business—Combination in Restraint of Trade.—A contract by which a person sells his property and business good will to another **can not be repudiated** on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of interstate trade and commerce. *Camors-McConnell Co.* v. *McConnell*, 140 F., 412. **2**—817

4. Same.—In order to defeat a suit to enforce such a contract on the ground that its enforcement is sought to aid and facilitate the carrying out of an illegal combination to monopolize interstate trade and commerce, **it must appear that the contract is directly connected with such unlawful purpose,** and not merely collateral thereto. *Ib.*

5. Same.—Although the combination may be unlawful, an action for the **performance** of the contract **can not be defeated** upon the ground that plaintiff is carrying on its business in an unlawful manner as a monopoly. *Ib.*

6. Same.—An agreement, as incidental to the sale of property as a business, that the seller will **not enter into a competing business, is valid and enforceable,** notwithstanding it is in partial restraint of trade. *Ib.*

7. Same—Specific Performance—Sale of Business—Enjoining Violation.—A court of equity will enjoin a defendant from violating a contract, clearly shown, by which he deliberately obligated himself for a valuable consideration not to engage in a certain business. *Ib.*

CONTRACTS—Continued.

8. Purchaser of River Craft not Relieved from Obligation to Pay Purchase Price Because of His Agreement to Maintain Present Traffic Rates.—A purchaser of river craft can not invoke the Anti-Trust Act of July 2, 1890 (26 Stat., 209), to relieve him from his obligation to pay the purchase price, because of his covenant to maintain the present traffic rates, which is not declared by the contract to enter into the consideration of the sale—especially **where the rates referred to primarily,** if not exclusively, **relate to domestic,** and not to interstate, **business.** *Cincinnati, etc., Packet Co.* v. *Bay*, 200 U. S., 179. **2**—867

9. Same.—A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it. *Ib.*

10. Same.—Where a contract relates to commerce between points within a State, both on a boundary river, it will **not** be construed as falling **within** the prohibitions of the Sherman **act because the vessels** affected by the contract **sail over soil belonging to the other State** while passing between the intrastate points. *Ib.*

11. Same.—Even if there is some interference with interstate commerce, a **contract is not necessarily void under the Sherman Act** if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law. *Ib.*

12. Same.—A contract for sale of vessels, even if they are engaged in interstate commerce, is **not necessarily void because the vendors agree,** as is ordinary in case of sale of a business and its good will, **to withdraw from business for a specified period.** *Ib.*

13. Any contract or combination which directly and substantially restricts the right of an interstate carrier to fix its own rates, independently of its natural competitors, places a direct restraint upon interstate commerce, in that it tends to prevent competition, and **is in violation of the act,** whether the rates actually fixed be reasonable or unreasonable. *U. S.* v. *Northern Securities Co.*, 120 F., 721. **2**—215

14. Contracts—Proprietary Medicines.—A system of contracts made by the manufacturer of a proprietary medicine between him and wholesale dealers, to whom alone he sold his medicine, by which they were bound **to sell only at a certain price** and to retail dealers designated by him, and between him and the retail dealers by which, in consideration of being so designated, they agreed to sell to consumers only at a certain price, is **not unlawful as in restraint of trade,** but is a reasonable provision for the protection of the manufacturer's trade, and he is entitled to an injunction to restrain a defend-

CONTRACTS—Continued.

ant from inducing other parties to such contracts to violate the same. *Hartman* v. *John D. Parks & Sons Co.*, 145 F., 358. **2**—1000

See also *Dr. Miles Medical Co.* v. *Jaynes Drug Co.*, 149 F., 838.

15. **A contract for the sale of merchandise is not rendered illegal by the fact that the selling corporation is a trust** or monopoly organized **in violation of law**, either Federal or State, the contract of sale being collateral and having no direct relation to the unlawful scheme or combination. *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 F., 491. **2**—1027

16. **Contracts Limiting Character of Material to be Used to that Controlled by a Single Corporation.**—Where the contract for the paving of a street with asphalt limited the kind of asphalt to be use to **Trinidad asphalt**, such fact, and the further fact that such asphalt was controlled by a single corporation, was not violative of the commerce clause of the Constitution or of the Federal Anti-Trust Statutes, and did not affect the validity of the contract. *Field* v. *Barber Asphalt Pav. Co.*, 117 F., 925. **2**—193

Affirmed, 194 U. S., 618 (**2**—555).

17. **Illegal.—Parties to a transaction adjudged to violate the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), are **not exempt from the doctrine** *in pari delicto* on the theory that they acted in good faith and without intent to violate the law, where, with knowledge of the facts and of the statute, they acted under the mistaken supposition that the statute would not be held applicable to the facts. *Harriman* v. *Northern Securities Co.*, 197 U. S., 244. **2**—669

Affirming, 134 F., 331 (**2**—618).

Reversing, 132 F., 464 (**2**—587).

18. **Same.—Property delivered under an executed illegal contract can not be recovered back** by any party *in pari delicto*, and the courts can not relax the rigor of this rule where the record discloses no special considerations of equity, justice, or public policy. *Ib.*

19. **Same.—Where a vendor after transferring shares** of railway stock to a corporation in exchange for its shares **becomes a director of the purchasing corporation** and participates in acts consistent only with absolute ownership by it of the railway stocks, and **does so after an action has been brought to declare the transaction illegal, his right to rescind the contract** and compel restitution of his original railway shares, if it ever existed, **is lost** by acquiescence and laches. *Ib.*

CONTRACTS—Continued.

20. **Effect of Illegal Provisions—Divisibility.**—Stipulations in a contract which are invalid as in restraint of trade, if capable of being construed divisibly, do not affect the validity of other provisions. *U. S. Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 F., 364. **2**—288

21. **Same—Validity—When Question for Jury.**—Conceding that a contract legal in its terms and in its consideration may be rendered illegal as against public policy by reason of the intention of the parties to so use it as to commit civil injury to third persons, where the evidence as to such intention is conflicting, the contract can not be declared illegal by the court as matter of law. *Ib.*

22. **Effect of Anti-Trust Law upon Contracts in Restraint of Trade which at Common Law were Not Unlawful.**—The effect of the Anti-Trust Law of 1890 is to render contracts in restraint of trade, as applied to interstate commerce, unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and also to create a right of civil action for damages in favor of persons injured thereby, and a remedy by injunction in favor both of private persons and the public against the execution of such contracts and the maintenance of such trade restraints. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F., 271. **1**—772

See also *Continental Wall Paper Co.* v. *Lewis Voight & Sons Co.*, 148 F., 939.

23. The **statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but seeks to reach those which directly restrain** or impair the **freedom of interstate trade.** The law reaches contracts and combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity. *Chesapeake & O. Fuel Co.* v. *United States*, 115 F., 610, 624. **2**—168

24. **Applies to Common Carriers by Railroads—Contracts Affecting Rates.**—The provisions respecting contracts, combinations, and conspiracies in restraint of trade or commerce among the several States or with foreign countries, contained in the act of July 2, 1890, apply to and cover common carriers by railroad; and a contract between them in restraint of such trade or commerce is prohibited, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. **1**—648

CONTRACTS—Continued.

25. Act Applies to All Contracts in Restraint of Interstate or Foreign Commerce—Not Confined to Unreasonable Restraints.—The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

26. Test of Legality of a Contract or Combination.—The Anti-Trust Act of July 2, 1890 (26 Stat., 209), does not leave to the courts the consideration of the question whether the restraint is or is not unreasonable and such as would have rendered the contract invalid at common law. **The only question in each case** where the validity of a contract or combination under the law is involved is **whether or not its necessary effect is to restrain interstate commerce.** *Chesapeake & Ohio Fuel Co.* v. *U. S.*, 115 F., 610. 2—151

27. Same.—The test of the violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), by a contract or combination, is its effect upon competition in commerce among the States. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law, but if it promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law. *Phillips* v. *Iola Portland Cement Co.*, 125 F., 593. 2—284

28. The Sherman Act of July 2, 1890, is **not intended to affect contracts which have only a remote and indirect bearing** on commerce between the States. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. 2—555

29. The Anti-Trust Act of July 2, 1890 (26 Stat., 209), **does not apply to a contract or combination relating to the business of manufacturing within a State.** *Robinson* v. *Suburban Brick Co.*, 127 F., 804. 2—312

30. The act of July 2, 1890, commonly known as the "Anti-Trust Act," **does not**, and could not constitutionally, **affect any monopoly or contract** in restraint of trade, **unless it interferes directly and substantially with interstate commerce**, or commerce with foreign nations. *U. S.* v. *Addyston Pipe & Steel Co.*, 78 F., 712. 1—630

31. What Contracts, Combinations, or Conspiracies Violate Anti-Trust Act.—Every contract, combination, or conspiracy **the necessary effect of which is to stifle or to directly and substantially** restrict competition in commerce among the States is in restraint of interstate commerce, and violates section 1 of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

CONTRACTS—Continued.

32. What Acts, Contracts, and Combinations Do Not Violate Anti-Trust Act.—Acts, contracts, and combinations which **promote, or only incidentally or indirectly restrict,** competition in commerce among the States, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce or violative of section 1 of the act of July 2, 1890 (26 Stat., 209). *Ib.*

33. Section 1 of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209), **makes a distinction between a contract and a combination or conspiracy** in restraint of trade. *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633

34. Contract for Sale of Goods by Member of Combination.—The act of July 2, 1890, section 1 (26 Stat., 209), known as the "Sherman Anti-Trust Act," **does not invalidate or prevent a recovery for the breach of a collateral contract** for the manufacture and sale of goods **by a member of a combination** formed for the purpose of restraining interstate trade in such goods. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. 2—995

IN RESTRAINT OF TRADE. *See* COMBINATIONS, ETC., 54–77.

NOT ENFORCEABLE. *See* COMBINATIONS, ETC., 16–20.

FREEDOM OF CONTRACT—RIGHT OF PRIVATE CONTRACT. *See* CONSTITUTION, 2–8; and CONGRESS, 5–7, 11, 19.

CONTRACTS FOR ENTIRE PRODUCT. *See* COMBINATIONS, ETC., 149, 150.

AGREEMENTS NOT TO ENGAGE IN BUSINESS OR COMPETE. *See* COMBINATIONS, ETC., 144–146, 148, 159, 208.

CONTRACTS IN VIOLATION OF ANTI-TRUST ACT. *See* ACTIONS AND DEFENSES, 61, 62.

DEFENSES. *See* ACTIONS AND DEFENSES.

COPYRIGHT.

The rights acquired by publishers of copyrighted books under the copyright law did **not justify them in combining** and agreeing that their books should be subject to the rules laid down by the united owners, one of which was that no member of the association should sell any books to a **blacklisted purchaser** who was **known to cut prices.** *Mines* v. *Scribner*, 147 F., 927. 2—1035

See also COMBINATIONS, ETC., 28, 96–98.

COVENANTS. *See* COMBINATIONS, ETC., 152, 153, 155.

CORPORATIONS.

1. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is **not endowed with the inalienable rights of a natural**

CORPORATIONS—Continued.

person, but it is an artificial person, created and existing only for the convenient transaction of business. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (Brewer concurring). 2—341

2. **Stockholding—Corporations to Acquire Stock of Competing Railroads—Legality.**—The real control of a corporation is in its stockholders, who have the power to determine all important corporate acts and policies, and any contract or combination by which a majority of the stock of two railroad companies owning and operating parallel and competing interstate lines of road is transferred to a corporation organized for the purpose of holding and voting the same, and receiving the dividends thereon, to be divided pro rata among the stockholders of the two companies so transferring their stock, directly and substantially, restricts interstate trade and commerce, and is in violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), since it destroys any motive for competition between the two roads; and it is immaterial that each company has its own board of directors, which nominally directs its operations and fixes its rates. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

3. **Same.—The fact that** the purpose of **an illegal combination between stockholders of two railroad companies** operating parallel and competing interstate lines, to secure unity of interest and control of such companies, and to prevent competition, **has been accomplished by the formation of a corporation** which has acquired the ownership of a majority of the stock of each of the companies, **can not be urged to defeat a suit by the United States to restrain** the exercise of **the power so illegally acquired** by the corporation through such combination, as imposing a restraint upon interstate commerce in violation of the Anti-Trust Law (act July 2, 1890, 26 Stat., 209). *Ib.*

Affirmed, 193 U. S., 197 (2—338).

4. **Powers of Corporations—New Jersey Statutes.**—The language of the New Jersey enabling act (Laws 1899, p. 473), authorizing the organization of corporations "for any lawful purpose," imposes a limitation upon the powers of any corporation organized thereunder, however broad may be the terms of its articles of incorporation. *Ib.*

5. **Northern Securities Company—Distribution of Stock—Purchase and Sale.**—A contract by which defendant, the Northern Securities Company, acquired from complainants certain shares of stock of the Northern Pacific Railway Company (193 U. S. 197), *Held*, under the evidence, to have been one of purchase and sale, by which **defendant**, on payment of the agreed price, became the absolute owner of the shares, free from

CORPORATIONS—Continued.

any trust in favor of the complainants, and **free to distribute the same pro rata among all its stockholders** upon the entry of a decree declaring it to be an illegal combination, and prohibiting it from voting or receiving dividends on such stock. *Northern Securities Co.* v. *Harriman*, 134 F., 331. 2—618

Affirmed, 197 U. S., 244 (2—669).

6. **Same—Should not be Enjoined from Distributing Stock.**—Defendant corporation having been adjudged an illegal combination in restraint of interstate commerce, and enjoined from voting or receiving dividends on certain railroad stock which it owned, but permitted to transfer the same to its stockholders, a plan adopted by its directors and stockholders to distribute the same pro rata among all its stockholders was equitable, and its execution should not be enjoined. *Ib.*

7. **Same.—The decree of the Circuit Court** in the Northern Securities case, affirmed by this court (193 U. S., 197), **did not determine the quality of the transfer** as between the defendants, **and the provisions therein as to return of shares of stock** transferred to it by the railway stockholders **were permissive only**, and not an adjudication that any of the vendors were entitled to a restitution of their original railway shares. *Harriman* v. *Northern Securities Co.*, 197 U. S., 244. 2—669

8. **Same.—The judgment of the Supreme Court in the Northern Securities case went no further than the decree of the Circuit Court** itself, and while it leaves that court at liberty to proceed in the execution of its decree as circumstances may require, it **does not operate to change the decree or import a power to do so** not otherwise possessed. *Ib.*

9. **Same.—The judgment or opinion of the Supreme Court in this case did not enlarge the scope of the decree of the Circuit Court so as to make it an adjudication that** any of the **vendors** of railway stocks **were entitled to judicial restitution of the stocks transferred** by them to the Securities Company, or that the Securities Company could not distribute the shares of railway stock held by it *pro rata* between its own shareholders. *Ib.*

10. **Same.—The transaction** between complainants and the Northern Securities Company **was one of purchase and sale** of Northern Pacific Railway Company stock for shares of stock of the Securities Company and cash and **not a bailment or trust.** *Ib.*

11. **Same—Duty of Securities Company to Distribute Stock.**—It was the duty of the Securities Company under the decree in the Government suit to end a situation which had been adjudged unlawful, and as this could be effected by sale and distribution in cash, or by distribution in kind, the company was

CORPORATIONS—Continued.

justified in adopting the latter method and avoiding the forced sale of several hundred million dollars of stock which would have involved disastrous results. *Ib.*

12. **Unreasonable Search and Seizure of Contracts and Correspondence—Immunity—Grand Jury.**—A corporation charged with a violation of the Anti-Trust Act of July 2, 1890, is entitled to immunity under the fourth amendment of the Constitution from such an unreasonable search and seizure as the compulsory production before a grand jury, under a *subpœna duces tecum*, of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different States. *Hale* v. *Henkel*, 201 U. S., 43. **2**—874

13. **Same.**—A corporation is but an association of individuals with a distinct name and legal entity, and in organizing itself as a collective body it waives no appropriate constitutional immunities, and although it can not refuse to produce its books and papers it is **entitled to immunity** under the fourth amendment **against unreasonable searches** and seizures, and **where an examination of its books is not authorized by an act of Congress a subpœna duces tecum requiring the production of practically all of its books and papers is as indefensible** as a search warrant would be if couched in similar terms. *Ib.*

14. **Same.**—The protection against unreasonable searches and seizures afforded by **the Fourth Amendment can not ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers** in obedience to a *subpœna duces tecum*, issued in aid of an investigation by a grand jury of an alleged violation of the Anti-Trust Act of July 2, 1890, by such corporation. *Ib.*

15. **Same—Contempt.—Although the subpœna duces tecum may be too broad** in its requisition, where the witness has refused to answer any question, or to produce any books or papers, **this objection would not go to the validity of the order committing** him **for contempt.** *Ib.*

16. **Same—Reserve Right to Investigate Contracts of a Corporation.**—A corporation is a creature of the State, and there is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. *Ib.*

17. **Same.**—There is a **clear distinction between an individual and a corporation, and the latter,** being a creature of the State, **has not the constitutional right to refuse to submit its books and papers** for an examination at the suit of the State. *Ib.*

CORPORATIONS—Continued.

18. **Same.—An officer of a corporation** which is charged with criminal violation of a statute **can not plead the criminality of the corporation as a refusal to produce its books.** *Ib.*

19. **Franchises of a corporation chartered by a State are, so far as they involve questions of interstate commerce, exercised in subordination to the power of Congress** to regulate such commerce; and while Congress may not have general visitatorial power over State corporations, its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress. *Ib.*

20. **In an action against corporations** for violations of the Anti-Trust Law, the books of the various defendants both before and after the alleged combination, and **the contracts between them, as well as other papers,** referred to **in the opinion, are all matters of material proof,** but whether material or not the testimony must be taken and exceptions can be noted by the examiner and the materiality of the evidence passed on by the court. *Nelson* v. *United States*, 201 U. S., 92. **2**—920

21. **Corporate Officers—Production of Documentary Evidence.**—The **refusal** of corporate officers to obey orders of a Federal circuit court requiring them to produce certain documentary evidence, on their examination before a special examiner, **can not be justified on the theory that such evidence was not in their possession** or under their control, because their possession was not personal, but was that of the corporations. *Ib.*

22. **Same.**—Documentary evidence in the shape of **books and papers** of corporations **are in the possession of the officers thereof.** *Ib.*

23. **Same—Officers and Employees Can Not Refuse to Testify or Produce Books, etc.**—*Hale* v. *Henkel* (vol. 2, p. 874) followed, to the effect that officers and employees of corporations can not, under the fourth and fifth amendments, refuse to testify or produce books of corporations in suits against the corporations for violations of the Anti-Trust Law of July 2, 1890, in view of the immunity given by the act of February 25, 1903. *Ib.*

24. **Corporation can not Claim Immunity Because of Testimony or Evidence Furnished by its Officers.**—A corporation, whether State or Federal, can not claim immunity from prosecution for violation of the interstate commerce or anti-trust laws of the United States because of testimony given or evidence produced by its officers or agents before the Interstate Commerce Commission or the Commissioner of Corporations, or in any proceeding, suit, or prosecution under such laws; **the right to immunity** on account of evidence so **given** in the several cases granted **by act February 11, 1893** (27 Stat., 443), **and acts February 14 and February 25, 1903** (32 Stat., 827, 904),

CORPORATIONS—Continued.

being **limited to individuals** who as witnesses give testimony or produce evidence. *United States* v. *Armour & Co.*, 142 F., 808. **2**—951

25. Article IV of the Constitution of the United States has nothing to do with the conduct of individuals or corporations. It only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State, other than that in which the court is sitting. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2**—533

26. Indictment—Criminal Responsibility—Joinder of Defendants—Corporation and its Officers. *See U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 823, 836.

COSTS.

The discretion of the trial court under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), to allow a reasonable attorney's fee to the successful plaintiff in an action brought under that section to recover damages for a violation of the provisions of that act against combinations in restraint of trade, is **not abused by an allowance of $750,** although the verdict was but for $500, where the trial took five days, and from the proof offered it appeared that from $750 to $1,000 would be a reasonable sum. *Montague* v. *Lowry*, 193 U. S., 38. **2**—329

COURTS.

I. Federal Courts in General—Jurisdiction and Power.

1. Jurisdiction over Nonresident Defendants in Private Suits.—The authority given by section 5 of the act of July 2, 1890 (26 Stat., 209), to bring in nonresidents of the district can not be availed of in private suits, and the court can not acquire jurisdiction over them. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1**—620

2. Jurisdiction in Private Suits Against a State for Violation of Anti-Trust Law—Necessary Parties.—Where a person brings an action under section 7 of the Anti-Trust Law of July 2, 1890, against the officials of a State, to recover damages for acts done under authority of a State statute, which gives the State an entire monopoly of the traffic in intoxicating liquors (act S. C., Jan. 2, 1895), the State itself is a necessary party thereto, and consequently the Federal courts would have no jurisdiction of the action. *Lowenstein* v. *Evans*, 69 F., 908. **1**—598

COURTS—Continued.

I. Federal Courts in General—Continued.

3. Court of Equity can not Entertain Bill of Private Party to Enforce Anti-Trust Law.—The Anti-Trust Law of July 2, 1890, does not authorize a court of equity to entertain a bill by a private party to enforce its provisions, **his remedy being by an action at law for damages.** *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. **1**—862

4. The United States can not maintain a bill in equity to restrain an association of railroads from carrying into effect an agreement alleged to be illegal under the Interstate Commerce Law, **when it appears that it did not grant the charter of,** and has no proprietary interest in, any of the roads. Its right is to prosecute for breaches of the law, not to provide remedies. *U. S.* v. *Joint Traffic Assn.*, 76 F., 895. **1**—615
Case reversed, 171 U. S., 505 (**1**—869).

5. Jurisdiction After Admission of Territory as State.—In 1895 the plaintiff in error was indicted, with others, in a district court of the Territory of Utah, under section 3 of the act of July 2, 1890 (26 Stat., 209), which declares illegal "every * * * combination * * * in restraint of trade or commerce in any Territory." In January, 1896, Utah was admitted as a State, and thereafter the case was transferred to the Federal court for the district of Utah, where, after hearing on demurrer to the indictment, the plaintiff in error was tried and convicted. *Held*, on writ of error, that neither under the act of Congress authorizing Utah to form a State government (28 Stat., 111, 112), nor the constitution of Utah (art. 24, sec. 7), nor by other legislation, was jurisdiction conferred upon the Federal court to proceed with the case. *Moore* v. *U. S.*, 85 F., 465. **1**—815

6. Same.—*Held*, further, that the case did not come within the provisions of Revised Statutes, section 13, regulating the effect of the repeal of statutes, for the admission of Utah as a State did not operate to repeal the act of July 2, 1890, which still applies to the Territories of the United States. *Ib.*

7. Court of Equity—Adjustment of Difficulties Between Receiver of Railroad and Employees.—Where the property of a railway or other corporation is being administered by a receiver under the superintending power of a court of equity, it is competent for the court to adjust difficulties between the receiver and his employees, which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership. *Waterhouse* v. *Comer*, 55 F., 149. **1**—119

8. Same.—It follows, then, that it is **in the power of the court,** in the interest of public order and for the protection of the property under its control, to direct a suitable arrangement with its employees or officers, **to provide compensation and**

COURTS—Continued.

I. Federal Courts in General—Continued.

conditions of their employment, and to avoid, if possible, an **interruption of their labor** and duty, which will be disastrous to the trust and injurious to the public. *Ib.*

9. **A Court of Equity Should Not Aid by Entertaining Infringement Suits Brought by an Illegal Corporation.**—A corporation organized for the purpose of securing assignments of all patents relating to "spring-tooth harrows," to grant licenses to the assignors to use the patents upon payment of a royalty, to fix and regulate the price at which such harrows shall be sold, and to take charge of all litigation, and prosecute all infringements of such patents as an illegal combination, whose purposes are contrary to public policy, and which a court of equity should not aid by entertaining infringement suits brought in pursuance thereof. *National Harrow Co.* v. *Quick*, 67 F., 130. **1—443**

10. **Jurisdiction of a Court of Equity can not be Invoked to Enforce a Contract Arising out of an Unlawful Combination of Railroads—Ticket Brokers.**—In a suit by a railroad company to enjoin the defendants, who were ticket brokers, from dealing in special tickets issued by complainant on account of the Pan-American Exposition, which were by their terms nontransferable, it appeared from the showing made on a motion for a preliminary injunction that complainant was a member of a combination known as the "Trunk Line Association," formed by a number of railroads operating in different States for the purpose of preventing competition; that the passenger receipts of all such roads were pooled and divided on an agreed basis; and that the special rates made on account of the exposition were fixed, and the terms of the tickets which were the basis of the suit were prescribed by such association through its passenger committee. *Held*, That such combination was illegal, as in violation of the Federal Anti-Trust Law (26 Stat., 209), and that complainant could not invoke the aid of a Federal court of equity for the protection of rights claimed under contracts which were the direct result and evidence of such unlawful combination. *Delaware, L. & W. R. Co.* v. *Frank*, 110 F., 689. **2—82**

11. **A railroad company, belonging to an illegal combination** in violation of the Anti-Trust Act of 1890, **can not invoke the aid of a Federal court of equity** for the protection of its rights claimed under contracts which were the direct result and evidence of such unlawful combination. *Ib.*

12. **Will Enjoin a Combination Between Two Parallel and Competing Lines of Railroad—Question of Public Policy.**—Where the effect of a combination is to directly prevent competition between two parallel and naturally competing lines of railroad engaged in interstate business, it is in restraint of interstate commerce and a **violation of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), and the court, in a suit to enjoin it as such, can not consider the question whether the combination may not be of greater benefit to the public than competition would be; that being a question of public policy to be determined by Congress. *U. S.* v. *Northern Securities Co.*, 120 F., 721. **2—216**

COURTS—Continued.

I. Federal Courts in General—Continued.

13. **May Restrain Violations of Anti-Trust Act and Frame its Decree to Accomplish Practical Results.**—Although cases should not be brought within a statute containing criminal provisions that are not clearly embraced by it, the court should not by narrow, technical, or forced construction of words exclude cases from it that are obviously within its provisions, and while the act of July 2, 1890, contains criminal provisions, the Federal court has power under section 4 of the act in a suit in equity to prevent and restrain violations of the act, and may mold its decree so as to accomplish practical results such as law and justice demand. *Northern Securities Co.* v. *United States*, 193 U. S., 197. **2—339**

14. **Consent of Parties can Never Confer Jurisdiction upon a Federal Court.** If the record does not affirmatively show jurisdiction in the circuit court, this court must, upon its own motion, so declare, and make such order as will prevent the circuit court from exercising an authority not conferred upon it by statute. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2—533**

15. **A State is not a citizen** within the meaning of the provisions of the Constitution or acts of Congress regulating the jurisdiction of the Federal courts. *Ib.*

16. **A case can not,** under existing statutes regulating the jurisdiction of the courts of the United States, **be removed from a State court, as one arising under the Constitution or laws** of the United States **unless** the plaintiff's **complaint, bill, or declaration shows it to be a case of that character.** *Ib*

17. **While an allegation in a complaint** filed in a circuit court of the United States **may confer jurisdiction to determine whether** the **case is of the class** of which the court may properly take cognizance for purposes of a final decree on the merits, **if notwithstanding** such allegation, the court finds, at any time, that **the case does not really** and substantially **involve a dispute or controversy within its jurisdiction then,** by the express command of the act of 1875, **its duty is to proceed no further.** And if the suit, as discussed by the complaint could not have been brought by plaintiff originally in the circuit court, then, under the act of 1887–88 it

COURTS—Continued.

I. Federal Courts in General—Continued.

should not have been removed from the State court and should be remanded. *Ib.*

18. **A State can not, by a suit in its own name, invoke the original jurisdiction of a Federal circuit court to restrain and prevent violations** by competing interstate railway companies, **of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), because, alone, of the alleged remote and indirect injury to its proprietary interests arising from the mere absence of free competition in trade and commerce as carried on by such carriers within its limits. *Ib.*

19. **Article IV of the Constitution** of the United States **only prescribes a rule by which courts, Federal and State, are to be guided when a question arises** in the progress of a pending suit **as to the faith and credit** to be given by the court to the public acts, records, and judicial proceedings of a State, other than that in which the court is sitting. It has nothing to do with the conduct of individuals or corporations. *Ib.*

20. **Allegation of Amount in Controversy.**—It is not essential that a bill in a Federal court should state the amount or value in controversy, if it appears to be within the jurisdictional limit, from the allegations of the bill, or otherwise from the record, or from evidence taken in the case before the hearing of objections to the jurisdiction. *Robinson* v. *Suburban Brick Co.*, 127 F., 804. **2**—312

21. **Abatement—Pendency of Action in State Court.**—The pendency of a suit in a State court is not a bar to one on the same cause of action in a Federal court. *Ib.*

22. **Production of Documents.—The search and seizure clause of the fourth amendment** was **not intended to interfere** with the power of courts to compel the production upon a trial of documentary evidence through a *subpœna duces tecum*. *Hale v. Henkel*, 201 U. S., 43. **2**—874

See also Search, and Witnesses.

23. **Orders of a Federal circuit court directing witnesses** to answer the questions put to them and produce written evidence in their possession on their examination before a special examiner appointed in a suit brought by the United States to enjoin an alleged violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), **is interlocutory in the principal suit, and therefore not appealable** to the Supreme Court. An appeal does lie, however, from a judgment of contempt, attempting to enforce the order. *Alexander* v. *United States*, 201 U. S., 117. **2**—945

See also *Nelson* v. *United States*, 201 U. S., 92 (**2**—920).

24. **Admission of Evidence—Order of Proof.**—In an action to recover damages for an alleged conspiracy in restraint of interstate commerce, it was **within the discretion of the trial court** to admit evidence of acts and declarations of various of the defendant associations, their officers, committees, members, and agents, made in the absence of many of the other defendants, **before a prima facie case of conspiracy had been established**, and before privity of some of the defendants had been proven, on condition that such connecting evidence should be thereafter given. *Loder* v. *Jayne*, 142 F., 1010. **2**—977

COURTS—Continued.

I. Federal Courts in General—Continued.

II. Circuit Courts.

25. **Jurisdiction to Restrain and Punish Violations of Anti-Trust Act.**—The circuit court have jurisdiction under the Anti-Trust Act of July 2, 1890, to issue injunctions to restrain and punish violations of that act. *U. S.* v. *Agler*, 62 F., 824. **1**—294

26. **Jurisdiction—Habeas Corpus—Removal of Prisoner.**—Where a prisoner, arrested under warrant based upon an indictment in a distant State and district, is held pending an application to the district court for a warrant of removal for trial, the circuit court of the district in which he is held has authority on *habeas corpus* to examine such indictment and to release the prisoner, if in its judgment the indictment should be quashed on demurrer. *In re Terrell*, 51 F., 213. **1**—46

27. **Habeas Corpus—Removal of Prisoner—Examination of Indictment.**—It is the right and duty of the circuit court on an application for *habeas corpus* for the purpose of releasing a person held under a warrant of a United States commissioner to await an order of the district judge for his removal to another district to answer an indictment, to examine the indictment to ascertain whether it charges any offense against the United States, or whether the offense comes within the jurisdiction of the court in which the indictment is pending. *In re Greene*, 52 F., 104. **1**—54

28. **Jurisdiction—Obstruction of the Mails.**—The circuit court had power to issue its process of injunction upon complaint which clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mails, not only temporarily existing, but threatening to continue. *In re Debs*, 158 U. S., 565. **1**—565

29. **Same—Violation of Injunction—Contempt.**—Such an injunction having been issued and served upon the defendants, the circuit court had authority to inquire whether its orders had been disobeyed, and when it found that they had been disobeyed, to proceed under Revised Statutes, section 725, and to enter the order of punishment complained of. *Ib.*

30. **Same—Habeas Corpus.**—The circuit court having full jurisdiction in the premises, its findings as to the act of disobedi-

COURTS—Continued.

II. Circuit Courts—Continued.

ence are not open to review on *habeas corpus* in this or any other court. *Ib.*

31. The circuit court **has power, in an action brought by the Attorney-General, to enjoin the Northern Securities Company,** a corporation organized to hold the majority of the stock of two competing and parallel lines of railroad for the purpose of preventing competition, from voting such stock, and from exercising any control whatever over the acts and doings of the railroad companies in question, and also to enjoin them from paying any dividends to the holding corporation on any of the stock so held by it. *Northern Securities Co.* v. *United States*, 193 U. S., 197. **2**—338

32. The circuit court **can have no jurisdiction of a suit instituted by a State, because of an allegation** in the complaint **that full faith and credit will not be given to its public acts if a New Jersey corporation** organized for the purpose of acquiring the control of two competing interstate railway companies engaged in business within its limits **is allowed to carry out the object of its incorporation.** *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2**—533

33. The **jurisdiction** of the circuit court **to entertain a suit to enjoin a combination of persons from interfering with and preventing shipowners from shipping a crew may be maintained** on the ground of preventing a multiplicity of suits at law, and for the reason that damages at law for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural and not susceptible of proof. 54 Fed. Rep., 40, affirmed. *Blindell* v. *Hagan*, 56 F., 696. **1**—182

34. **The jurisdiction of the circuit court** over a bill in equity **to enjoin a railroad company from granting rebates** to favored shippers can not be maintained upon the ground that such act of the railroad company is a monopoly within the meaning of the second section of said Anti-Trust Act (act July 2, 1890, 26 Stat., 209). *United States* v. *Atchison, T. & S. F. Ry. Co.*, 142 F., 176. **2**—831

35. **The pendency of a suit in a State court can not be pleaded in abatement of an action in a circuit court** of the United States **to recover treble damages** under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), since the State court is without jurisdiction to enforce the remedy given by said section, and therefore the same case can not be depending in both courts. *Locke* v. *Lawlor*, 130 F., 633. **2**—563

36. **Appeal to Supreme Court.—Where there are allegations of diverse citizenship** in the bill, **but the jurisdiction** of the circuit court **is also invoked on constitutional grounds,** the case is appealable directly to the Supreme Court under section 5 of the act of March 3, 1891, as one involving the construction or application of the Constitution of the United States, and where both parties have appealed the entire case comes to this court, and the respondent's appeal does not have to go to the Circuit Court of Appeals. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. **2**—555

COURTS—Continued.

II. Circuit Courts—Continued.

III. Circuit Court of Appeals.

37. The Circuit Court of Appeals **will not reverse an interlocutory order granting or continuing a temporary injunction unless** it is clearly shown that the same was improvidently granted and is hurtful to the appellant. *Workingmen's Amalg. Council* v. *U. S.*, 57 F., 85. **1**—184

IV. Supreme Court.

38. **Jurisdiction—Appeal—Dissolution of Illegal Association.**—The dissolution of the freight association **does not prevent** this **court** from **taking cognizance** of the appeal and deciding the case on its merits; as, where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law, and the jurisdiction of the court has attached by the filing of a bill to restrain such or like action under a similar agreement, and a trial has been had and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association effected subsequently to the entry of judgment in the suit. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. **1**—648

39. **Same.**—While the **statutory amount** must as a matter of fact be in controversy, yet the fact that it is so need not appear in the bill, but may be shown to the satisfaction of the court. *Ib.*

40. **Jurisdiction—Appeal—Refusal of Witness to Answer Questions in Anti-Trust Investigation—Fifth Amendment.**—In a suit in the Circuit Court of the United States brought by the United States against corporations for violations of the Anti-Trust Law of July 2, 1890, a witness refused to answer questions or submit books to inspection before an examiner appointed by the court on the ground of immateriality, also pleading the Fifth Amendment; after the court had overruled the objections and directed him to answer he again refused and judgment in contempt was entered against him. On appeal to the Supreme Court, *Held*, That questions under the Constitution of the United States were involved and the court has jurisdiction of an appeal direct from the circuit court. *Nelson* v. *United States*, 201 U. S., 92. **2**—920

41. **Same.**—In such an action **the books of the various defendants, both before and after the alleged combination, and the contracts between them, as well as other papers referred to in the opinion, are all matters of material proof,** but whether

COURTS—Continued.

IV. Supreme Court—Continued.

material or not the testimony must be taken and **exceptions can be noted** by the examiner **and the materiality of the evidence passed on by the court.** *Ib.*

42. Jurisdiction—The Order of a Judge of the Circuit Court to a Witness to Answer or be Punished for Contempt is Interlocutory and Not Appealable to Supreme Court.—In a suit in a circuit court of the United States brought by the United States against corporations for violations of the Anti-Trust Law of July 2, 1890, a **witness refused to answer questions or produce** books before the examiner on the ground of immaterially, also **pleading the privileges of the Fifth Amendment**; the court overruled the objections and ordered the witness to answer the questions and produce the books; an appeal was taken to this court. *Held*, That while **such an order** might leave the witness no alternative except to obey or be punished for contempt it **is interlocutory** in the principal suit and not a final order, nor does it constitute a practically independent proceeding amounting to a final judgment, and an **appeal will not lie** therefrom to this court. *Alexander* v. *United States*, 201 U. S., 117. **2**—945

43. Same—But an Appeal from a Judgment of Contempt is Reviewable.—If the witness refuses to obey and the court goes further and punishes him for contempt there is a right of review, and this is adequate for his protection without unduly impeding the process of the case. [*See* also *Nelson* v. *United States*, 201 U. S., 92 (**2**—920).] *Ib.*

44. The jurisdiction of the Supreme Court of the United States on writ of error to a circuit court, under the Circuit Court of Appeals act, **when the constitutionality of a State statute is in question, extends to all cases in which such a question is decided against the claim of either party,** and therefore includes a case in which the writ of error is taken by a defendant who set up in defense of the action a statute which the court held unconstitutional. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 54. **2**—118

45. Same.—If a claim is made in the circuit court that a State enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, the Supreme Court may review the judgment at the instance of the unsuccessful party. *Ib.*

46. Consent of Parties can Never Confer Jurisdiction upon a Federal Court.—If the record does not affirmatively show jurisdiction in the circuit court, the Supreme Court must, upon its own motion, so declare, and make such order as will prevent the circuit court from exercising an authority not conferred upon it by statute. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2**—533

COURTS—Continued.

II. Supreme Court—Continued.

47. The findings of fact made in a State court in a suit in equity **are conclusive upon the Supreme Court** of the United States on writ of error to that court. *Bement* v. *National Harrow Co.*, 186 U. S., 70, 83. **2**—169, 181

48. Certiorari.—Where the decree of the Circuit Court of Appeals in an action in equity **only reverses an order of the Circuit Court** granting an injunction, **but** the court, the record presenting the whole case, **practically disposes of the entire controversy** on the merits, **certiorari may issue** from the Supreme Court and that court may finally dispose of it by its direction to the Circuit Court. *Harriman* v. *Northern Securities Co.*, 197 U. S., 244. **2**—669

CREDIBILITY OF WITNESSES. *See* Jury, 2.

DAMAGES.

1. Damages Recoverable.—Only actual damages, established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable under the Sherman Anti-Trust Law (26 Stat., 209). Speculative, remote, or contingent damages can not form the basis of a lawful judgment. *Central Coal & Coke Co.* v. *Hartman*, 111 F., 96. **2**—94

2. Same—Speculative Damages—Evidence—Sufficiency.—The estimates, speculations, or conjectures of witnesses unfounded in the knowledge of actual facts from which the amount of the damages could have been inferred with reasonable certainty will no more sustain a judgment than the conjectures of a jury. *Ib.*

3. Same—Anticipated Profits—When Recoverable.—The general rule is that the anticipated profits of a commercial business are too remote, speculative, and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to this rule that the loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was. *Ib.*

4. Same—Profits of Established Business—Evidence—Indispensable to Recovery.—Proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business. *Ib.*

5. Same—Loss of Profits.—The plaintiff testified that the acts of the defendants had greatly diminished his business, prevented him from making contracts for future delivery of coal, and diminished his sales from 15 to 20 carloads per month, on which he would have made a profit of from $12 to $20 per car; that he could not tell what the volume of his

DAMAGES—Continued.

business was before or after the acts complained of, and that he had no books or papers which would show this fact. He produced no evidence of the expenses or income of his business before or after the acts complained of. *Held*, That the evidence was insufficient to sustain a verdict for damages for the loss of anticipated profits. *Ib.*

6. **Burden of Proof.**—In an action for damages for conspiracy in restraint of interstate commerce in violation of act of Congress of July 2, 1890 (26 Stat., 209), the burden was on plaintiff to show some real actual damage to his business by reason of the alleged unlawful combination. *Loder* v. *Jayne*, 142 F., 1010. 2—977

7. **Same—Compensation for Extra Work—Evidence.**—Where, in an action for damages to plaintiff's business because of an alleged conspiracy in restraint of interstate commerce, plaintiff claimed $5,000 compensation to himself for extra work claimed to have been required by reason of such unlawful combination, but failed to prove how much additional time he was required to spend in his business after the combination went into effect, he was not entitled to recover for such alleged extra services. *Ib.*

8. **Same—Additional Capital.**—Where, in a suit for damages to plaintiff's business because of an alleged unlawful combination in restraint of interstate commerce, plaintiff claimed that because of such combination it was necessary to put $10,000 extra capital into his business from rents of his building, which were collected from time to time, but he testified on cross-examination that the payments of interest and taxes on the building were in excess of the amount paid into the business, he was not entitled to recover interest on such alleged additional capital. *Ib.*

9. **Same—Increased Cost.**—Where, by reason of an unlawful combination in restraint of interstate commerce in violation of the Sherman Act, plaintiff was compelled to conduct his business at a greater cost, though it was greater in volume, and by reason of the injury he received a less percentage of return, he was entitled to recover such additional cost, though by reason of his increased efforts and the natural increase of his business he was enabled to withdraw from the business for his personal services an amount equal to, or larger than, he drew from the business before the conspiracy became operative. *Ib.*

10. The owner of goods may dictate the prices at which he will sell them, and the damages which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit constitute no legal injury, and are not actionable, because they are not the result of any breach of duty or of contract by

DAMAGES—Continued.

the owner. *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

ACTIONS FOR RECOVERY. *See* ACTIONS AND DEFENSES, 21–42; Statutes 62–71.

DECLARATIONS.

1. **Averments.**—A declaration in an action for damages under the Anti-Trust Act of 1890, which does not aver that the goods manufactured by plaintiff, and in respect of which he claims to be injured, are a subject of interstate commerce, or that the acts complained of have anything to do with any contract in restraint of trade, or that the parties are citizens of different States, is demurrable. *Bishop* v. *American Preservers Co.*, 51 F., 272. 1—49

2. **Duplicity.**—A declaration in a suit based on section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), to recover damages resulting to plaintiff from a violation of such provision, which alleges in a single count that defendant entered into a "contract, combination, and conspiracy" in restraint of trade, is bad for duplicity. *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633

See also PARTIES, 3.

DEFENSES. *See* ACTIONS AND DEFENSES.

DEFINITIONS. *See* WORDS AND PHRASES.

DEMURRER.

A bill in equity, and the demurrer thereto, are neither of them to be read and construed strictly as an indictment, but are to be taken to mean what they fairly convey to a dispassionate reader by a fairly exact use of English speech. *Swift & Co.* v. *United States*, 196 U. S., 375. 2—642

See DECLARATIONS, 1; HABEAS CORPUS, 1.

DIRECT AND IMMEDIATE EFFECT.

DIRECT. *See* COMBINATIONS, ETC., 14, 19, 30, 43, 51, 63, 67, 91, 168, 175; CONSTITUTION, 9; INTERSTATE COMMERCE, 32, 37; STATUTES, 11, 19, 23.

DIRECT AND IMMEDIATE. *See* COMBINATIONS, ETC., 14, 44, 45, 105.

DIRECTLY AND APPRECIABLY. *See* COMBINATIONS, ETC., 8, 31; STATUTES, 26.

DIRECTLY AND EFFECTUALLY. *See* COMBINATIONS, ETC., 104.

DIRECTLY AND NECESSARILY. *See* COMBINATIONS, ETC., 9, 197; STATUTES, 17.

DIRECTLY AND SUBSTANTIALLY. *See* COMBINATIONS, ETC., 9, 11, 12, 69, 70, 87, 108; CONGRESS, 7; STATUTES, 10, 11, 14, 15, 16, 43, 48.

DIVISION OF TERRITORY. *See* COMBINATIONS, ETC., 39, 136, 137.

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DOCUMENTARY EVIDENCE. *See* EVIDENCE, 8, 9; *and* PRODUCTION OF DOCUMENTS.

DRUGS. *See* COMBINATIONS, ETC., 29, 160.

ENFORCEMENT. *See* INJUNCTIONS, 5, 8, 9, 13, 20, 21; COMBINATIONS, ETC., 16–20.

EQUITY.

1. **Equity will not encourage a combination in restraint of trade** and probably illegal under the Federal Anti-Trust Act of July 2, 1890. *Amer. Biscuit Mfg. Co.* v. *Klotz*, 44 F., 721. 1—3
2. **Jurisdiction.—Equity has jurisdiction to restrain public nuisances** on bill or information filed by the proper officer on behalf of the people. *U. S.* v. *Debs*, 64 F., 724. 1—322
3. **Same—Right to Jury.**—The power given by act of July 2, 1890, to circuit courts "to prevent and restrain violations" of the act is not an invasion of the right of trial by jury, as the jurisdiction so given to equity will be deemed to be limited to such cases only as are of equitable cognizance. *Ib.*
4. **A bill in equity and the demurrer thereto are neither of them to be** read and **construed strictly as an indictment,** but are to be taken to mean what they fairly convey to a dispassionate reader by a fairly exact use of English speech. *Swift & Co.* v. *United States*, 196 U. S., 375. 2—642

See also PARTIES; COURTS; PLEADING AND PRACTICE.

EVIDENCE.

1. **Admissibility—Proclamations of Various Government Officers—Newspaper Reports.**—In order to sustain the allegations of a bill praying an injunction against a combination in restraint of interstate commerce, the complainant may offer in evidence, as matter of history, the official proclamation of the various Government officers and also newspaper reports supported by affidavits containing manifestoes and declarations of the respondents. *U. S.* v. *Workingmen's Amalg. Council*, 54 F., 994. 1—110

   Case affirmed, 57 F., 85 (1—184).
2. **Admission of Evidence—Order of Proof.**—In an action to recover damages for an alleged conspiracy in restraint of interstate commerce it was **within the discretion of the trial court** to admit evidence of acts and declarations of various of the defendant associations, their officers, committees, members, and agents, made in the absence of many of the other defendants, **before a prima facie case of conspiracy had been established,** and before privity of some of the defendants had been proven, on condition that such connecting evidence should be thereafter given. *Loder* v. *Jayne*, 142 F., 1010. 2—977
3. **Same—Burden of Proof.**—The burden of proving a combination and conspiracy between manufacturers and wholesale and retail dealers of proprietary medicines and drugs in restraint of trade, in violation of act of Congress of July 2, 1890 (26 Stat., 209), injurious to plaintiff, and that defendants were engaged and took part in such conspiracy, **was on the plaintiff.** *Ib.*
4. **Same—Damages—Burden of Proof.**—In an action for damages for conspiracy in restraint of interstate commerce, in violation of act of Congress of July 2, 1890 (26 Stat., 209), the **burden was on plaintiff to show some real actual damage** to his business by reason of the alleged unlawful combination. *Ib.*
5. **Same—Compensation for Extra Work—Evidence.**—Where, in an action for damages to plaintiff's business because of an alleged conspiracy in restraint of interstate commerce, plaintiff claimed $5,000 compensation to himself for extra work claimed to have been required by reason of such unlawful combination, but **failed to prove how much additional time he was required to spend in his business** after the combination went into effect, he was **not entitled to recover** for such alleged extra services. *Ib.*
6. **Sufficiency—Injunction Pendente Lite.**—Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorize the court to enjoin interference with the business of the complainants by such combination pendente lite. *Blindell* v. *Hagan*, 56 F., 696. 1—182

   Affirming 54 F., 40 (1—106).
7. **Acts of One Party.**—Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be **evidence against any of the others** who were engaged in the conspiracy. *U. S.* v. *Cassidy*, 67 F., 698. 1—449
8. **Documentary or Oral—Materiality.**—Evidence, whether documentary or oral, sought to be elicited from witnesses summoned in an action brought by the United States to enjoin an alleged conspiracy by manufacturers of paper to suppress competition, in violation of the act of July 2, 1890 (26 Stat., 209), by creating a general selling and distributing agent, is material, **where it would tend to establish the manner in which such agent executed its functions.** *Nelson* v. *United States*, 201 U. S., 92. 2—920

EVIDENCE—Continued.

9. **Same.—Documentary evidence in the shape of books and papers of corporations are in the possession of the officers thereof,** who can not refuse to produce them on the ground that they are not in their possession or under their control. *Ib.*

10. **Same.—The immateriality of the evidence** sought to be elicited **can not justify the refusal of witnesses to obey** the orders of the Federal circuit court, requiring them to answer the questions put to them and to produce written evidence in their possession, on their examination before a special examiner. *Ib.*

11. **Same.—Objections to the materiality of the testimony** are **not open to consideration on a writ of error sued out by witnesses** to review a judgment for contempt, entered against them for disobeying an order to testify. *Ib.*

OVERT ACTS—CUMULATIVE EVIDENCE. *See U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 836.

See also WITNESSES.

EXPRESS COMPANIES. *See* STATUTES, 83.

FAIR AND REASONABLE RESTRAINTS. *See* COMBINATIONS, ETC., 59, 174, 191.

FISH. *See* COMBINATIONS, 144, 147.

FORFEITURE OF GOODS. *See* SEIZURE; STATUTES, 59.

FRANCHISES. *See* CORPORATIONS, 19.

GRAND JURY.

Powers—Witnesses—Refusal to Testify—Contempt.—Where, after a witness had refused to testify before a grand jury considering supposed infractions of the Anti-Trust Law, the grand jury made a presentment to the court charging the witness with contempt, and the court, after hearing, ordered the witness to answer the questions and to forthwith produce the papers required, the court's action was equivalent to an express instruction to the grand jury to investigate the matter referred to in the presentment, and hence the fact that the grand jury had been previously acting beyond its power was harmless. *In re Hale*, 139 F., 496. **2—804**

Order affirmed. *Hale* v. *Henkel*, 201 U. S., 43 (**2—874**).

See also IMMUNITY.

HABEAS CORPUS.

1. **Removal of Prisoner—Jurisdiction of Circuit Courts.**—Where a prisoner, arrested under warrant based upon an indictment in a distant State and district, is held pending an application to the district court for a warrant of removal for trial, the circuit court of the district in which he is held has **authority** on *habeas corpus* **to examine** such **indictment and to release the prisoner, if in its judgment the indictment**

HABEAS CORPUS—Continued.

should be quashed on demurrer. *In re Terrell*, 51 F., 213. **1—46**

2. **Same.**—On *habeas corpus* to release a person held under a warrant of a United States commissioner to await an order of the district judge for his removal to another district to answer an indictment, it is the **right and duty** of the circuit court **to examine the indictment to ascertain whether** it charges any offense against the United States, or whether **the offense comes within the jurisdiction of the court** in which the indictment is pending. *In re Greene*, 52 F., 104. **1—54**

3. **Witness—Contempt—Incriminating Evidence.**—Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on *habeas corpus* because some of the questions might be safely answered. *Foot* v. *Buchanan*, 113 F., 156. **2—104**

4. **Witness Committed for Contempt by One Judge Would Not be Discharged by Habeas Corpus by Another Judge of Same Court.**—Where a *subpœna duces tecum* was directed to be issued by a circuit judge, and the witness was committed for contempt for failure to obey the same, he would not be discharge on *habeas corpus* by another judge of the same court, though the latter was of the opinion that the subpœna authorized an unconstitutional search and seizure of private papers. *In re Hale*, 139 F., 496. **2—804**

Order affirmed in *Hale* v. *Henkel*, 201 U .S., 43 (**2—874**).

5. **Jurisdiction of Circuit Courts in Contempt Proceedings.**—Where the circuit court has full jurisdiction, its findings as to the act of disobedience of its orders are not open to review on *habeas corpus* in the Supreme Court or any other court. *In re Debs*, 158 U. S., 564. **1—566**

HOLDING COMPANIES.

TO VOTE STOCK. *See* COMBINATIONS, ETC., 84–91, 181, 182.

TO RECEIVE ASSIGNMENTS OF PATENTS. *See* COMBINATIONS, ETC., 92–95, 183.

IMMUNITY.

1. **Of Witnesses Before the Grand Jury.—Act of Congress, February 11, 1893** (27 Stat., 443), providing that no person shall be excused from testifying in a proceeding growing out of an alleged violation of an act to regulate interstate commerce, approved February 4, 1887, on the ground that his testimony will tend to incriminate him, and that no person shall be prosecuted, etc., on account of anything concerning which he may testify in such proceeding, **applies only to proceedings connected with the act of February 4, 1887, and does**

IMMUNITY—Continued.

not apply to a prosecution for violation of the Anti-Trust Act (26 Stat., 209), so as to abrogate in relation thereto the Fifth Amendment to the Constitution, providing that no person shall be compelled in a criminal case to be a witness against himself. *Foot* v. *Buchanan*, 113 F., 156. **2—104**

2. **Same—Question of Incrimination one for Judge.**—Where a witness claims that the answer to a question will tend to incriminate him, it is not for the witness, but for the judge, to decide whether, under all the circumstances, such might be the effect, and the witness entitled to the privilege of silence. *Ib.*

3. **Same.—Where a person has already been indicted for an offense about which he is to be examined as a witness,** and the questions asked him tend to connect him with such offense, the **testimony sought is within the inhibition of the Fifth Amendment to the Constitution** providing that no person shall be compelled in any criminal case to be a witness against himself. *Ib.*

4. **Same—Witness not Compelled to act Upon an Assurance of Judge.**—Where a witness before a grand jury declines to answer certain questions, and is taken before the judge, who assures him that he can safely answer, as his testimony can not be used against him, he is not compelled by such assurance to relinquish his constitutional privilege, where the answer may tend to criminate him. *Ib.*

5. **Same.—An inquisition before a grand jury to determine the existence of supposed violations of the Anti-Trust Act was a "proceeding" within the act of February 19, 1903** (32 Stat., 848), providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding" under several statutes mentioned, including such Anti-Trust Act. *In re Hale*, 139 F., 496. **2—804**

6. **Same.**—The **examination of witnesses before a grand jury concerning an alleged violation of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), **is a "proceeding" within the meaning of the** proviso to the **act of February 25, 1903** (32 Stat., 854–903), **that no person shall be prosecuted or be subjected to any penalty** or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-Trust Act is one. The word "proceeding" should receive as wide a construction as is necessary to protect the witness in his disclosures. *Hale* v. *Henkel*, 201 U. S., 43. **2—874**

7. **Same.—The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, and does not apply if the criminality is taken away.** *Ib.*

IMMUNITY—Continued.

8. **Same.—A witness is not excused from testifying** before a grand jury under a statute which provides for immunity, **because he may not be able, if subsequently indicted, to procure the evidence necessary to maintain his plea.** The law takes no account of the practical difficulty which a party may have in procuring his testimony. *Ib.*

9. **Same.—The difficulty,** if any, **of procuring such testimony** does not render the immunity from prosecution or forfeiture, given by the proviso to the act of February 25, 1903, insufficient to satisfy the guaranty of the Fifth Amendment to the Constitution against self-incrimination. *Ib.*

10. **Same.—A witness can not refuse to testify** before a Federal grand jury in face of a Federal statute granting immunity from prosecution as to matters sworn to, **because the immunity does not extend to prosecutions in a State court.** In granting immunity the only danger to be guarded against is one within the same jurisdiction and under the same sovereignty. *Ib.*

11. **Same.—The privilege against self-incrimination** afforded by the United States Constitution, Fifth Amendment, **is purely personal to the witness,** and he can not claim the privilege of another person, or of the corporation of which he is an officer or employee. [To same effect, *McAlister* v. *Henkel*, 201 U. S., 90 (**2—919**).] *Ib.*

12. **Same.**—Under the practice in this country the **examination of witnesses by** a Federal **grand jury need not be preceded by a presentment or formal indictment,** but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committed, and if so, they may indict upon such evidence. *Ib.*

13. **Same.**—In summoning witnesses before a grand jury it is **sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify,** without indicating the nature of the charge against such persons. *Ib.*

14. **Same.—A corporation charged with a violation of the Anti-Trust Act** of July 2, 1890, **is entitled to immunity under the Fourth Amendment to the Constitution from** such an **unreasonable search and seizure** as the compulsory production before a grand jury under a *subpœna duces tecum* of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different States. *Ib.*

IMMUNITY—Continued.

15. **Same.—The protection against unreasonable searches and seizures** afforded by United States Constitution, Fourth Amendment, **can not ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers** in obedience to a *subpœna duces tecum*, issued in aid of an investigation by a grand jury of an alleged violation of the Anti-Trust Act of July 2, 1890, by such corporation. *Ib.*

16. **Same.** *Hale* v. *Henkel* (vol. 2, p. 874) followed as to the inquisitorial powers of the Federal grand jury and the extent of privilege and immunity of a witness under the Fifth Amendment. *McAlister* v. *Henkel*, 201 U. S., 90. **2—919**

17. **Persons who furnished evidence in the "beef trust" investigation** conducted by the Commissioner of Corporations pursuant to a resolution of the House of Representatives of March 7, 1904, **although they did so without being subpœnaed or sworn, can not be prosecuted** for violation of the Anti-Trust Law on account of the transactions, matters, or things to which such evidence relates. *United States* v. *Armour & Co.*, 142 F., 808. **2—951**

18. **Same—Scope of Immunity Provisions of Statutes.**—The immunity provisions of the various statutes applicable to the investigation, to be valid, **must be as broad as** the privilege given by the **Fifth Amendment to the Constitution.** *Ib.*

19. **Same.—Section 6 of the act creating the Department of Commerce and Labor** (act Feb. 14, 1903, 32 Stat., 827), defining the powers and duties of the **Commissioner of Corporations**, requiring him to make **investigation** into the organization, conduct, and management of the business **of all corporations or combinations engaged in interstate or foreign commerce, other than common carriers**, and giving him the same powers in that respect as is conferred on the Interstate Commerce Commission with respect to carriers, including the power to subpœna and compel the attendance of witnesses, and to administer oaths and require the production of documentary evidence, **contemplates that he shall proceed by private hearings.** *Ib.*

20. **Same.—Section 6** (32 Stat., 827) **provides that** "all the **requirements**, obligations, liabilities, **and immunities imposed** or conferred **by the 'act to regulate commerce' and by 'an act in relation to testimony before the Interstate Commerce Commission' shall also apply to all persons who may be subpœnaed to testify** as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section." *Ib.*

21. **Same.—The act of February 11, 1893** (27 Stat., 443), which is supplementary to the Interstate Commerce Act, **provides that "no person shall be prosecuted or subjected to any penalty** or forfeiture for or on account of any transaction, matter,

IMMUNITY—Continued.

or thing concerning which he may testify or produce evidence, documentary or otherwise, **before said commission or in obedience to its subpœna * * *** or in any such case or proceeding. *Ib.*

22. **Same.—And the appropriation act of February 25, 1903** (32 Stat., 904), **making provision for the enforcement of the** interstate commerce and **Anti-Trust Laws, contains a similar immunity provision** relating to persons giving testimony or producing evidence **in any proceeding**, suit, or prosecution **under said acts.** *Ib.*

23. **Corporations can not Claim Immunity because of Testimony Given or Evidence Furnished by its Officers or Agents.**—A corporation, whether State or Federal, can not claim immunity from prosecution for violation of the interstate commerce or Anti-Trust Laws of the United States because of testimony given or evidence produced by its officers or agents **before the Interstate Commerce Commission or the Commissioner of Corporations**, or in any proceeding, suit, or prosecution under such laws; **the right to immunity** on account of evidence so given in the several cases granted by act of February 11, 1893 (27 Stat., 443), and acts of February 14 and 25, 1903 (32 Stat., 827, 904), being **limited to individuals** who as witnesses give testimony or produce evidence. *United States* v. *Armour & Co.*, 142 F., 808. **2—951**

IN PARI DELICTO. *See* SALE, 6, 7.

INCIDENTALLY, INDIRECTLY, OR REMOTELY. *See* COMBINATIONS, ETC., 9, 105, 135, 136, 138, 139, 142, 151, 174, 176, 205; CONGRESS, 7; STATUTES, 7, 8, 14, 44, 49.

INCITING STRIKES. *See* COMBINATIONS, ETC., 119–125.

INCRIMINATING EVIDENCE. *See* WITNESSES; IMMUNITY.

INDICTMENTS.

1. **Failure to Allege that Defendants Monopolized or Conspired to Monopolize Trade and Commerce Among the Several States, etc.**—An indictment under section 2 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), which fails to allege that defendants monopolized, or conspired to monopolize, trade and commerce among the several States, or with foreign nations, fails to state an offense, even though it does allege that they did certain acts with intent to monopolize the traffic in distilled spirits among the several States, and that they have destroyed free competition in such traffic in one of the States and increased the price of distilled spirits therein. *U. S.* v. *Greenhut*, 50 F., 469. **1—30**

INDICTMENTS—Continued.

2. **Failure to Charge a Crime.**—An indictment under the act of July 2, 1890, relating to monopolies, averred that defendants, in pursuance of a combination to restain trade in distillery products between the States and monopolize the traffic therein, acquired by lease or purchase, prior to the passage of the act, some 70 distilleries, producing three-quarters of the distillery products of the United States, and that they continued to operate the same after the passage of the law, and by certain described means sold the product at increased prices. *Held*, That no crime was charged in respect to the purchase or continued operation of the distilleries, since there was **no averment that defendants obligated the vendors of the distilleries not to build others, or to withhold their capital or experience** from the business. *In re Corning*, 51 F., 33. 1—33

3. **Same.**—The indictment further averred that defendants, in pursuance of the combination, shipped certain of the products to Massachusetts, and sold them there through their distributing agents to dealers, who were promised a **rebate** of 5 cents per gallon on their purchases, provided such dealers purchased their distillery products exclusively from the distributing agents, and sold them no lower than the prescribed list prices, said rebate to be paid when such dealers should sign a certificate that they had so purchased and sold for six months; and that by this means defendants had controlled and increased the price of distillery products in Massachusetts. *Held*, That no crime was charged with respect to such sales, since there was **no averment of any contract whereby the purchasers bound themselves not to purchase from others, or not to sell at less than list prices.** *Ib.* 1—34

4. **Failure to Charge a Crime.**—An indictment under the act of July 2, 1890, relating to monopolies, averred in the fourth count that defendants, in pursuance of a combination to restrain trade in distillery products between the States, shipped certain whisky to Massachusetts and sold it there through their distributing agents to dealers under a contract whereby said dealers were promised a **rebate** of 5 cents per gallon on their purchases, providing such dealers purchased their distillery products exclusively from the distributing agents and sold them no lower than the prescribed list prices; said rebate to be paid when such dealers should sign a certificate that they had so purchased and sold for six months; and that by this means defendants had controlled and increased the price of distillery products in Massachusetts. *Held*, That no crime was charged with respect to such sales, since there was **no averment of any contract whereby the dealers bound themselves not to purchase from others, or not to sell at less than list prices.** *In re Corning*, 51 F., 205, approved. *In re Terrell*, 51 F., 213. 1—46

INDICTMENTS—Continued.

5. **Failure to Allege Contract or Means of Compulsion—Vagueness.**—In an indictment under section 1 of the act of July 2, 1890, to protect trade and commerce against monopolies, one count alleged, in substance, that on a specified date defendants, under the guise of the Distilling and Cattle Feeding Company, sold to certain persons in Boston a quantity of alcohol, then in Illinois, and that, by reason of the fact that said company controlled the manufacture and sale of 75 per cent of all distillery products in the United States, defendants fixed the price at which the purchasers should and did sell such alcohol, and "did compel" said purchasers "to sell said alcohol at no less price than that fixed" by them, but there were no allegations as to the means of compulsion. *Held*, That it could not be assumed from these allegations that the means used was a contract with the purchasers, and the count was bad, as being too vague to charge any contract or restraint of trade between the States. *In re Greene*, 52 F., 104. 1—55

6. **Indictments which Simply Follow the Language of the Statute—Tested by Specific Facts Alleged.**—Under the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," an indictment simply following the language of the statute would be wholly insufficient, for the words of the act do not themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense; and the indictment must, therefore, be tested by the specific facts alleged to have been done or committed. *Ib.*

7. **Indictment of Stockholders for Acts of Corporation—Omission to State Relation Defendants Bore to the Corporation.**—In indictments of individuals under the said statute, where all the acts alleged to constitute the offense are charged to have been done by a corporation, an omission to state what relation defendants bore to the corporation, other than that of stockholders, is fatal, since mere stockholders can not be held criminally responsible for the acts of the corporation. *Ib.*

8. **Must Contain Description of the Offense and a Statement of the Facts Constituting Same—Words of Statute.**—An indictment under the act of Congress, "to protect trade and commerce against unlawful restraint and monopolies" (26 Stat., 209), must contain a certain description of the offense, and a statement of facts constituting same, and it is **not sufficient simply to follow the language of the statute.** *U. S.* v. *Nelson*, 52 F., 646. 1—77

INDICTMENTS—Continued.

9. An indictment under the anti-trust law should describe something that amounts to a conspiracy under that act conformably to the rules of pleading at common law, as perhaps modified by general Federal statutes. *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 823, 831.

10. **Must Show Means Whereby it is Sought to Monopolize.**—In an indictment under the Anti-Trust Act of 1890 it is not sufficient to declare in the words of the statute, but the means whereby it is sought to monopolize the market must be set out, so as to enable the court to see that they are illegal. *U. S.* v. *Patterson*, 55 F., 605. 1—133

Rehearing on general demurrer, 59 F., 280 (1—244).

11. **Allegations of what was done** in pursuance of an alleged conspiracy **are irrelevant** in an indictment under this statute, and are of **no avail** either to enlarge or **to take the place of** the **necessary allegations as to the elements of the offense.** *Ib.*

12. **Scope of the Statute.**—The words "**trade**" and "**commerce,**" as used in the Anti-Trust Act of 1890, **are synonymous.** The use of both terms in the first section does not enlarge the meaning of the statute beyond that employed in the common-law expression, "**contract in restraint of trade,**" as they are **analogous to the word "monopolize,"** used in the second section of the act. *Ib.*

13. The word "monopolize" is the basis and limitation of the statute, and hence an **indictment must show a conspiracy in restraint by engrossing or monopolizing** or grasping the market. It is **not sufficient** simply **to allege a purpose** to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise. *Ib.*

14. **Acts of Violence.**—Where counts in such indictment allege a purpose of engrossing or monopolizing the entire trade in question, acts of violence and intimidation **may be alleged** as the means to accomplish the general purpose. *Ib.*

15. **Surplusage** in an indictment **can not be reached by demurrer** of any character; but, if it be assumed that a **special demurrer** will lie, it **must point out the specific language objected to,** and not require counsel and the court to search through the indictment for what is claimed as demurrable. *U. S.* v. *Patterson*, 59 F., 280. 1—244

16. An **indictment** for conspiracy to monopolize interstate commerce in cash registers **need not negative the ownership of patents** by defendants, or aver that the commerce proposed to be carried on is a lawful one. *Ib.*

17. **Averments.**—It **is unnecessary to set out in detail the operations supposed to constitute interstate commerce,** and in this respect it is sufficient to use the language of the statute. *Ib.*

INDICTMENTS—Continued.

18. It **is unnecessary to allege the existence of a commerce which defendants conspire to monopolize,** as the statute does not distinguish between strangling a commerce which has been born and preventing the birth of a commerce which does not exist. *Ib.*

19. The **indictment need not show** that the **purpose** of the conspiracy was **to grasp the commerce** into the hands of one of the defendants, or that defendants were interested in behalf of the party for whose benefit they conspired, or what were their relations to such party. *Ib.*

20. **Grand Jury—Finding—Indictment.**—An indictment should only be found where the grand jury believe that the evidence before them would warrant a conviction. *In re Grand Jury*, 62 F., 840. 1—310

See also *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 823.

INDIRECTLY. *See* INCIDENTALLY.

INFRINGEMENT OF PATENTS. *See* PATENTS.

INJUNCTIONS.

1. **Must be Brought by the Government.**—The act of July 2, 1890 (26 Stat., 209), does not authorize the bringing of injunction suits or suits in equity by any parties except the Government. *Blindell* v. *Hagan*, 54 F., 40. 1—106

Case affirmed, 56 F., 696 (1—182).

2. **Same.**—The intention of the **Anti-Trust Act** of July 2, 1890 (26 Stat., 209), was to **limit direct proceedings in equity to prevent** and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, **to those instituted in the name of the United States,** under section 4 of the act, **by district attorneys** of the United States, acting under the direction of the **Attorney-General**; thus securing the enforcement of the act, so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. 2—533

3. **The right to bring suits for injunction** under section 4 of the act of July 2, 1890 (26 Stat., 209), **is limited to suits instituted on behalf of the Government.** *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. 1—620

4. The fourth section of the Anti-Trust Act (26 Stat., 209) **invests the Government with full power** and authority **to bring a suit to set aside an agreement between competing railroads for the regulation of rates** and to have an **association** founded for that purpose **dissolved** and its **members enjoined** from carrying out the terms of the agreement. *U. S.* v. *Trans-Missouri Ft. Assn.*, 166 U. S., 290. 1—648

INJUNCTIONS—Continued.

5. **Jurisdiction of Circuit Courts.**—The circuit courts have jurisdiction under the Anti-Trust Act of July 2, 1890, to issue injunctions to restrain and punish violations of that act. *U. S.* v. *Agler*, 62 F., 824. 1—294

6. **Same—Technical Defects in Bill.**—That a bill for such injunction contains no prayer for process, this being a mere technical defect, although it renders the bill demurrable, does not affect the jurisdiction of the court or render the injunction issued thereon void. *Ib.*

7. **Same—Defendants Not Named in Bill, nor Served with Subpœna.**—An injunction for such purpose becomes binding, as against one not named in the bill, and not served with subpœna, when the injunction order is served on him as one of the unknown defendants referred to in the bill. *Ib.*

8. **Same—Proceedings to Punish Violation.**—An information to punish violation of such an injunction order which fails to allege that the order was a lawful one, in the language of the statute, or that the person charged, not named in the order, was one of the unknown parties referred to therein, or that, either by his words or his acts, he was engaged in aiding the common object with other members of the alleged combination, lacks the necessary certainty. *Ib.*

9. **Equity Jurisdiction—Power to Enjoin—Right to Jury.**—The power given by section 4 of the act July 2, 1890, to circuit courts "to prevent and restrain violations" of the act, is not an invasion of the right of trial by jury, as the jurisdiction so given to equity will be deemed to be limited to such cases only as are of equitable cognizance. *U. S.* v. *Debs*, 64 F., 724. 1—323

See also *U. S.* v. *Elliott*, 64 F., 27 (1—311), and *U. S.* v. *Agler*, 62 F., 824 (1—294).

10. **Obstruction of Mails—Jurisdiction of Circuit Court.**—The circuit court has power to issue its process of injunction upon a complaint which clearly shows an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mails, not only temporarily existing, but threatening to continue. *In re Debs*, 158 U. S., 564. 1—565

11. **Same—Violation of Injunction—Contempt.**—Such an injunction having been issued and served upon the defendants, the circuit court had authority to inquire whether its orders had been disobeyed, and when it found that they had been disobeyed, to proceed under Revised Statutes, section 725, and to enter the order of punishment complained of. *Ib.*

12. **Same—Habeas Corpus.**—The circuit court having full jurisdiction in the premises, its findings as to the act of disobedience are not open to review on *habeas corpus* in this or any other court. *Ib.*

INJUNCTIONS—Continued.

13. **Enforcement—Contempt.**—The proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt. *Ib.*

14. **Such proceedings are not in execution of the criminal laws of the land.** *Ib.*

15. **Penalty for Contempt no Defense in Criminal Action.**—The penalty for a violation of an injunction is no substitute for, and no defense to, a prosecution for any criminal offense committed in the course of such violation. *Ib.*

16. **Obstruction of Railroads.**—An injunction will lie under section 4 of the Anti-Trust Act of July 2, 1890, to restrain a combination whose professed object is to arrest the operation of the railroads whose lines extend from a great city into adjoining States until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust. Such a combination is an unlawful conspiracy in restraint of trade and commerce among the States, within the meaning of section 4 of that act. *U. S.* v. *Elliott*, 62 F., 801. 1—262

Demurrer overruled, 64 F., 27 (1—311).

17. **Same—Power of Congress to Authorize.**—Act of July 2, 1890, section 4, which provides that the circuit courts of the United States have jurisdiction to restrain combinations and conspiracies to obstruct and destroy interstate commerce, before such objects are accomplished, is not void for want of power in Congress to authorize such proceedings. *U. S.* v. *Elliott*, 64 F., 27. 1—311

18. **Injunction Order—Persons not Named in Bill.**—Under act of July 2, 1890, section 5, an injunction order in an action to enjoin an illegal conspiracy against interstate commerce may provide that it shall be in force on defendants not named in the bill, but who are within the terms of the order, where it also provides that it is operative on all persons acting in concert with the designated conspirators, though not named in the writ, after the commission of some act by them in furtherance of the conspiracy, and service of the writ on them. *Ib.*

19. **Strike—Interference with Interstate Commerce.**—Where an injunction is asked against the interference with interstate commerce by combinations of striking workmen, the fact that the strike is ended and labor resumed since the filing of the bill is no ground for refusing the injunction. The invasion of rights, especially where the lawfulness of the invasion is not disclaimed, authorizes the injunction. *U. S.* v. *Workingmen's Amalg. Council*, 54 F., 994. 1—110

Case affirmed, 57 F., 85 (1—184).

INJUNCTIONS—Continued.

20. Injunction in Northern Securities Case no Invasion of States' Rights to Create Corporations.—The enforcement of the provisions of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), by a Federal court decree enjoining a corporation organized in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the power acquired by such corporation by virtue of its acquisition of such stock, does not amount to an invasion by the Federal Government of the reserved rights of the States creating the several corporations. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (48 L. ed., 679). **2—342**

21. Same.—A Federal court, by its decree in a suit instituted under the authority of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), section 4, to prevent and restrain violations of the act, **may properly enjoin a corporation** organized in pursuance of a combination of stockholders of two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, **from acquiring any further stock therein, from voting such stock as** it then holds or may subsequently acquire, and **from exercising any control over the railway companies by virtue of its holdings,** and may restrain the railway companies from permitting or suffering any such action on the part of the stockholding corporation, and **from paying any dividends on account of the stock held by it.** *Ib.*

22. Allowance—Comparative Hardship or Inconvenience.—In an application for a preliminary injunction to prevent the Northern Securities Company from parting with, disposing of, transferring, assigning, or distributing the stock of the Northern Pacific Railway Company, or any part thereof, by reason of the decision of the Supreme Court in the Northern Securities Company case (193 U. S., 197), during the pendency of a suit to determine the rights of the Northern Pacific Company in regard to such return or distribution, *Held*, That the preliminary injunction should issue, regard being had to the comparative hardship or convenience to the respective parties resulting from the awarding or denial of the injunction. *Harriman* v. *Northern Securities Co.*, 132 F., 464. **2—587**

Reversed by Circuit Court of Appeals, 134 F., 331 (**2**—619).

Action of Circuit Court of Appeals affirmed by Supreme Court, 197 U. S., 244 (**2**—669).

23. Same.—Where, in a doubtful case, **the denial** of a preliminary injunction would, on the assumption that the complainant ultimately will prevail, **result in greater detriment to him** than would, on the contrary assumption, **be sustained by the defendant,** through its allowance, the injunction usually should be granted. *Ib.*

24. Same.—The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. *Ib.*

25. Same.—Such doubt may relate either to the facts or to the law of the case, **or to both.** It may equally attach to, or widely vary in degree as between, the showing of the complainant and of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. *Ib.*

26. Same.—Preservation of Fund.—Where the sole object for which an injunction is sought is the preservation of a fund in controversy, or the **maintenance of the status quo,** until the question of right between the parties can be decided on final hearing the injunction **properly may be allowed, although there may be serious doubt of the ultimate success of the** complainant. *Ib.*

27. Same.—While the consideration that an appeal does not lie from an interlocutory decree denying a preliminary injunction is entitled to no weight where, on the application, it clearly appears that the complainant can not prevail on the final hearing, it **is often of controlling importance where,** on such application, **there is room for reasonable doubt as to the ultimate result.** *Ib.*

28. Preliminary Injunctions—Where Material Allegations are Denied.—Where the material allegations of a bill filed by the United States against various coal companies, under act of Congress, July 2, 1890, to enjoin their combination in restraint of trade, are denied by defendants' affidavits, a preliminary injunction will not be granted, as plaintiff gives no indemnifying bond in case the injunction should be dissolved. *U. S.* v. *Jellico Mtn. Coke & Coal Co.*, 43 F., 898. **1—1**

29. Injunction Pendente Lite—Evidence.—Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorize the court to enjoin interference with the business of the complainants by such combination pendente lite. 54 F., 40, affirmed. *Blindell* v. *Hagan*, 56 F., 696. **1—183**

INJUNCTIONS—Continued.

30. **Restraining Orders—May Issue Without Notice.**—Under section 4 of the Anti-Trust Law of July 2, 1890, a restraining order may be issued without notice, under the circumstances sanctioned by the established usages of equity practice in other cases. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. 1—749

31. **Preliminary Injunctions—Review.**—Where the opinion of a circuit court in granting a preliminary injunction shows that the judge regarded as of controlling importance the fact that an order denying the injunction would not be reviewable by appeal, the rule that the appellate court will not interfere with the exercise of the discretionary power of the court of first instance unless there is strong reason for it does not apply, and the question of the right to the injunction will be determined on the merits. *Northern Securities Co.* v. *Harriman*, 134 F., 331. 2—618
Reversing 132 F., 464 (2—587).

32. **Same—Should Not be Enjoined from Distributing Assets.**—Defendant corporation having been adjudged an illegal combination in restraint of interstate commerce, and enjoined from voting or receiving dividends on certain railroad stock which it owned, but permitted to transfer the same to its stockholders, a plan adopted by its directors and stockholders to distribute the same pro rata among all its stockholders was equitable, and its execution should not be enjoined. *Ib.*

33. **Same—Dissent.**—It is a proper exercise of discretion for a court to grant a preliminary injunction where the bill and evidence present a prima facie case and raise important and doubtful questions of law and fact, and, unless the injunction is granted to preserve the status quo until the hearing, the suit would be ineffective; and an order for an injunction, granted on such grounds after the court has given due consideration to the balance of inconvenience and injury which may result to one party or the other, should not be reversed by an appellate court before the case has been finally heard and determined by the court below on full proofs. Per Gray, Circuit Judge, dissenting. *Ib.*

34. **Review of Order Granting Temporary Injunction.**—The Circuit Court of Appeals will not reverse an interlocutory order granting or continuing a temporary injunction unless it is clearly shown that the same was improvidently granted and is hurtful to the appellant. *Workingmen's Amalg. Council* v. *U. S.*, 57 F., 85. 1—184
See also *Dr. Miles Medical Co.* v. *Jaynes Drug Co.*, 149 F., 838.

INTERSTATE COMMERCE.

1. **Commerce Defined.**—The word "commerce," as used in the Anti-Trust Act of July 2, 1890, and in the Constitution of the United States, has a broader meaning than the word "trade." Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities. *U. S.* v. *Cassidy*, 67 F., 698. 1—452

2. **Scope of Anti-Trust Act.**—While the primary object of the statute was doubtless to prevent the destruction of legitimate and healthy competition in interstate commerce, by the engrossing and monopolizing of the markets for commodities, yet its provisions are broad enough to reach a combination or conspiracy that will interrupt the transportation of such commodities and persons from one State to another. *U. S.* v. *Workingmen's Amalgamated Council*, 54 F., 995, cited. *Ib.*

3. **Pullman cars** in use upon railroads are instrumentalities of "commerce." *U. S.* v. *Debs*, 64 F., 763, cited. *Ib.*

4. **Commerce—Definition.—Commerce is the sale or exchange of commodities,** but that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the initiatory and intervening acts, instrumentalities, and dealings—that directly bring about the sale or exchange. *U. S.* v. *Swift & Co.*, 122 F., 529. 2—237

5. **Interstate Commerce Includes Purchase, Sale, and Exchange of Commodities.**—Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. *Addyston Pipe and Steel Co.* v. *United States*, 175 U. S., 211. 1—1009

6. **Same—What Constitutes a Violation of the Statute.—Any agreement or combination which directly operates,** not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, thereby regulates interstate commerce to that extent, and thus trenches upon the power of the national legislature, and violates the Anti-Trust Act of 1890 (26 Stat., 209). *Ib.*

7. **Commerce Between Two Points in Same State—Vessels Passing Over Soil of Adjoining States.**—Where a contract relates to commerce between points within a State, both on a boundary river, it will not be construed as falling within the prohibi-

INTERSTATE COMMERCE—Continued.

tions of the Sherman Act because the vessels affected by the contract sail over soil belonging to the other State while passing between the interstate points. *Cincinnati, etc., Packet Co.* v. *Bay*, 200 U. S., 179. **2**—867

8. **Same.—Even if there is some interference with interstate commerce, a contract is not necessarily void** under the Sherman Act if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law. *Ib.*

9. **Same.—A contract for sale of vessels,** even if they are engaged in interstate commerce, **is not necessarily void because the vendors agree,** as is ordinary in case of sale of a business and its good will, **to withdraw from business for a specified period.** *Ib.*

10. **Policy of Congress.**—It is the declared policy of Congress, which accords with the principles of the common law, **to promote individual competition** in relation to interstate commerce, **and to prevent combinations which restrain such competition** between their members, or between such members as individuals and outside competitors. *U. S.* v. *Chesapeake & O. Fuel Co.*, 105 F., 93. **2**—34

Affirmed, 115 F., 610 (**2**—151).

11. **Policy of the Nation in Regard to.**—It has been the public policy of this nation, from the date of the passage of the Interstate Commerce Act of 1887, **to regulate that part of interstate commerce which consists of transportation, and to** so far restrict competition in freight and passenger rates between railroad companies engaged therein as shall be necessary **to make such rates open, public, reasonable, uniform, and steady,** and **to prevent discriminations** and undue preferences. *U. S.* v. *Trans-Missouri Freight Ass'n.*, 58 F., 58. **1**—186

Decision reversed, 166 U. S., 290 (**1**—648).

12. **The Anti-Trust Act** of July 2, 1890, **embraces and declares to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature,** and whoever may be parties to it, **which directly or necessarily** operates in restraint of trade or commerce among the several States or with foreign nations. *Northern Securities Co.* v. *United States*, 193 U. S., 197. (Harlan, Brown, McKenna, Day.) **2**—339

13. **Combinations, even among private manufacturers or dealers,** whereby interstate or international commerce is restrained, are equally embraced by the act. *Ib.*

14. **Every combination or conspiracy which would extinguish competition between otherwise competing railroads,** engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act. *Ib.*

INTERSTATE COMMERCE—Continued.

15. **Congress may,** in the exercise of the power conferred upon it by the commerce clause of the Constitution, **prohibit private contracts which** operate **directly and substantially to restrain interstate commerce.** *U. S.* v. *Northern Securities Co.*, 120 F., 721. **2**—216

16. The **power of Congress to regulate** interstate commerce **comprises the right to enact a law prohibiting the citizen from entering into** those **private contracts which directly and substantially** and not merely indirectly, remotely, incidentally, and collaterally, **regulate** to a greater or less degree **commerce among the States.** *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211, 229. **1**—1009

17. **A State can not invest a corporation** organized under its laws **with the power to do acts** in the corporate name **which would** operate to **restrain interstate commerce.** *U. S.* v. *Northern Securities Co.*, 120 F., 721. **2**—215

18. **Powers of the United States—Transmission of the Mails.**—While the United States is a Government of enumerated powers, it has full attributes of sovereignty within the limits of those powers, among which are the power over interstate commerce and the power over the transmission of the mails. *In re Debs*, 158 U. S., 564. **1**—565

19. **Same.—The powers thus conferred are not dormant,** but have been assumed and put into practical exercise by Congressional legislation. *Ib.*

20. **Same—Removal of Obstructions.**—In the exercise of those powers the United States may remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails. *Ib.*

21. **Same—Executive Power May Appeal to Civil Courts.**—While it may be competent for the Government, through the executive branch and in the use of the entire executive power of the nation, to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and the character of any of them, and if such are found to exist or threaten to occur, to invoke the powers of those courts to remove or restrain them, the jurisdiction of courts to interfere in such matters by injunction being recognized from ancient times and by indubitable authority. *Ib.*

22. **Same—Circuit Court had Power to Issue Injunction.**—The complaint filed in this case clearly shows an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mails, not only temporarily existing, but threatening to continue, and under it the circuit court had power to issue its process of injunction. *Ib.*

INTERSTATE COMMERCE—Continued.

23. Carriers—Connecting Lines—Prepayment of Freight.—A common carrier engaged in interstate commerce may at common law, and under the Interstate Commerce Law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. 1—823

24. Railroad Companies—Arrangements for Through Billing.—There is no principle of common law which forbids a single railroad corporation, or two or more of such corporations, from selecting, from two or more other corporations, one which they will employ as the agency by which they will send freight beyond their own lines, on through bills of lading, or as their agent to receive freight, and transmit it on through bills to their own lines, and without breaking bulk; and the right to make such selection is not taken away by the Interstate Commerce Law. (*New York & N. Ry. Co.* v. *New York & N. E. R. Co.*, 50 Fed., 867, explained.) *Prescott & A. C. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 73 F., 438. 1—604

25. Kansas City Live Stock Association—Engaged in Interstate Commerce.—Where the shipments of live stock from growers, dealers, and traders in various States and Territories to the defendants, the Kansas City Live Stock Association, was solicited by the latter chiefly through personal solicitation of traveling agents, and through advertisements, the course of business involving frequent loans to shippers in other States, secured by chattel mortgages on herds, and frequent drafts drawn by shippers on the defendants, and discounted at their local banks in other States on the strength of bills of shipment attached thereto, shipments being made to Kansas City, and the loans or drafts paid from proceeds of sale, and the balance remitted to the shippers, and sales at Kansas City were made for shipment to markets in other States, as well as for slaughter at packing houses near by, the traffic being of immense proportions, and defendants active promoters, and frequently interested parties, gathered in for sale and slaughter millions of cattle, sheep, and hogs; and their rules and regulations covered the entire business, and extended over the whole field of operation, *held*, that defendants were engaged in commerce between the States, and were subject to the provisions of the law of July 2, 1890, against trusts and monopolies. *U. S.* v. *Hopkins*, 82 F., 529. 1—725

Reversed, 171 U. S., 578 (1—941).

INTERSTATE COMMERCE—Continued.

26. Same.—Live stock shipped from various States to the yards of a stock-yards association in another State, by the solicitation and procurement of the members thereof, **to be there sold or to be reshipped to other States, if the market should be unsatisfactory, does not cease to be a subject of interstate commerce as soon as it reaches such yards and is there unloaded,** nor until it has been further acted upon so as to become mingled with the mass of property in the State. *Ib.*

27. Same.—The fact that the place of business of an association **is located upon both sides of the line dividing two States is** in itself **of no material importance** in determining whether the business transacted by it is commerce between the States. *Ib.*

28. Same.—The fact that a State line runs through stock yards, and that sales may be made of a lot of stock in the yards which may be partly in one State and partly in another, has no effect to make the business of selling stock interstate commerce. *Hopkins* v. *United States*, 171 U. S., 578. 1—941

29. Same.—The business of buying and selling live stock at stock yards in a city by members of a stock exchange **as commission merchants is not interstate commerce,** although most of the purchases and sales are of live stock sent from other States, and the members of the stock exchange are employed to sell by letter from the owners of the stock in other States, and send agents to other States to solicit business, and advance money to the cattle owners, and pay their drafts, and aid them in making the cattle fit for market. *Hopkins* v. *United States*, 171 U. S., 578. 1—941

Reversing, 82 F., 578 (1—725).

30. Same.—A by-law of the Kansas City Live Stock Exchange, **which regulates the commissions to be charged by members** of that association for selling live stock **is not in restraint of interstate commerce,** or a violation of the act of July 2, 1890, to protect commerce from unlawful restraints. *Ib.*

31. Same.—A commission agent who sells cattle at their place of destination, which are **sent from another State to be sold, is not engaged in interstate commerce;** nor is his agreement with others in the same business, as to the commissions to be charged for such sales, void as a contract in restraint of that commerce. *Ib.*

32. Same.—In order to come within the provisions of the statute, the direct effect of an agreement or combination must be in restraint of trade or commerce among the several States or with foreign nations. *Ib.*

33. Same.—Restrictions on sending prepaid telegrams or telephone messages, made by a by-law of a live-stock exchange, when

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INTERSTATE COMMERCE—Continued.

these restrictions are merely for the regulation of the business of the members, and do not affect the business of the telegraph company, are not void as regulations of interstate commerce. *Ib.*

34. **Same.—The business of agents in soliciting consignments of cattle to commisison merchants in another State for sale** is not interstate commerce, and a by-law of a stock exchange restricting the number of solicitors to three does not restrain that commerce or violate the act of Congress. *Ib.*

35. **Same.—A combination of commission merchants** at stock yards, by which they **refuse to do business with those who are not members of their association**, even if it is illegal, is not subject to the act of Congress of July 2, 1890, to protect trade and commerce, since their business is not interstate commerce. *Ib.*

36. **Beef Trust—Combination to Monopolize Interstate Commerce in Fresh Meats.**—Interstate commerce is unlawfully restrained, in violation of the act of July 2, 1890 (26 Stat., 209), by a combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the States, to **bid up prices for live stock for a few days** at a time, in order **to induce** cattle men in other States to make **large shipments** to the stock yards, or by a combination for the same purpose **to fix the selling price of fresh meat,** and to that end to restrict shipments, when necessary, to establish a uniform rule of credit to dealers, and **to keep a black list,** or by a combination in aid of such purpose to make uniform and improper charges for cartage for the delivery of meat sold to be shipped to dealers and consumers in the several States. *Swift & Co.* v. *United States*, 196 U. S., 375. **2—643**

37. The **effect upon interstate commerce of a combination of a** dominant portion of the **dealers in fresh meat throughout the United States not to bid against, or only in conjunction with, each other** in order to regulate prices in and induce shipments to the live-stock markets in other States, to restrict shipments, etc., with intent to monopolize commerce among the States, **is direct and not accidental** or secondary as in *U. S.* v. *E. C. Knight Co.*, 156 U. S., 1. *Swift & Co.* v. *United States*, 196 U. S., 375. **2—641**

38. **When cattle are sent for sale from a place in one State, with the expectation they will end their transit,** after purchase, **in another State,** and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a constantly recurring course, it constitutes interstate commerce and the purchase of the cattle is an incident of such commerce. *Ib.*

INTERSTATE COMMERCE—Continued.

39. Although the **jurisdiction of Congress** over commerce among the States is full and complete, it is not questioned that it **has none over that which is wholly within a State,** and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce; nor does it acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State by reason of the fact that the combination also covers and regulates commerce which is interstate. *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S., 211. **1—1009**

POWER OF CONGRESS OVER. *See* CONGRESS.

PREPAYMENT OF FREIGHT. *See* CARRIERS.

See also CORPORATIONS, 2, 3; ACTIONS AND DEFENSES, 72, 73; and COMBINATIONS, ETC., generally, particularly paragraphs 54–76, 134–151.

IRON PIPE. *See* COMBINATIONS ETC., 136.

JOINT RATES AND BILLING. *See* CARRIERS.

JOINT TRAFFIC ASSOCIATIONS. *See* COMBINATIONS, 103–104, 189–192.

JUDGMENT.

General expressions in an opinion which are not essential to dispose of a case are not permitted to control the judgment in subsequent suits. *Harriman* v. *Northern Securities Co.*, 197 U. S., 244. **2—669**

JURISDICTION.

1. **In a suit instituted in the name of the United States, under the Anti-Trust Law, jurisdiction depends alone upon the act,** and the court is concerned with no case between private persons or corporations, where jurisdiction depends on other conditions, and in which proceeding a common-law remedy might become available. *U. S.* v. *Addyston Pipe & Steel Co.*, 78 F., 712. **1—631**

2. **Nonresidents.—The authority** given by section 5 of the act of July 2, 1890 (26 Stat., 290), to **bring in nonresidents** of the district **can not be availed of in private suits,** and the court can acquire no jurisdiction over them. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1—620**

See also COURTS; STATES, 8, 10; UNITED STATES.

JURY.

1. **Reasonable Doubt.**—A reasonable doubt is one arising out of the evidence; not an imaginary doubt, a fanciful conjecture, or strained inference, but such a doubt as a reasonable man would act upon or decline to act upon when his own concerns are involved—a doubt for which a good reason can be given, which reason must be based upon the evidence or want of evidence. *U. S.* v. *Cassidy*, 67 F., 698. **1—452**

JURY—Continued.

2. **Credibility of Witnesses.**—The jury are the exclusive judges of the credibility of the witnesses. A witness is presumed to speak the truth, but this presumption may be repelled by the manner in which he testifies, by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives, and by contrary evidence. But the power of the jury to judge of the effect of evidence is not arbitrary; it must be exercised with legal discretion, and in subordination to the rules of evidence. *Ib.*

3. **Validity of Contract—When Question for Jury.**—Conceding that a contract legal in its terms and in its consideration may be rendered illegal as against public policy by reason of the intention of the parties to so use it as to commit civil injury to third persons, where the evidence as to such intention is conflicting the contract can not be declared illegal by the court as matter of law. *U. S.* v. *Consolidated Seeded Raisin Co.*, 126 F., 364. **2**—288

See also WITNESSES; GRAND JURY.

LABOR ORGANIZATIONS.

1. **The employees of railway companies have a right to organize for mutual benefit and protection**, and for the purpose of securing the highest wages and the best conditions they can command. They **may appoint officers**, who shall advise them as to the course to be taken in their relations with their employer, and they may, if they choose, repose in their officers authority to order them, or any of them, on pain of expulsion from their union, peaceably to leave the employment because the terms thereof are unsatisfactory. **But it is unlawful for them to combine and quit work for the purpose of compelling their employer to withdraw from his relations with a third party**, for the purpose of injuring that third party. *Thomas* v. *Railway Co.*, 62 Fed., 817, followed. *U. S.* v. *Cassidy*, 67 F., 698. **1**—452

2. **Same.**—A **strike**, or a preconcerted quitting of work, by a combination of railroad employees, is, in itself, unlawful, if the concerted action is knowingly and willfully directed by the parties to it for the purpose of obstructing and retarding the passage of the mails, or in restraint of trade and commerce among the States. *Ib.*

See also COMBINATIONS, ETC., IN RESTRAINT OF TRADE, 113–133, 213; COURTS, 7, 8.

LIABILITY. *See* STATUTES, 64.

LICORICE PASTE TRUST. *See* U. S. *v.* MACANDREWS & FORBES CO., 149 F., 823.

LIMITATION OF ACTION. *See* ACTIONS AND DEFENSES, 36.

LIQUOR TRAFFIC. *See* COMBINATIONS, ETC., 217; COURTS, 2.

LIVE-STOCK ASSOCIATIONS AND EXCHANGES, ETC. *See* COMBINATIONS, ETC., 78–81, 167–176.

LUMBER. *See* COMBINATIONS, ETC., 30–32, 134, 135, 211, 212.

MAILS, OBSTRUCTION OF. *See* COMBINATIONS, ETC., 127, 129, 133.

MARKET QUOTATIONS. *See* COMBINATIONS, ETC., 177–180.

MANUFACTURERS.

RIGHT TO REGULATE PRICES OF THEIR OWN PRODUCTS. *See* COMBINATIONS, ETC., 160–166.

MINNESOTA.

1. **Anti-trust Law of Minnesota Should Receive the Same Construction as the Sherman Anti-Trust Law.**—The anti-trust law of Minnesota (Laws 1899, p. 487, c. 359), making unlawful any contract or combination in restraint of trade or commerce within the State, is in substantially the same language as the Sherman Anti-Trust Law of July 2, 1890 (26 Stat., 209), and must receive a similar construction. *Minnesota* v. *Northern Securities Co.*, 123 F., 692. **2**—246 Case reversed, 194 U. S., 48, and remanded to State court. Circuit court without jurisdiction (**2**—533).

2. Following the decisions of the United States Supreme Court construing the latter act, the Minnesota law applies to railroads, and **any contract or arrangement between railroad companies for the purpose** and having the effect **of preventing competition** by fixing rates to be maintained by the parties **is in violation** of its provisions; **but contracts** or combinations **which do not directly** and necessarily **affect transportation, or rates** therefor, **are not in restraint** of trade or commerce, nor within the statute, even though they may remotely and indirectly appear to have some probable effect in that direction. *Ib.*

3. **Same—Stockholding Corporation.**—A holding corporation organized by individual stockholders of two railroad companies, owning and operating substantially parallel and competing lines of railroad within the State of Minnesota, for the sole purpose of acquiring, by the exchange of its own stock therefor, stock of the two companies, and holding and voting the same, but having no power or franchise to operate a railroad, is **not in violation of the Minnesota anti-trust law** (Laws 1899, p. 487, c. 359), which provides that "any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust or otherwise * * * which is in restraint of trade or commerce within this State * * * is hereby prohibited and declared to be

MINNESOTA—Continued.

unlawful," where the purpose of its promoters was thereby to acquire and retain in the same hands a majority of the stock of one or both companies, to insure uniformity of policy and stability of management, although it in fact acquired the controlling interest in both, in the absence of any evidence that it ever exercised its power to prevent competition between the two roads, or to interfere in any manner with the fixing of rates by either company. *Ib.*

4. **Same—Enforcement of Statute—Jurisdiction or Equity.**—The anti-trust law of Minnesota (Laws 1899, p. 487, c. 359) imposes severe penalties for its violation, but contains no provision for restraining or enjoining violations, and without such statutory authority a court of equity has no jurisdiction to enjoin an act which constitutes a criminal offense. *Ib.*

MONOPOLY.

1. **Need not be a Complete Monopoly.** In order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is **sufficient if it really tends to that end** and to deprive the public of the advantages which flow from free competition. *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 16. 1—392

2. **Congress did not attempt** by the act of July 2, 1890, to assert the power to deal with monopoly directly as such; or **to limit and restrict the rights of corporations created by** the **States or the citizens of the States in the acquisition,** control, **or disposition of property;** or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, **what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce** among the several States or with foreign nations. *Ib.*

3. **The word "monopolize" was not intended** to be used with reference to the acquisition of exclusive rights under Government concession, but the word was used **to mean "to aggregate" or "concentrate" in the hands of few,** practically, and, as a matter of fact, and according to the known results of human action, to **the exclusion of others;** to accomplish this end by what, in popular language, is expressed in the word "**pooling,**" which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. *Amer. Biscuit & Mfg. Co.* v. *Klotz*, 44 F., 721, 724. 1—7

MONOPOLY—Continued.

4. **To constitute the offense of "monopolizing,** or attempting to monopolize," trade or commerce among the States, within the meaning of section 2 of said act, **it is necessary to acquire, or attempt to acquire, an exclusive right in** such commerce by means which will **prevent others from engaging therein.** *In re Greene*, 52 F., 104. 1—54

5. **A "monopoly,"** in the prohibited sense, **involves** the element of an **exclusive privilege or grant** which restrained others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. *Ib.* 1—71

6. **The word "monopolize,"** used in section 2 of the act of 1890, is **the basis and limitation of** the statute, and hence an **indictment must show a conspiracy** in restraint by engrossing or monopolizing or grasping the market. It is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise. *U. S.* v. *Patterson*, 55 F., 605. 1—133

7. The **statute** is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but **seeks to reach those which directly restrain or impair the freedom of interstate trade.** The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity. *Chesapeake & O. Fuel Co.* v. *United States*, 115 F., 610, 624. 2—168

8. **Monopoly Not Necessary—Tendency Sufficient.**—It is not required, in order to violate this statute, that a monopoly be created. It is sufficient if that be the necessary tendency of the agreement. *Ib.*

9. **Every attempt to monopolize** a part of interstate commerce, the necessary **effect of which is to stifle or to directly and substantially restrict** competition in commerce among the States, **violates section 2** of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

10. **Attempts** to monopolize a part of commerce among the States **which promote, or only incidentally or indirectly** restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were **not,** made **illegal or punishable** by section 2 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), because such attempts are indispensable to the existence of any competition in commerce among the States. *Ib.*

MONOPOLY—Continued.

11. **Statute Operates Only on Monopolies in Interstate Commerce, and Not Because Commodity is a Necessary of Life.**—The monopoly and restraint denounced by the act of July 2, 1890 (26 Stat., 209), "to protect trade and commerce against unlawful restraints and monopolies," are a monopoly in interstate and international trade or commerce, and not a monopoly in the manufacture of a necessary of life. *U. S.* v. *E. C. Knight Co.*, 156 U. S., 1. 1—379

12. **Rebate to Exclusive Purchasers.**—An arrangement whereby a distillery company promised persons who purchased from its distributing agents that if, for the ensuing six months, they would purchase their distillery products exclusively from such agents and would not resell the same at prices less than those fixed by the company, then, on being furnished with a certificate of compliance therewith, it would pay a certain rebate on the amount of such purchases, did not operate to "monopolize," or "as an attempt to monopolize," trade and commerce, within the meaning of section 2 of said act. *In re Greene*, 52 F., 104. 1—56

13. **A monopoly of trade embraces two essential elements:** (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58, 82. 1—218

14. **State Monopoly of Liquor Traffic.**—The Anti-Trust Act is not applicable to the case of a State which by its laws assumes an entire monopoly in the traffic in intoxicating liquors (S. C. act of Jan. 2, 1895). *Lowenstein* v. *Evans*, 69 F., 908. 1—589

15. **Validity of Sale of Property where Object is Monopoly.**—The sale and transfer by a corporation of its property and good will to another corporation, where such sale was within its powers, **can not be repudiated** on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of trade. *Metcalf* v. *Amer. School Furniture Co.*, 122 F., 115. 2—234

See also COMBINATIONS, ETC., IN RESTRAINT OF TRADE, II and III.

MULTIFARIOUSNESS. *See* ACTIONS AND DEFENSES, 8; PLEADING AND PRACTICE, 19, 20.

MUNICIPAL CONTRACTS. *See* COMBINATIONS, ETC., 214–216.

MUNICIPAL ORDINANCE.

The specification in an ordinance, not invalid under the laws of the State, that a particular kind of asphalt produced only in a foreign country shall be used for street improvements

MUNICIPAL ORDINANCE—Continued.

does not violate the Sherman Anti-Trust Law or any Federal right. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. 2—555

NEW JERSEY. *See* CORPORATIONS, 4.

NEW TRIAL. *See* JAYNE v. LODER, 149 F., 21.

NONRESIDENTS. *See* STATUTES, 58.

NOTE. *See* ACTIONS AND DEFENSES, 64.

NOTICE. *See* STATUTES, 55.

OBSTRUCTION OF MAILS.

1. **Obstructing the Mails—Section 3995 Revised Statutes.**—Although the law (section 3995 Revised Statutes) which makes it an offense to obstruct and retard the passage of the United States mails was originally passed prior to the introduction into the United States of the method of transporting mail by railroads, and the phraseology of the law conforms to conditions prevailing at that time (March 3, 1825), yet it is equally applicable to the modern system of conveyance and protects alike the transportation of the mail by the "limited express" and by the old-fashioned stagecoach. *U. S.* v. *Cassidy*, 67 F., 698. 1—451

2. **Same.—The statute applies to all persons who "knowingly and willfully" obstruct and retard the passage of the mails or the carrier carrying the same;** that is, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the mail, and who perform the acts with the intent that such shall be their operation. *U. S.* v. *Kirby*, 7 Wall., 485, cited. *Ib.*

3. **Same.—The statute also applies to persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails.** In such case, an intent to obstruct and retard the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S.* v. *Kirby*, 7 Wall., 485, cited. *Ib.*

4. **Same—Mail Trains.**—A mail train is a train as usually and regularly made up, including not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such train, as a mail train, would include the Pullman car as a part of its regular make-up. Therefore, if such a train is obstructed or retarded because it draws a Pullman car, it is no defense

OBSTRUCTION OF MAILS—Continued.

that the parties so delaying it were willing that the mail should proceed if the Pullman car were left behind. *U. S.* v. *Clark*, Fed. Cas. No. 14805, 23 Int. Rev. Rec., 306, followed. *Ib.*

5. Same.—**Any train which is carrying mail**, under the sanction of the postal authorities, **is a mail train**, in the eye of the law. *Ib.*

6. Same—Intent.—It is not necessary that defendants should be shown to have had knowledge that the mails were on board of a train which they have detained and disabled. On the contrary, they are chargeable with an intent to do whatever is the reasonable and natural consequence of their acts; and as the laws make all railways postal routes of the United States, and it is within everyone's knowledge that a large portion of the passenger trains carry mail, it is to be presumed that any person obstructing one of those trains contemplates, among other intents, the obstruction of the mail. *U. S.* v. *Debs*, 65 F., 211, followed. *Ib.*

See also COMBINATIONS, ETC., 121, 127, 129.

PARTIES.

1. **Parties to Conspiracy.**—Where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, **every one of said persons becomes a member of the conspiracy**, although the part any one was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. *U. S.* v. *Cassidy*, 67 F., 698. 1—450

2. Same.—**Any one who, after a conspiracy is formed, and who knows** of its existence **joins therein**, becomes as much a party thereto from that time as if he had originally conspired. *U. S.* v. *Babcock*, Fed. Cas. No. 14487, 3 Dill., 586, cited. *Ib.*

3. Same.—**Any declaration made by one of the parties**, during the pendency of the illegal enterprise, is not only **evidence** against himself, but **against all the other conspirators**, who, when the combination is proved, are as much responsible for such declarations, and the acts to which they relate, as if made and committed by themselves. This rule applies to the declaration of a coconspirator, although he may not himself be under prosecution. *Ib.*

4. **Necessary Parties—Directors of Unincorporated Associations.**—All the directors of an unincorporated association are necessary parties to a suit against it arising out of contractual relations, even though a less number are authorized by the association to transact business. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. 1—620

PARTIES—Continued.

5. **Parties in Equity—Unincorporated Association.**—In a suit in equity to restrain an alleged unlawful combination acting as an unincorporated association, it is **sufficient that the association, together with a large number of its members**, as individuals and officers of the association, **are made parties defendant**. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. 1—749

6. **Indictment—Joinder of Defendants.**—In an indictment under the Anti-Trust Law, the offenses thereunder being made misdemeanors, all who aid in their commission may be charged as principals, and a corporation and its officers, who personally participates in committing the same, may be joined as defendants, although their acts may have been separate. *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 824.

7. **Injunction—Government Only can Bring Suit for.**—The Anti-Trust Act of 1890 (26 Stat., 209) does not authorize the bringing of injunction suits or suits in equity by any parties except the Government. *Blindell* v. *Hagan*, 54 F., 40. 1—106
Case affirmed, 56 F., 696 (1—182).

8. **Injunctive Relief—United States Attorney.**—The only party entitled to maintain a bill in equity for injunctive relief for violating the provisions of the Anti-Trust Act is the United States attorney, at the instance of the Attorney-General. *Metcalf* v. *Amer. School Furniture Co.*, 122 F., 115. 2—235

9. **The State is a necessary party** to an action under section 7 of the Anti-Trust Act of July 2, 1890, against the officials of a State to recover **damages for acts done under the authority of a State statute**, which gives the State an entire monopoly of the traffic in intoxicating liquors (act of S. C. of Jan. 2, 1895). *Lowenstein* v. *Evans*, 69 F., 908. 1—598

10. **Consent of parties** can never confer jurisdiction upon a Federal court. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. 2—533

11. **Monopolies—Suit by Private Individual.**—The act "to protect trade and commerce against unlawful restraints and monopolies" (act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons, and the right to bring suits in equity being vested in the district attorneys of the United States. *Pidcock* v. *Harrington*, 64 F., 821. 1—377

See also ACTIONS AND DEFENSES, 1–20.

PATENTS.

1. **A corporation organized for the purpose of securing assignments of all patents relating to "spring-tooth harrows,"** to grant licenses to the assignors to use the patents upon pay-

PATENTS—Continued.

ment of a royalty, to fix and regulate the price at which such harrows shall be sold, and to take charge of all litigation, and prosecute all infringements of such patents, **is an illegal combination**, whose purposes are **contrary to public policy**, and which a court of equity should not aid by entertaining infringement suits brought in pursuance thereof. *National Harrow Co.* v. *Quick*, 67 F., 130. 1—443

2. **Corporation Organized to Receive Assignments of Patents.**—A combination among manufacturers of spring-tooth harrows, by which each manufacturer assigns to a corporation organized for the purpose the patents under which he is operating, and takes back an exclusive license to make and sell the same style of harrows previously made by him, and no other, all the parties being bound to sell at uniform prices, *held* to be **an unlawful combination** for the enhancement of prices, and in restraint of trade. *National Harrow Co.* v. *Hench*, 76 F., 667. 1——610

Affirmed, 83 F., 36 (1—742).

See also *Indiana Mfg. Co.* v. *J. I. Case Thrashing Mach. Co.*, 148 F., 21.

3. **Same.**—Though the fact that several patentees are exposed to litigation justifies them in composing their differences, they can not make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage. *National Harrow Co.* v. *Hench*, 83 F., 36. 1—743

4. **Same—Infringement Suit.**—A combination among manufacturers of spring-tooth harrows, whereby a corporation organized for the purpose, becomes the assignee of all patents owned by the various manufacturers, and executes licenses to them, so as to control the entire business and enhance prices, **is void both as to the assignments and licenses**, so that the **corporation can not maintain a suit** against one of its assignors who violates the agreement, **for infringement.** *National Harrow Co.* v. *Hench*, 84 F., 226. 1—746

5. **Contracts by which a number of patents covering similar inventions are conveyed** by the several owners **to one of the parties, which grants licenses** under all **to the others**, are **not void** as against public policy, or **as in violation of the Sherman Anti-Trust Law, because of provisions intended to protect and keep up the** patent **monopoly** by requiring the licensor to prosecute all infringers, limiting the licenses to be granted to such licensees as shall be agreed on, and imposing conditions on each license as to the use and ownership of the patented machines, and prohibiting him from using any others. *U. S. Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 F., 364. 2—288

PATENTS—Continued.

6. **Same.—Rights acquired under the patent laws** of the United States **can not be affected by a State statute.** *Ib.*

7. **The object of the patent laws is monopoly**, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee, and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts; and **the fact that the conditions in the contracts keep up the monopoly does not render them illegal.** The prohibition was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others, who were engaged in manufacturing and selling other machines under other patents; but it would be unreasonable to so construe the provision as to prevent the defendant from using any letters patent legally obtained by it and not infringing patents owned by others. *Bement* v. *National Harrow Co.*, 186 U. S., 70. 2—169

8. **Conditions imposed by the patentee** in a license of the right to manufacture or sell the patented article, **which keep up the monopoly** or fix prices, do not violate the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints or monopolies. *Ib.*

9. **Reasonable and legal conditions imposed by the patentee** in a license of the right to manufacture and sell the patented article, **restricting the terms** upon which the article manufactured under such license may be used and **the price** to be demanded therefore, do not constitute such a restraint on commerce as is forbidden by the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints and monopolies. *Ib.*

10. **The agreement** of the licensee of a patent for improvements relating to float spring-tooth harrows **not to manufacture or sell any other such harrows** than those which it had made under its patents before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by such licensor, is not void as an unlawful restraint on trade or commerce forbidden by the act of Congress of July 2, 1890 (26 Stat., 209), since the plain purpose of this provision is to prevent the licensee from infringing on the rights of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows. *Ib.*

PATENTS—Continued.

11. **An agreement by the licensor** of a patent for improvements relating to harrows **not to license any other person** than the licensee to manufacture or sell any harrow of the peculiar style and construction then used or sold by such licensee does not violate the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints and monopolies. *Ib.*

12. **Licenses—Right to Attach Conditions.**—It is within the rights of the owner of a patent to grant licenses conditioned that the licensees shall sell the patented article only at prices fixed by the agreement and also restricting the production of a licensee, and such agreements, **if made in good faith and for the purpose of protecting the patent monopoly,** are not illegal as in restraint of trade and commerce, and such good faith is not impeached by the fact that the patent has been held invalid by the Federal courts in some circuits, where it has been sustained in others. *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 142 F., 531. **2—855**

13. **Same.**—Such patent monopoly **does not include,** however, the **right** of the patentee **to enter into a combination in the form of license contracts** with manufacturers throughout the United States, not only **to raise and maintain the prices** of such articles, being articles of interstate commerce, above the normal market price, but **to crush out competition** by outside manufacturers. *Ib.*

14. **Suit for Infringement—Defenses.**—The fact that the owner of a patent is a corporation alleged to have been formed in violation of the Anti-Trust Law, and that the patent is alleged to have been assigned to it in furtherance of the illegal purpose to create a monopoly and control the price of an article of commerce, is not available to an infringer of such patent to defeat a suit for the infringement. *National Folding-Box & Paper Co.* v. *Robertson*, 99 F., 985. **2—4**

15. **In an action** by a corporation **for the infringement** of elevator patents, a private **defendant** was **not entitled to urge** as a defense **that plaintiff was a corporation organized** merely for the purpose of holding the legal title to various elevator patents alleging to have been infringed, for the purpose of controlling sales and enhancing prices of elevators and apparatus, without itself engagaing in the manufacture and sale of such appliances, **in violation of the Sherman Anti-Trust Law** (26 Stat., 209), since until the United States has acted and sought to prosecute the plaintiff for violation of such act an infringer of the plaintiff's patent will not be permitted to raise such issue as a defense thereto. *Otis Elevator Co.* v. *Geiger*, 107 F., 131. **2—66**

PATENTS—Continued.

16. **Infringement of Patent Belonging to Member of a Corporation in Violation of Anti-Trust Law.**—That a complainant is a member of a combination in violation of the Anti-Trust Law of July 2, 1890 (26 Stat., 209), **does not give third persons the right to infringe** a patent of which complainant is owner, nor preclude complainant from maintaining a suit in equity to enjoin such infringement. *General Electric Co.* v. *Wise*, 119 F., 922. **2—205**

PATENT MEDICINES. *See* COMBINATIONS, ETC., 29, 160.

PAYMENT. *See* ACTIONS AND DEFENSES, 63, 64.

PLEADING AND PRACTICE.

1. **Bill and Answer—Waiver of Oath.**—Where the bill for injunction waives the oath of the respondents, an answer, under oath, denying all the equities of the bill, can, under the amendment to equity rule 41, be used at the hearing with probative force of an affidavit alone. Whether the injunction should issue must be determined by the whole evidence submitted. *U. S.* v. *Workingmen's Amalg. Council*, 54 F., 994. **1—110**

   Case affirmed, 57 F., 85 (1—184).

2. **Hearing on Bill and Answer—Evidence.**—When a suit is heard on bill and answer, the allegations of fact in the bill that are denied in the answer are to be taken as disproved, and the averments of fact in the answer stand admitted. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. **1—186**

3. **Same.—Where the contract is admitted, but the allegations tending to show its sinister purpose,** tendency, and effect contained in the bill **are denied** by the answer, **and averments** tending to **show a just and honest purpose,** tendency, and effect are made, the latter averments contained in the answer stand admitted, and the contract will be presumed to have been made for an honest and legitimate purpose, unless the provisions of the agreement clearly show the contrary. In the examination of such a contract, fraud and illegality are not to be presumed. *Ib.*

4. **Notice—Restraining Order.**—Under section 4 of the Anti-Trust Law of July 2, 1890, a restraining order may be issued without notice, under the circumstances sanctioned by the established usages of equity practice in other cases. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. **1—749**

5. **Allegations.—A complaint alleging that members of an association have conspired and combined to raise the prices of tiles,** mantels, and grates, to control the output, and to regulate the prices thereof, **with the intent to monopolize trade and commerce between the other States and California**

PLEADING AND PRACTICE—Continued.

in regard thereto, as well as to arbitrarily fix their prices independently of their natural market value, brings the case within the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Lowry* v. *Tile, Mantel & Grate Assn. of Cal.*, 98 F., 817. 1—995

6. **Averments.**—A bill charges a violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), as against the objections of want of equity, multifariousness, and failure to set forth sufficient definite or specific facts, where it avers the existence of a combination of a dominant proportion of the dealers in fresh meat throughout the United States, not to bid against each other in the live-stock markets of the different States, to bid up prices for a few days, in order to induce shipments to the stock yards, to fix selling prices, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and to secure less than lawful freight rates, to the exclusion of competitors. *Swift & Co.* v. *United States*, 196 U. S., 375. 2—643

7. **Same.**—Trade in fresh meat is sufficiently shown to be commerce among the States, protected from restraint by the act of July 2, 1890 (26 Stat., 209), by allegations in a bill charging meat dealers with violations of that act, which, even if they import a technical passage of title at the slaughtering places in cases of sales, also import that the sales are to persons in other States, and that the shipments to other States are pursuant to such sales, and by allegations charging sales of such meat by their agents in other States, which indicate that some, at least, of the sales were in the original packages *Ib.*

8. **Same.**—A general allegation of intent may color and apply to all the specific charges of a bill which seeks relief against alleged violations of the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Ib.*

9. **Same.**—Vagueness can not be asserted of a charge in a bill seeking relief against an attempt to monopolize commerce in fresh meat among the States, in violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), that a combination exists among independent meat dealers to restrain their respective agents from bidding against each other when purchasing live stock for them in the stock yards. *Ib.*

10. **Sufficiency of Complaint—Action Under Anti-Trust Act.**—The complaint, in an action to recover damages under section 7 of the Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat., 210), which sets forth, among other things, that defendants are members of a local labor union, which is a branch of a larger organization covering several States, which in its turn is subordinate to the American Federation of Labor, which

PLEADING AND PRACTICE—Continued.

covers still other States; that defendants, by reason of such membership, were able to compel, and undertook to compel, and did compel, plaintiffs, against their will, to unionize their factory, by withdrawing from plaintiffs' employment, by preventing others from working for them, and by boycotting, with the aid of their associates, plaintiffs' goods in the hands of plaintiffs' customers in other States. *Held* sufficient on motion for correction of same. *Loewe & Co.* v. *Lawlor et al.*, 130 F., 633. 2—854

SUFFICIENCY—INJUNCTION. *See* DR. MILES MEDICAL CO. v. JAYNES DRUG CO., 149 F., 838.

11. **What Must be Shown.**—In order to maintain a suit under the Anti-Trust Act the Government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, if such restraint is its necessary effect. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—649

12. **Allegations and Proofs—Means Contemplated.**—It is not incumbent upon the prosecution to prove that all the means set out in the indictment were in fact agreed upon to carry out the conspiracy, or that any of them were actually used or put in operation. It is sufficient if it be shown that one or more of the means described in the indictment were to be used to execute that purpose. *U. S.* v. *Cassidy*, 67 F., 698. 1—450

13. **Same—Overt Acts.**—While at common law it was not necessary to aver or prove an overt act in furtherance of a conspiracy, yet, under the statute relating to conspiracies to commit an offense against the United States, the doing of some act in pursuance of the conspiracy is made an ingredient of the crime, and must be established as a necessary element thereof, although the act may not be in itself criminal. *U. S.* v. *Thompson*, 31 Fed., 331, 12 Sawy., 155, cited. *Ib.*

14. **Same.**—It is not necessary, however, to a verdict of guilty, that the jury should find that each and every one of the overt acts charged in the indictment was in fact committed; but it is sufficient to show that one or more of these acts was committed, and that it was done in furtherance of the conspiracy. *Ib.*

15. **Allegation of Amount in Controversy.**—It is not essential that a bill in a Federal court should state the amount or value in controversy, if it appears to be within the jurisdictional limit, from the allegations of the bill, or otherwise from the record, or from evidence taken in the case before the hearing of objections to the jurisdiction. *Robinson* v. *Suburban Brick Co.*, 127 F., 804. 2—312

PLEADING AND PRACTICE—Continued.

16. **Technical Defects in Bill.—That a bill for injunction contains no prayer for process,** this being a mere technical defect, although it renders the bill demurrable, **does not** affect the jurisdiction of the court or **render the injunction** issued thereon **void.** *U. S.* v. *Agler*, 62 F., 824. **1—294**

17. **Same—Defendants not Named in Bill, nor Served with Subpœna.**—An **injunction** for such purpose becomes **binding,** as against one not named in the bill, and not served with subpœna, when the injunction order is served on him as one of the unknown defendants referred to in the bill. *Ib.*

18. **Same—Proceedings to Punish Violation.**—An information to punish violation of such an injunction order **which fails to allege** that the order was a lawful one, in the language of the statute, or that the person charged, not named in the order, was one of the unknown parties referred to therein, or that, either by his words or his acts, he was engaged in aiding the common object with other members of the alleged combination, lacks the necessary certainty. *Ib.*

19. **Multifariousness.**—A **bill setting up a claim for damages** under the Anti-Trust Law of July 2, 1890, **and also asking an injunction** restraining defendant from using complainant's trade-mark and trade name, is multifarious, as joining two distinct causes of action, having no connection with each other, and one of which is triable at law. *Block* v. *Standard Distilling & Distributing Co.*, 95 F., 978. **1—993**

20. **Multifariousness of Bill.**—A bill for relief by a minority stockholder, on behalf of himself and all other stockholders similarly situated, **to set aside an alleged unlawful transfer of the property of the corporation** in pursuance of a conspiracy between its officers and the transferee in restraint of trade and commerce; and **which also seeks the recovery of treble damages** under the Anti-Trust Act of July 2, 1890, **is multifarious,** since such damages are only recoverable in an action at law by the plaintiff as an individual, and not as a stockholder, while the equitable relief prayed for is in behalf of the corporation, and, if granted, would inure to the benefit of all the stockholders. *Metcalf* v. *Amer. School Furniture Co.*, 108 F., 909. **2—75**

21. **Indefiniteness.**—In an action by a corporation for the infringement of elevator patents, an answer alleging as a defense that the plaintiff is an unlawful combination in restraint of trade and in violation of the Sherman Anti-Trust Law (26 Stat., 209), but **which fails to state who are in the combination** in the agreement characterized as unlawful, **and does not disclose fully and in detail that the combination was entered into** after the act took effect, and all the facts necessary to show its illegality, is insufficient for indefiniteness. *Otis Elevator Co.* v. *Geiger*, 107 F., 131. **2—66**

PLEADING AND PRACTICE—Continued.

22. **Duplicity.**—A declaration in an action brought under section 7 of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 210), to recover damages for a violation of section 1 of the act, **which alleges in a single count that defendant entered into a "contract, combination, and conspiracy"** in restraint of trade, is bad for duplicity. *Rice* v. *Standard Oil Co.*, 134 F., 464. **2—633**

23. **Same.**—The Anti-Trust Act of 1890 makes a **distinction between a contract and a combination** or conspiracy in restraint of trade. *Ib.*

See also *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 824.

24. Under the practice in this country the **examination of witnesses by a Federal grand jury need not be preceded by a presentment or formal indictment,** but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committeed, and if so, they may indict upon such evidence. *Hale* v. *Henkel*, 201 U. S., 43. **2—874**

25. **In summoning witnesses** it is **sufficient to apprise them of the names of the parties** with respect to whom they will be called to testify without indicating the nature of the charge against them, or laying a basis by a formal indictment. *Ib.*

See also WITNESSES; AND GRAND JURY.

26. In an action against corporations for violations of the Anti-Trust Law the **books of the various defendants both before and after the alleged combination, and the contracts between them,** as well as other papers referred to in the opinion, **are all matters of material proof,** but whether material or not the testimony must be taken and **exceptions can be noted by the examiner** and the materiality of the evidence passed on by the court. *Nelson* v. *United States*, 201 U. S., 92. **2—921**

PRELIMINARY INJUNCTIONS. *See* INJUNCTIONS, 28, 31, 34.

PREPAYMENT OF FREIGHT. *See* CARRIERS.

PROCEDURE. *See* PLEADING AND PRACTICE.

PRODUCTION OF DOCUMENTS. *See* CORPORATIONS, 12–15, 17, 18, 20–23; WITNESSES, 8, 16, 20, 23; SEARCH, 2–4.

PROFIT AND LOSS. *See* DAMAGES, 3, 5.

PUBLIC POLICY.

1. **Public Policy—How Determined.**—The public policy of the nation must be determined from its constitution, laws, and judicial decisions. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. **1—186**

Case reversed, 166 U. S., 290 (1—648).

PUBLIC POLICY—Continued.

2. **Same—Interstate Commerce.**—The act of February 4, 1887, entitled "An act to regulate commerce," demonstrates the fact that from the date of the passage of that act it has been the public policy of this nation to regulate that part of interstate commerce which consists of transportation, and to so far restrict competition in freight and passenger rates between railroad companies engaged therein as shall be necessary to make such rates open, public, reasonable, uniform, and steady, and to prevent discriminations and undue preferences. *Ib.*

3. **Contracts—Public Policy.**—Freedom of contract is as essential to unrestricted commerce as freedom of competition, and one who asks the court to put restrictions upon the right to contract ought to make it clearly appear that the contract assailed is against public policy. *Ib.*

See ACTIONS AND DEFENSES, 73; COMBINATIONS, 92, 157.

PUBLISHERS. *See* COMBINATIONS, ETC., 28, 96.

PURCHASE AND SALE. *See* SALE, 4.

PROPRIETARY PATENT MEDICINES. *See* COMBINATIONS, ETC., 29, 160.

RAILROADS *See* COMBINATIONS, ETC., 100–111, 189–201.

RAILROAD EMPLOYEES. *See* COMBINATIONS, ETC., 117–133.

RATES. *See* RAILROADS.

REASONABLE DOUBT. *See* JURY, 1.

REASONABLENESS OR UNREASONABLENESS. *See* COMBINATIONS, ETC., 3, 4, 13, 48, 55, 59, 63, 79, 81, 163, 174; STATUTES, 5, 6, 13, 16, 19, 31.

REBATES. *See* ACTIONS, 49,; COMBINATIONS, ETC., 161, 162; INDICTMENTS. 3, 4.

RECEIVERS. *See* COURTS, 7; CONTEMPT, 1, 2; COMBINATIONS, ETC., 119, 122.

RECOVERY. *See* ACTIONS AND DEFENSES, 11, 13, 14, 38, 39, 41, 66.

REMEDIES.

1. **Suit by Private Individual Must Be at Law.**—The act "to protect trade and commerce against unlawful restraints and monopolies" (act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons. and the right to bring suits in equity being vested in the district attorneys of the United States. *Pidcock* v. *Harrington*, 64 F., 821. 1—377

REMEDIES—Continued.

2. **Voluntary Associations—Suspension of Members.**—Where a member of a voluntary association has been suspended by the directors for nonpayment of a fine for violation of the by-laws, his action to be restored to the privileges of membership is founded upon the contract between himself and the association, which he must either accept in its entirety or repudiate. He does not occupy the position of a stranger injured by the acts of cotrespassers. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. 1—620

See also ACTIONS AND DEFENSES.

REMOTELY. *See* INCIDENTALLY, INDIRECTLY, AND REMOTELY.

REMOVAL FROM STATE COURT. *See* COURTS, 16.

REMOVAL OF PRISONERS.

1. **From One State to Another for Trial.**—On an application to a Federal court for the removal of a resident of the district to a distant State and district for trial, it is the **duty of the court to scrutinize the indictment**, disregarding technical defects, but **to refuse the warrant if** the crime alleged is not triable in the district to which a removal is sought, or if the indictment fails to charge any offense under the law. *In re Corning*, 51 F., 203. 1—33

2. **Habeas Corpus—Jurisdiction of Circuit Courts.**—Where a prisoner, arrested under warrant based upon an indictment in a distant State and district, is held pending an application to the district court for a warrant of removal for trial, the **circuit court** of the district in which he is held **has authority on habeas corpus to examine such indictment, and to release the prisoner, if,** in his judgment, the indictment should be quashed on demurrer. *In re Terrell*, 51 F., 213. 1—46

3. **Same.—On habeas corpus** to release a person held under a warrant of a United States commissioner to await an order of the district judge for his removal to another district to answer an indictment, it is the **right and duty of the circuit court to examine the indictment to ascertain whether** it charges any offense against the United States or whether the offense comes within the jurisdiction of the court in which the indictment is pending. *In re Greene*, 52 F., 104. 1—54

RESTRAINING ORDERS. *See* INJUNCTIONS, 30.

RESTRAINT OF TRADE.

See COMBINATIONS, ETC., IN RESTRAINT OF TRADE, particularly paragraphs 1, 3–5, 7–16, 18, 20, 22, 23, 43, 48, 54–77, 79, 81, 91, 107, 108, 133–150, etc.; *and* Statutes, 5–7, 10, 11, 13, 17, 19, 21–24, 26, 28, 31, 35, 36, 43, 44, 48, 49.

RIGHT OF ACTION. *See* ACTIONS AND DEFENSES, 9, 57.

RUBBER TIRES. *See* COMBINATIONS, ETC., 99.

RULES OF LABOR UNIONS. *See* COMBINATIONS, ETC., 117.

SALE.

1. **Validity of Sale.**—The sale and transfer by a corporation of its property and good will to another corporation, where such sale was within its powers, **can not be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly** of the business and in pursuance of an illegal combination in restraint of trade. *Metcalf* v. *Amer. School Furniture Co.*, 122 F., 115. **2—234**

2. **A contract for sale of vessels,** even if they are **engaged in interstate commerce, is not necessarily void because** the **vendors agree,** as is ordinary in case of sale of a business and its good will, **to withdraw from business** for a specified period. *Cincinnati, &c., Packet Co.* v. *Bay*, 200 U. S., 170. **2—867**

3. **Contract for Sale of Goods by Member of Combination.**—The act of July 2, 1890, section 1 (26 Stat., 209), known as the "Sherman Anti-Trust Act," **does not invalidate or prevent a recovery for the breach of a collateral contract** for the manufacture and sale of goods **by a member of a combination** formed for the purpose of restraining interstate trade in such goods. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. **2—995**

4. **The transaction between the complainants and the Northern Securities Company** by which the former parted with and delivered to the latter, as a holding corporation, certain shares of the stock of the Northern Pacific Railway Company and received in exchange certain other shares of the Securities Company stock, **held to be one of purchase and sale** of the Northern Pacific stock, **and not a bailment or trust.** *Harriman* v. *Northern Securities Co.*, 197 U. S., 244. Affirming 134 F., 331 (**2—618**). **2—669**

5. **Same.**—When a **vendor** testifies that the transaction was an unconditional sale and that he attached to his negotiations no other conditions than that of price, **he is estopped from** afterwards **denying** that this is a statement of fact and claiming that he only swore to a conclusion of law. *Ib.*

6. **Same.—Property delivered under an executed illegal contract can not be recovered back** by any party *in pari delicto*, and the courts can not relax the rigor of this rule where the record discloses no special considerations of equity, justice, or public policy. *Ib.*

7. **Same.—The fact that the complainants in this case acted in good faith** and without intention to violate the law **does not exempt them from the doctrine** of *in pari delicto*. All

SALE—Continued.

the parties having supposed the statute would not be held applicable to the transaction neither can plead ignorance of the law as against the other and the defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed. *Ib.*

8. **Same.—Where a vendor after transferring shares** of railway stock to a corporation in exchange for its shares **becomes a director of the purchasing corporation** and participates in acts consistent only with absolute ownership by it of the railway stocks, **and does so after an action has been brought to declare the transaction illegal, his right to rescind the contract** and compel restitution of his original railway shares, if it ever existed, **is lost** by acquiescence and laches. *Ib.*

9. **Restriction of Sales of Goods.**—A manufacturer, a corporation, and its employee restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but refused to refrain from handling the goods of the corporation's competitors, and sued it for damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again. *Held*, the restriction of their own trade by the defendants to those purchasers who declined to deal in the goods of their competitors was **not violative of the Anti-Trust Act.** *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. **2—271**

10. **Same.—The owner of goods may dictate** the **prices** at which he will sell them, and the damages which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit constitute no legal injury, and are **not actionable,** because they are not the result of any breach of duty or of contract by the owner. *Ib.*

See also COMBINATIONS, ETC., 18.

SEARCH AND SEIZURE.

1. **Unreasonable Searches—Subpœna Duces Tecum—Rights of an Agent.**—A *subpœna duces tecum* commanding the secretary and treasurer of a corporation supposed to have violated the Anti-Trust Act to testify and give evidence before the grand jury, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, de-

SEARCH AND SEIZURE—Continued.

scribed generically, in effect including all the correspondence and documents of his corporation originating since the date of its organization, to which nineteen other named corporations or persons were parties, for the purpose of enabling the district attorney to establish a violation of such act on the part of the witness' principal, **constituted an unreasonable search** and seizure of papers, prohibited by Fourth Amendment to the Constitution. *In re Hale*, 139 F., 496. **2**—804

2. **Same.—A corporation charged with a violation of the Anti-Trust Act** of July 2, 1890, **is entitled to immunity** under the Fourth Amendment to the Constitution **from** such an **unreasonable search and seizure** as the compulsory production before a grand jury, **under a subpœna duces tecum, of all understandings, contracts, or correspondence** between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different States. *Hale* v. *Henkel*, 201 U. S., 43. **2**—874

3. **The search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel the production** upon a trial **of documentary evidence** through a *subpœna duces tecum*. *Ib.*

4. **The protection** against unreasonable searches and seizures afforded by the **Fourth Amendment** to the Constitution **can not ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books** and papers in obedience to a *subpœna duces tecum*, issued in aid of an investigation by a grand jury of an alleged violation of the Anti-Trust Act of July 2, 1890, by such corporation. *Ib.*

5. **In a suit in equity** brought **by the United States to enjoin the carrying out of a contract** or combination in restraint of interstate commerce, under the act of 1890, there can be **no seizure of goods in course of transportation pursuant to the unlawful contract.** Such seizure can only be made under the sixth section of the act, which authorizes seizures and condemnation by like proceedings to those provided in cases of property imported into the United States contrary to law. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F., 271. **1**—773

SHINGLES. *See* COMBINATIONS, ETC., 32, 211, 212.

SOUTH CAROLINA DISPENSARY LAWS. *See Lowenstein* v. *Evans*, 69 F., 908 (1—598).

SPECIFIC PERFORMANCE. *See* CONTRACTS, 7.

SPECULATIVE DAMAGES. *See* DAMAGES, 2.

STATES.

1. **Right to Create Corporations—Interstate Commerce.—A State can not invest a corporation** organized under its laws **with the power to do acts** in the corporate name **which would operate to restrain interstate commerce.** *U. S.* v. *Northern Securities Co.*, 120 F., 721. **2**—216

2. **Same.—No State can, by merely creating a corporation,** or in any other mode, project its authority into other States, so as to **prevent Congress from exerting the power it possesses** under the Constitution **over interstate and international commerce,** or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce; nor can any State give a corporation created under its laws authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (Harlan, Brown, McKenna, Day). **2**—341

3. **Right to Create Corporations—Injunction in Northern Securities Case no Invasion.**—The enforcement of the provisions of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), by a Federal court decree enjoining a corporation organized in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the power acquired by such corporation by virtue of its acquisition of such stock, does not amount to an invasion by the Federal Government of the reserved rights of the States creating the several corporations. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (48 L. ed., 679). **2**—342

4. **Jurisdiction of Federal Courts.—A State is not a citizen** within the meaning of the provisions of the Constitution or acts of Congress regulating the jurisdiction of the Federal courts. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2**—533

5. **Same.—A State can not maintain an action** in equity to restrain a corporation from violating the provisions of the **act of July 2, 1890, on the ground that such violations** by decreasing competition **would depreciate the value of its public lands** and enhance the cost of maintaining its public institutions, the damages resulting from such violations being remote and indirect and not such direct actual injury as is provided for in section 7 of the act. *Ib.*

STATES—Continued.

6. **State Corporations—Power of Congress.**—Congress has **no authority**, under the commerce clause or any other provision of the Constitution, **to limit the right of a corporation created by a State in the acquisition, control, and disposition of property in the several States**, and it is immaterial that such property, or the products thereof, may become the subjects of interstate commerce; and it is apparent that by the act of July 2, 1890, in relation to monopolies, Congress did not intend to declare that the acquisition by a State corporation of so large a part of any species of property as to enable the owners to control the traffic therein among the several States constituted a criminal offense. *In re Greene*, 52 F., 104. 1—55

7. **State Corporations—Interstate Commerce—Power of Congress.—Franchises of** a corporation chartered by a State are, so far as they involve questions of interstate commerce, **exercised in subordination to the power of Congress to regulate such commerce.** While Congress may not have general visitatorial power over State corporations, **its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress.** *Hale* v. *Henkel*, 201 U. S., 43. 2—874

8. **State courts are without jurisdiction of a suit to recover damages under** section 7 of the Federal **Anti-Trust Act** of 1890. *Loewe* v. *Lawlor*, 130 F., 633. 2—563

9. A State is neither a "person" nor a "corporation," within the meaning of the Anti-Trust Act of 1890, and the **provisions** of that act are **not applicable** to the case **where the State** by its laws **assumes a monopoly of the traffic in intoxicating liquors.** *Lowenstein* v. *Evans*, 69 F., 908. 1—598

10. **Where an action is brought against the officials of a State** under section 7 of the Anti-Trust Law of July 2, 1890, **to recover damages** for acts done under authority of a State statute which gives the State an entire monopoly of the traffic in intoxicating liquors (act S. C., Jan. 2, 1895), **the State itself is a necessary party thereto**, and consequently the Federal courts would have no jurisdiction of the action. *Ib.*

11. **Manufactures within a State.**—The Anti-Trust Act of 1890 has no reference to the mere manufacture or production of articles or commodities within the limits of the several States. *Northern Securities Co.* v. *United States*, 193 U. S., 197. 2—339

STATE MONOPOLIES. *See* STATES, 9.

STATUTES.

I. ANTI-TRUST ACT OF JULY 2, 1890.

1. Construction and operation—In general.

1. **Act Operates on Monopolies in Interstate Commerce, and Not Because Commodity is a Necessary of Life.**—The monopoly and restraint denounced by the act of July 2, 1890 (c. 647, 26 Stat., 209), "to protect trade and commerce against unlawful restraints and monopolies," are a monopoly in interstate and international trade or commerce, and not a monopoly in the manufacture of a necessary of life. *U. S.* v. *E. C. Knight Co.*, 156 U. S., 1. 1—379

2. **The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity,** but **seeks to reach those which directly restrain** or impair the **freedom of interstate trade.** The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity. *Chesapeake & O. Fuel Co.* v. *United States*, 115 F., 610, 624. 2—168

3. **Common Carriers Not Included Within the Statute.**—It was not the intention of Congress to include common carriers subject to the act of February 4, 1887, within the provisions of the act of July 2, 1890, which is a special statute, relating to combinations in the form of trusts and conspiracies in restraint of trade. *U. S.* v. *Trans-Mo. Ft. Assn.*, 53 F., 440. Case reversed, 166 U. S., 290 (1—648). 1—80

4. **Applies to Common Carriers by Railroads—Contracts Affecting Rates.**—The provisions respecting contracts, combinations, and conspiracies in restraint of trade or commerce among the several States or with foreign countries, contained in the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," apply to and cover common carriers by railroad; and a contract between them in restraint of such trade or commerce is prohibited, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

5. **Act Applies to All Contracts in Restraint of Interstate or Foreign Commerce—Not Confined to Unreasonable Restraints.**—The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable. *Ib.*

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STATUTES—Continued.

I. Act of 1890—Continued.

6. Act Aimed at all Restraints—Reasonableness of Restraints Immaterial.—The act of Congress is aimed against all restraints of interstate commerce, and its purpose is to permit commerce between the States to flow in its natural channels, unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever. The reasonableness of the restrictions in a given case is immaterial. *U. S.* v. *Hopkins*, 82 F., 529. 1—725

Reversed, 171 U. S., 579 (1—941).

7. Test of Validity of Contract or Combination under Anti-Trust Act.—The test of the violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209, c. 647), by a contract or combination, is its effect upon competition in commerce among the States. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law, but if it promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law. *Phillips* v. *Iola Portland Cement Co.*, 125 F., 593. 2—284

8. The Sherman Act of July 2, 1890, is **not intended to affect contracts which have only a remote and indirect bearing** on commerce between the States. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. 2—555

9. The Anti-Trust Act of July 2, 1890 (26 Stat., 209), **does not apply to a contract or combination relating to the business of manufacturing within a State.** *Robinson* v. *Suburban Brick Co.*, 127 F., 804. 2—312

10. The act of July 2, 1890, commonly known as the "Anti-Trust Act," **does not**, and could not constitutionally, **affect any monopoly or contract** in restraint of trade, **unless it interferes directly and substantially with interstate commerce,** or commerce with foreign nations. *U. S.* v. *Addyston Pipe & Steel Co.*, 78 F., 712. 1—630

11. Any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce by preventing or restricting its sale thereby regulates interstate commerce to that extent, and thus trenches upon the power of the national legislature and violates the statute. *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S., 211. 1—1009

12. Effect of Anti-Trust Law upon Contracts in Restraint of Trade which at Common Law were Not Unlawful.—The effect of the Anti-Trust Law of 1890 is to render contracts in restraint of trade, as applied to interstate commerce, unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and also to create a right of civil action for damages in favor of persons injured thereby, and a remedy by injunction in favor both of private persons and the public against the execution of such contracts and the maintenance of such trade restraints. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F., 271. 1—772

STATUTES—Continued.

I. Act of 1890—Continued.

13. Test of Legality.—The Anti-Trust Act of July 2, 1890 (26 Stat., 209), declaring all contracts and combinations illegal if in restraint of trade or commerce among the States, does not leave to the courts the consideration of the question whether the restraint is or is not unreasonable and such as would have rendered the contract invalid at common law. **The only question in each case** where the validity of a contract or combination under the law is involved is **whether or not its necessary effect is to restrain interstate commerce.** *Chesapeake & Ohio Fuel Co.* v. *U. S.*, 115 F., 610. 2—151

14. Same.—The test of the violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), by a contract or combination **is its effect upon competition in commerce among the States.** If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law, but if it promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law. *Phillips* v. *Iola Portland Cement Co.*, 125 F., 593. (*See also* Combinations, etc., 9–15.) 2—284

15. Construction—Act Includes Every Combination which Directly and Substantially Restricts Interstate Commerce.—The generality of the language used in the Anti-Trust Act of 1890 (act July 2, 1890, 26 Stat., 209), declaring illegal "every contract, combination, or conspiracy in restraint of trade or commerce among the several States or with foreign nations," indicates the purpose of Congress to include in the prohibition every combination which directly and substantially restricts interstate commerce, whatever its form. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

16. Same.—The Anti-Trust Act (act July 2, 1890, 26 Stat., 209) **applies to interstate carriers of freight and passengers,** and any contract or combination which directly and substantially restricts the right of such a carrier to fix its own rates, independently of its natural competitors, places a direct restraint upon interstate commerce, in that it tends to prevent competition, and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable. *Ib.*

17. Same.—The Anti-Trust Act of July 2, 1890, **embraces and declares to be illegal every contract, combination, or con-**

STATUTES—Continued.

I. Act of 1890—Continued.

spiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations. *Northern Securities Co.* v. *United States*, 193 U. S., 197. (Harlan, Brown, McKenna, Day.) 2—339

18. That act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States. *Ib.*

19. The act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy, or monopoly upon such trade or commerce. *Ib.*

20. Railroad carriers engaged in interstate or international trade or commerce are embraced by the act. *Ib.*

21. Combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained, are equally embraced by the act. *Ib.*

22. Every combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act. *Ib.*

23. The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce. *Ib.*

24. The act of July 2, 1890, was leveled, as appears by its title, at only unlawful restraints and monopolies. Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. *Northern Securities Co.* v. *United States*, 193 U. S., 197. (Brewer, concurring.) 2—341

25. The general language of the act is limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. *Ib.*

26. In determining whether or not a combination is in violation of the Federal Anti-Trust Law, as in restraint of interstate commerce, it is immaterial that such is not its ultimate object, which is in most cases to increase the trade and profits of the parties to such combination; nor is it material to ascertain what proportion the resulting restraint of interstate commerce bears to other results. The true inquiry is whether it tends directly to appreciably restrain interstate trade, and, if it does, it is within the statute, although such effect may not be so considerable as its other effects. *Ellis* v. *Inman, Poulsen & Co.*, 131 F., 182. 2—577

STATUTES—Continued.

I. Act of 1890—Continued.

27. The statute under review (act of July 2, 1890) is a legitimate exercise of the power of Congress over interstate commerce, and a valid regulation thereof. *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505. 1—869

28. Section 1 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), makes a distinction between a contract and a combination or conspiracy in restraint of trade. *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633

29. The Interstate Commerce Act and the act known as the "Sherman Anti-Trust Law" are separate and independent acts, not germane in character and purpose; and therefore jurisdiction in the circuit court of the United States over a bill in equity to enjoin a railroad company from granting rebates to favored shippers can not be maintained upon the ground that such act of the railroad company is a monopoly within the meaning of the second section of said Anti-Trust Act (act July 2, 1890, 26 Stat., 209). *United States* v. *Atchison, T. & S. F. Ry. Co.*, 142 F., 176. 2—831

30. Acts done under an agreement legal when made, but which became illegal on the passage of the act of July 2, 1890, are done in violation of that act. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—669

31. The statute has no concern with prices, but looks solely to competition and to the giving of competition full play by making illegal any effort at restriction upon competition. Restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination averred, nor is it to be tested by the prices that result from the combination. *U. S.* v. *Swift & Co.*, 122 F., 529. 2—237

32. The Anti-Trust Act should have a reasonable construction—one which tends to advance the remedy it provides and to abate the mischief at which it was leveled. *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

33. Scope of the Statute.—The words "trade" and "commerce," as used in the Anti-Trust Act of 1890, are synonymous. The use of both terms in the first section does not enlarge the meaning of the statute beyond that employed in the common-law expression "contract in restraint of trade," as they are analogous to the word "monopolize," used in the second section of the act. *U. S.* v. *Patterson*, 55 F., 605. 1—133

34. Same.—The word "monopolize" is the basis and limitation of the statute, and hence an indictment must show a conspiracy

STATUTES—Continued.

I. Act of 1890—Continued.

in restraint by engrossing or monopolizing or grasping the market. It is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise. *Ib.*

35. **Scope of the Statute—Conspiracy.**—The act of July 2, 1890 (26 Stat., 209), section 1, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy" in restraint of trade or commerce among the States or with foreign nations, **is not aimed at capital merely and combinations of a contractual nature**, which by force of the title, "An act to protect trade and commerce against unlawful restraints and monopolies," are limited to such as the courts have declared unlawful, the words "in restraint of trade" having, in connection with the words "contract" and "combination," their common-law significance, but the term "conspiracy" is used in its well-settled legal meaning, so that **any restraint of trade or commerce, if to be accomplished by conspiracy**, is unlawful. *U. S.* v. *Debs*, 64 F., 724. 1—322

36. **Same—Construction.**—The construction of the statute is not affected by the use of the phrase "**in restraint of trade**," rather than one of the phrases "to injure trade" or "to restrain trade." *Ib.*

37. **Same.—The word "commerce,"** in the statute, **is not synonymous with "trade,"** as used in the common-law phrase "restraint of trade," but has the meaning of the word in that clause of the Constitution which grants to Congress power to regulate interstate and foreign commerce. *Ib.*

38. **Supreme Court Does Not Dissent from Conclusions in U. S. v. Debs.**—The court enters into no examination of the act of July 2, 1890 (26 Stat., 209), on which the circuit court mainly relied to sustain its jurisdiction; but it must not be understood that it dissents from the conclusions of that court in reference to the scope of that act, but simply that it prefers to rest its judgment on the broader ground discussed in its opinion, believing it important that the principles underlying it should be fully stated and fully affirmed. *In re Debs*, 158 U. S., 564. 1—565

39. While **the primary object** of the Anti-Trust Act of 1890 **was** doubtless **to prevent the destruction of** legitimate and healthy **competition in interstate commerce** by the engrossing and monopolizing of the markets for commodities, **yet its provisions are broad enough to reach a combination or conspiracy that will interrupt the transportation** of such commodities and persons **from one State to another.** *U. S.* v. *Workingmen's Amalgamated Council*, 54 F., 995, cited. *U. S.* v. *Cassidy*, 67 F., 698. 1—452

STATUTES—Continued.

I. Act of 1890—Continued.

Section 1.

40. **Conspiracy in Restraint of Interstate Commerce.—A combination by railroad employees to prevent** all the **railroads of a large city engaged in carrying the United States mails and in interstate commerce from** carrying freight and passengers, hauling cars, and **securing the services of persons other than strikers,** and to induce persons to leave the service of such railroads, is within act of July 2, 1890, section 1, which provides that every contract, combination in the form of trust or otherwise, "or conspiracy in restraint of trade or commerce" among the States is illegal. *U. S.* v. *Elliott*, 64 F., 27. 1—311

41. **Same.**—Act of July 2, 1890 (26 Stat., 209), section 1, **is not aimed at capital merely and combinations of a contractual nature**, which by force of the title, "An act to protect trade and commerce against unlawful restraints and monopolies," are limited to such as the courts have declared unlawful. *U. S.* v. *Debs*, 64 F., 724. 1—322

42. **Same.**—The **term "conspiracy"** in section 1 of the act of July 2, 1890 (26 Stat., 209), **is used in its well-settled legal meaning**, so that **any restraint of interstate trade or commerce, if accomplished by conspiracy, is unlawful.** *Ib.*

43. **What Contracts, Combinations, or Conspiracies Violate Anti-Trust Act.—**Every contract, combination or conspiracy **the necessary effect of which is to stifle or to directly and substantially** restrict competition in commerce among the States is in restraint of interstate commerce, and violates section 1 of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

44. **What Acts, Contracts, and Combinations Do Not Violate Anti-Trust Act.—**Acts, contracts, and combinations which **promote, or only incidentally or indirectly restrict,** competition in commerce among the States, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce or violative of section 1 of the act of July 2, 1890 (26 Stat., 209). *Ib.*

45. **Section 1** of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209), **makes a distinction between a contract and a combination or conspiracy** in restraint of trade. *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633

46. **Contract for Sale of Goods by Member of Combination.—**The act of July 2, 1890, section 1 (26 Stat., 209), known as the "Sherman Anti-Trust Act," **does not invalidate or prevent a recovery for the breach of a collateral contract** for the manufacture and sale of goods **by a member of a combination**

STATUTES—Continued.

I. Act of 1890—Continued.

formed for the purpose of restraining interstate trade in such goods. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. **2—995**

See also Indictments, 5.

Section 2.

47. **Monopolies.—To constitute the offense of "monopolizing,** or attempting to monopolize," trade or commerce among the States, within the meaning of section 2 of the Anti-Trust Act of 1890, it is necessary to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engaging therein. *In re Greene*, 52 F., 104. **1—55**

48. **Every attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict** competition in commerce among the States, **violates section 2** of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. **2—271**

49. **Same.—Attempts** to monopolize a part of commerce among the States **which promote, or only incidentally or indirectly restrict,** competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were **not, made illegal or punishable** by section 2 of the Anti-Trust Act of July 2, 1890 (c. 647, 26 Stat., 209), because such attempts are indispensable to the existence of any competition in commerce among the States. *Ib.*

See also Indictments, 1; Monopoly.

Section 4.

50. **Power of Congress to Authorize Injunction.**—Act of July 2, 1890, section 4, which provides that the circuit courts of the United States have jurisdiction to restrain combinations and conspiracies to obstruct and destroy interstate commerce, before such objects are accomplished, is not void for want of power in Congress to authorize such proceedings. *U. S.* v. *Elliott*, 64 F., 27. **1—311**

51. **Government Has Power to Bring Suit.**—The fourth section of the act of 1890 invests the Government with full power and authority to bring suit against the Trans-Missouri Freight Association; and, if the facts alleged are proved, an injunction should issue. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. **1—649**

52. **Who May Sue to Restrain.**—The intention of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public,

STATUTES—Continued.

I. Act of 1890—Continued.

or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, **to those instituted in the name of the United States,** under section 4 of the act, **by district attorneys** of the United States, acting under the direction of the **Attorney-General;** thus securing the enforcement of the act, so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2—533**

53. **The right to bring suits for injunction** under section 4 of the act of July 2, 1890 (26 Stat., 290), is limited to suits instituted on behalf of the **Government.** *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1—620**

54. Although the act of July 2, 1890, contains criminal provisions, **the Federal court has power under section 4** of the act **in a suit in equity to prevent and restrain violations of the act,** and may mold its decree so as to accomplish practical results such as law and justice demand. *Northern Securities Co.* v. *United States*, 193 U. S., 197. **2—339**

55. **Restraining Order—Notice.**—Under section 4 of the Anti-Trust Law of July 2, 1890, a restraining order **may be issued without notice,** under the circumstances sanctioned by the established usages of equity practice in other cases. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. **1—749**

56. **Injunction.—A combination** whose professed object is **to arrest the operation of the railroads** whose lines extend from a great city into adjoining States **until such roads accede to certain demands** made upon them, whether such demands are in themselves reasonabe or unreasonabe, just or unjust, is an unlawful conspiracy in restraint of trade and commerce among the States, within the act of July 2, 1890, and acts threatened in pursuance thereof **may be restrained by injunction under section 4** of the act. *U. S.* v. *Elliott*, 62 F., 801. **1—262**

See also Injunctions, 9, 16, 17, 21.

Section 5.

57. **Injunction Order—Persons Not Named in Bill.**—Under act of July 2, 1890, section 5, an injunction order in an action to enjoin an illegal conspiracy against interstate commerce may provide that it shall be in force on defendants not named in the bill, but who are within the terms of the order, where it also provides that it is operative on all persons acting in concert with the designated conspirators, though not named in the writ, after the commission of some act by

STATUTES—Continued.

I. Act of 1890—Continued.

them in furtherance of the conspiracy, and service of the writ on them. *U. S.* v. *Elliott*, 64 F., 27. 1—311

58. **The authority** given by section 5 of the act of July 2, 1890 (26 Stat., 290), to **bring in nonresidents** of the district **can not be availed of** in **private suits**, and the court can acquire no jurisdiction over them. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. 1—620

See also Injunctions, 18.

Section 6.

59. **Forfeiture of Property.**—The provision of act of July 2, 1890, section 6, for forfeiture of "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in this act, and being in the course of transportation from one State to another or to a foreign country," does not imply that only cases in which property shall be found subject to forfeiture shall be deemed within the scope of the act. *U. S.* v. *Debs*, 64 F., 724. 1—322

60. **Seizure of goods in course of transportation pursuant to the unlawful contract can only be made under the sixth section** of the act of 1890, which authorizes seizures and **condemnation** by like proceedings to those provided in cases of property imported into the United States contrary to law. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F., 271. 1—773

61. **There can be no such seizure** in a **suit in equity** brought by the United States under the act of 1890 to enjoin the carrying out of a contract or combination in restraint of interstate commerce. *Ib.*

Section 7.

62. **Necessary Parties—Jurisdiction of Federal Courts.**—Where a person brings an **action** under section 7 of the Anti-Trust Law of July 2, 1890, **against the officials of a State** to recover damages for acts done under authority of a State statute which gives the State an entire monopoly of the traffic in intoxicating liquors (act S. C., Jan. 2, 1895), **the State itself is a necessary party thereto**, and consequently the Federal courts would have no jurisdiction of the action. *Lowenstein* v. *Evans*, 69 F., 908. 1—598

63. **A municipal corporation** engaged in **operating water, lighting, or similar plants**, from which a revenue is derived, is, in relation to such matters, a business corporation, and **may maintain an action under section 7** of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), for injury to its business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F., 23. Affirmed, 203 U. S., 390. 2—299

STATUTES—Continued.

1. Act of 1890—Continued.

64. **Same—Who Liable.—Every member of such an illegal combination** is liable for the injury resulting to the business or property of a plaintiff by reason of such combination, regardless of any contract relation between the plaintiff and defendant. *Ib.*

65. **Does Not Authorize an Action for Damages by Party to the Trust.**—Section 7 of the Anti-Trust Act (26 Stat., 209), giving to any person injured by any other person or corporation by reason of anything forbidden in the act the right to recover treble damages, does not authorize an action against an alleged trust corporation by one who was a party to its organization **and a stockholder therein** to recover damages resulting from the enforcement by defendant of rights given it by the alleged unlawful agreement. *Bishop* v. *American Preservers Co.*, 105 F., 845. 2—51

Affirming 51 F., 272 (1—49).

66. For an **action for recovery** under this section brought under this section **against an association of manufacturers** of and dealers in tiles, mantels, and grates, **where the party suing was not a member of the association**, and the sales were made within the State, *see Montague* v. *Lowry*, 193 U. S., 38. 2—327

67. **Attorneys' Fees.**—The **discretion of the trial court** under the Anti-Trust Act of July 2, 1890 (26 Stat., 209), section 7, to allow a reasonable attorney's fee to the successful plaintiff in an action brought under that section to recover damages for a violation of the provisions of that act against combinations in restraint of trade, is not abused by an allowance of $750, although the verdict was for but $500, where the trial took five days, and from the proof offered it appeared that from $750 to $1,000 would be a reasonable sum. *Ib.*

68. A **recovery of the treble damages** authorized by the Sherman Anti-Trust Act of July 2, 1890, section 7 (26 Stat., 209), in case of injury sustained by violation of the act, **can be had only by direct action**, and **not by way of set-off** in an action brought for the price of goods by a company illegally formed in violation of the act, especially when the State practice does not permit the set-off of unliquidated damages. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540. 2—118

69. A **declaration** in a suit based on section 7 of the Anti-Trust Act of 1890 (26 Stat., 210), to recover damages resulting to plaintiff from a violation of such provision, **which alleges in a single count that defendant entered into a "contract, combination, and conspiracy"** in restraint of trade, is **bad for duplicity.** *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633

70. The **pendency of a suit in a State court can not be pleaded in abatement** of an action in a circuit court of the United

STATUTES—Continued.

I. Act of 1890—Continued.

States to recover treble damages under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), since the State court is without jurisdiction to enforce the remedy given by said section, and therefore the same case can not be depending in both courts. *Loewe* v. *Lawlor*, 130 F., 633. **2—563**

71. **Limitation.**—An action under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States, * * * and shall recover threefold the damages by him sustained," **is not an action for a penalty or forfeiture within Revised Statutes, section 1047,** prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but one for the enforcement of a civil remedy for a private injury, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, and **such action is governed as** to **limitation by the statutes of the State in which it is brought.** *City of Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 F., 900. **2—11**

Affirmed, 127 F., 23 (**2**—299).

Affirmed, 203 U. S., 390.

For Combinations, etc., prohibited, *see* Combinations, Conspiracies, Contracts, etc., in Restraint of Trade, II.

For Combinations, etc., not within the Statute, *see* Combinations, Conspiracies, Contracts, etc., in Restraint of Trade, III.

For Actions, Defenses, or Parties, *see* Actions and Defenses; and Parties.

For Jurisdiction of Federal Courts, *see* Courts.

For Damages, *see* Actions and Defenses, 21–42; and Damages.

II. Immunity Statutes.

Act of February 11, 1893.

72. **Immunity of Witnesses.**—Act of February 11, 1893 (27 Stat., 443), providing that no person shall be excused from testifying in a proceeding growing out of an alleged violation of an act to regulate interstate commerce, approved February 4, 1887, on the ground that his testimony will tend to incriminate him, and that no person shall be prosecuted, etc., on account of anything concerning which he may testify in such proceeding, applies only to proceedings connected with the act of February 4, 1887, and **does not apply to a prosecution for violation of the act of July 2, 1890** (26 Stat., 209), **so as to abrogate in relation thereto the Fifth Amendment to the Constitution,** providing that no person shall be compelled in a criminal case to be a witness against himself. *Foot* v. *Buchanan*, 113 F., 156. **2—104**

STATUTES—Continued.

II. Immunity Statutes—Continued.

73. The act of February 11, 1893 (27 Stat., 443), which is **supplementary to the Interstate Commerce Act,** provides that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpœna * * * or in any such case or proceeding." *U. S.* v. *Armour & Co.*, 142 F., 808. **2—951**

Act of February 19, 1903.

74. **Immunity of Witnesses—Anti-Trust Act—Inquisitions.**—An inquisition before a grand jury to determine the existence of supposed violations of the Anti-Trust Act was a "proceeding" within act of Congress, February 19, 1903 (ch. 708, 32 Stat., 848), providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding" under several statutes mentioned, including such Anti-Trust Act. *In re Hale*, 139 F., 496. **2—804**

Act of February 25, 1903.

75. **The examination of witnesses before a grand jury concerning an alleged violation of the Anti-Trust Act of July 2, 1890** (26 Stat., 209), **is a "proceeding" within the meaning of the proviso to the act of February 25, 1903** (32 Stat., 854–903), that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-Trust Act is one. *Hale* v. *Henkel*, 201 U. S., 43. **2—874**

76. **The right of a witness to claim his privilege against self-incrimination,** afforded by the Fifth Amendment to the Constitution, when examined concerning an alleged violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), **is taken away by the proviso to the act of February 25, 1903** (32 Stat., 904), that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may tes-

STATUTES—Continued.

II. Immunity Statutes—Continued.

tify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-Trust Act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the State courts for the offense disclosed. [*See* also *Nelson* v. *United States*, 201 U. S., 92 (2—920).] *Ib.*

77. **Immunity Provision.**—The appropriation act of February 25, 1903 (32 Stat., 904), making provision for the **enforcement of the Interstate Commerce and Anti-Trust Laws, contains an immunity provision** relating to persons giving testimony or producing evidence in any proceeding, suit, or prosecution under said laws. *U. S.* v. *Armour & Co.*, 142 F., 808. 2—952

III. Commerce and Labor Act.

Act of February 14, 1903.

78. **The primary purpose of Commerce and Labor Act** of February 14, 1903 (32 Stat., 825), was legislative, to enable Congress, by information secured through the work of officers charged with the execution of that law to pass such remedial legislation as might be found necessary, and the act must be construed in view of such purpose. *United States* v. *Armour & Co.*, 142 F., 808. 2—951

79. **Commissioner of Corporations—Investigation of Corporations or Combinations.—Section 6 of that act** (32 Stat., 827), defining the powers and duties of the Commissioner of Corporations, requiring him to make investigation into the organization, conduct, and management of the business of all corporations or combinations engaged in interstate or foreign commerce other than common carriers, and giving him the same powers in that respect as is conferred on the Interstate Commerce Commission with respect to carriers, including the power to subpœna and compel the attendance of witnesses, and to administer oaths and require the production of documentary evidence, **contemplates that he shall proceed by private hearings; and**, having such powers, **a person who appears** before him on his demand or by his request, and gives testimony or produces documents, **although not sworn, is entitled to the same privileges and immunities as though** his attendance was **compelled by subpœna** and his testimony given under oath. *Ib.*

80. **Same—Immunity.—Section 6** (32 Stat., 827) requires the Commissioner of Corporations to investigate all corporations and combinations engaged in interstate or foreign commerce, except common carriers, and provides that "all the requirements, obligations, liabilities, and **immunities** imposed or

STATUTES—Continued.

III. Commerce and Labor Act—Continued.

conferred by said 'Act to regulate commerce' and by 'An act in relation to testimony before the Interstate Commerce Commission' * * * **shall also apply to all persons who may be subpœnaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section.**" *Ib.*

IV. Interstate Commerce Act.

Act of February 4, 1887.

81. **Public Policy.**—The act of February 4, 1887, entitled "An act to regulate commerce," demonstrates the fact that from the date of the passage of that act it has been the public policy of this nation **to regulate that part of interstate commerce which consists of transportation, and to so far restrict competition in freight and passenger rates** between railroad companies engaged therein as shall be necessary to make such rates open, public, reasonable, uniform, and steady and to prevent discriminations and undue preferences. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186
Case reversed, 166 U. S., 290 (1—648).

82. **Not Inconsistent with Anti-Trust Act.**—The act of February 4, 1887 (24 Stat., 379), "to regulate commerce," is not inconsistent with the act of July 2, 1890, as it does not confer upon competing railroad companies power to enter into a contract in restraint of trade and commerce, like the one which forms the subject of this suit. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

83. **Express Companies.**—The Interstate Commerce **Act does not apply to** independent express companies not operating railway lines. *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. 1—862

V. Revised Statutes.

84. **Section 725.**—Where an **injunction** had been issued and served upon the defendants, **the circuit court had authority to inquire whether its orders had been disobeyed**, and when it found that they had been disobeyed, to proceed under Revised Statutes, section 725, and to enter the order of **punishment** complained of. *In re Debs*, 158 U. S., 564. 1—566

85. **Section 1047.—An action under section 7 of the Anti-Trust Act of July 2, 1900** (26 Stat., 209), to recover threefold the damages, **is not an action for a penalty or forfeiture**, within Revised Statutes, section 1047, prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," **but one for the enforcement of a civil**

STATUTES—Continued.

V. REVISED STATUTES—Continued.

remedy for a private injury, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the State in which it is brought. *Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 F., 900. 2—11

Affirmed, 127 F., 23 (2—299).

Affirmed, 203 U. S., 390.

86. Section 3995.—Obstructing the Mails.—Although the law, which now appears in Revised Statutes, section 3995, and which makes it an offense to obstruct and retard the passage of the United States mails, was originally passed prior to the introduction into the United States of the method of transporting mail by railroads, and the phraseology of the law conforms to conditions prevailing at that time (Mar. 3, 1825), yet it is equally applicable to the modern system of conveyance and protects alike the transportation of the mail by the "limitel express" and by the old-fashioned stage-coach. *U. S.* v. *Cassidy*, 67 F., 698. 1—449

87. Same.—The statute applies to all persons who "knowingly and willfully" obstruct and retard the passage of the mails or the carrier carrying the same; that is, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the mail, and who perform the acts with the intent that such shall be their operation. *U. S.* v. *Kirby*, 7 Wall., 485, cited. *Ib.*

88. Same.—The statute also applies to persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails. In such case, an intent to obstruct and retard the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S.* v. *Kirby*, 7 Wall., 485, cited. *Ib.*

89. Section 5440—Conspiracy.—Construing several clauses of the interstate commerce law recited in the opinion with section 5440 of the Revised Statutes, it follows that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate commerce law, inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade or commerce of the country, will be obnoxious to the penalties therein prescribed. *Waterhouse* v. *Comer*, 55 F., 149. 1—119

STATUTES—Continued.

V. REVISED STATUTES—Continued.

90. Same.—The statute relating to conspiracies to commit offenses against the United States (Rev. Stat., sec. 5440) contains three elements which are necessary to constitute the offense. These are: (1) The act of two or more persons conspiring together; (2) to commit any offense against the United States; (3) the overt act, or the element of one or more of such parties doing any act to effect the object of the conspiracy. *U. S.* v. *Cassidy*, 67 F., 698. 1—449

VI. State Laws.

91. The anti-trust law of Minnesota (Laws 1899, p. 487, c. 359), making unlawful any contract or combination in restraint of trade or commerce within the State, is in substantially the same language as the Sherman Anti-Trust Law of July 2, 1890 (26 Stat., 209), and must receive a similar construction. *Minnesota* v. *Northern Securities Co.*, 123 U. S., 692. 2—246

Decision reversed, 194 U. S., 38. Circuit court had no jurisdiction (2—533).

STATUTORY CONSTRUCTION.

1. When Congress adopts or creates a common-law offense, the courts may properly look to the common law for the true meaning and definition thereof, in the absence of a clear definition in the act creating it. *In re Greene*, 52 F., 104. 1—55

2. Where Congress adopts or creates a common-law offense, and in doing so uses terms which have acquired a well-understood meaning by judicial interpretation, the presumption is that the terms were used in that sense, and courts may properly look to prior decisions interpreting them for the meaning of the terms and the definition of the offense where there is no other definition in the act. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186

3. Every statute must be read in the light of the general laws upon the same subject in force at the time of its enactment. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186

4. The Anti-Trust Act should have a reasonable construction—one which tends to advance the remedy it provides, and to abate the mischief at which it was leveled. *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

5. Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

STOCK AND STOCKHOLDERS. *See* CORPORATIONS, 2-11; COMBINATIONS, 177-182.

STOCK QUOTATIONS. *See* COMBINATIONS, 177–180.

STRIKES. *See* COMBINATIONS, ETC., 115, 116, 121–127, 132, 133, 213.

SUBPŒNA DUCES TECUM. *See* CORPORATIONS, 12–15; COURTS, 22.

SUGAR. *See E. C. Knight Co. case*, Vol. I, pages 250, 258, 379.

SUIT. *See* ACTIONS AND DEFENSES.

TELEGRAMS AND TELEPHONE MESSAGES. *See* INTERSTATE COMMERCE, 33.

TESTIMONY. *See* WITNESSES.

THROUGH TRANSPORTATION. *See* CARRIERS.

TICKET BROKERS. *See* COMBINATIONS, ETC., 111.

TILES. *See* COMBINATIONS, 33–37.

TOBACCO TRUST CASES.

Whitwell v. *Continental Tobacco Co.*, 125 F., 454 (2—271).
In re Hale, 139 F., 496 (2—804).
Hale v. *Henkel*, 201 U. S., 43 (2—874).
McAlister v. *Henkel*, 201 U. S., 61 (2—918).

TRANSPORTATION. *See* CARRIERS; AND STATUTES, 81.

TREBLE DAMAGES. *See* ACTIONS AND DEFENSES 21–42; STATUTES, 62–71.

TRINIDAD ASPHALT. *See* COMBINATIONS, ETC., 214–216.

TRUSTS. *See* WORDS AND PHRASES.

UNITED STATES.

The Government of the United States has jurisdiction over every foot of soil within its territory, and acts directly upon each citizen. *In re Debs*, 158 U. S., 564. 1—565

See also ACTIONS AND DEFENSES, 15–18.

UNREASONABLE SEARCHES. *See* SEARCH AND SEIZURE.

WAGES, ETC., OF EMPLOYEES. *See* COURTS, 8.

WALL PAPER TRUST. *See* CONTINENTAL WALL PAPER CO. *v.* LEWIS VOIGHT & SONS CO., 148 F., 939.

WITNESSES.

1. **Incriminating Evidence—Protection—Constitution—Statute.**—A witness before the grand jury can not be required, under the Fifth Amendment to the Constitution, to answer as to his participation in and knowledge of a combination to regulate and control the price of cotton seed and the product and price of oil throughout certain States, in violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat., 209), notwithstanding

WITNESSES—Continued.

section 860, Revised Statutes, providing that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court in any criminal proceeding, since such section does not exempt the witness from prosecution for the offense which may be disclosed by his testimony. *Foot* v. *Buchanan*, 113 F., 156. 2—103

2. **Same—Immunity of Witnesses.—Act of February 11, 1893** (27 Stat., 443), providing that no person shall be excused from testifying in a proceeding growing out of an alleged violation of an act to regulate interstate commerce, approved February 4, 1887, on the ground that his testimony will tend to incriminate him, and that no person shall be prosecuted, etc., on account of anything concerning which he may testify in such proceeding, applies only to proceedings connected with the act of February 4, 1887, and **does not apply to a prosecution for violation of the act of July 2, 1890** (26 Stat., 209), **so as to abrogate** in relation thereto **the Fifth Amendment to the Constitution**, providing that no person shall be compelled in a criminal case to be a witness against himself. *Ib.*
3. **Same—Question of Incrimination for Judge to Decide.**—Where a witness claims that the answer to a question will tend to incriminate him, it is not for the witness, but for the judge, to decide whether, under all the circumstances, such might be the effect, and the witness entitled to the privilege of silence. *Ib.*
4. **Same.—Where a person has already been indicted for an offense about which he is to be examined** as a witness, and the questions asked him tend to connect him with such offense, the testimony sought is within the inhibition of the Fifth Amendment to the Constitution, providing that no person shall be compelled in any criminal case to be a witness against himself.
5. **Same—Assurance of Safety—Relinquishment of Privilege—Can Not Be Compelled.**—Where a witness before a grand jury declines to answer certain questions, and is taken before the judge, who assures him that he can safely answer, as his testimony can not be used against him, he is not compelled by such assurance to relinquish his constitutional privilege where the answer may tend to criminate him. *Ib.*
6. **Same — Contempt — Commitment — Habeas Corpus — Relief.**—Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on habeas corpus because some of the questions might be safely answered. *Ib.*

WITNESSES—Continued.

7. **Immunity of Witnesses—Anti-Trust Act—Inquisitions.**—An inquisition before a grand jury to determine the existence of supposed violations of the Anti-Trust Act was a "proceeding" within act of Congress of February 19, 1903 (32 Stat., 848), providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding" under several statutes mentioned, including such Anti-Trust Act. *In re Hale*, 139 F., 496. 2—804

8. **Same—Unreasonable Searches—Rights of an Agent—Subpœna Duces Tecum.**—A subpœna duces tecum commanding the secretary and treasurer of a corporation supposed to have violated the Anti-Trust Act to testify and give evidence before the grand jury, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, described generically, in effect including all the correspondence and documents of his corporation originating since the date of its organization, to which nineteen other named corporations or persons were parties, for the purpose of enabling the district attorney to establish a violation of such act on the part of the witness' principal, constituted an unreasonable search and seizure of papers, prohibited by the Fourth Amendment to the Constitution. *Ib.*

9. **Same—Habeas Corpus.**—Where a subpœna duces tecum was directed to be issued by a circuit judge, and the witness was committed for contempt for failure to obey the same, he would not be discharged on habeas corpus by another judge of the same court, though the latter was of the opinion that the subpœna authorized an unconstitutional search and seizure of private papers. *Ib.*

10. **Protection of Witness—Act of February 25, 1903** (32 Stat., 905).—The examination of witnesses before a grand jury concerning an alleged violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), is a "proceeding" within the meaning of the proviso to the act of February 25, 1903 (32 Stat., 903), that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-Trust Act is one. The word "proceeding" should receive as wide a construction as is necessary to protect the witness in his disclosures. *Hale* v. *Henkel*, 201 U. S., 43. 2—874

11. The constitutional right of a witness to claim his privilege against self-incrimination, afforded by the Fifth Amendment,

WITNESSES—Continued.

when examined concerning an alleged violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), is taken away by the proviso to the act of February 25, 1903 (32 Stat., 904), that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-Trust Act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the State courts for the offense disclosed. [*See* also *Nelson* v. *United States*, 201 U. S., 92 (2—920).] *Ib.*

12. The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, and does not apply if the criminality is taken away. A witness is not excused from testifying before a grand jury under a statute which provides for immunity, because he may not be able, if subsequently indicted, to procure the evidence necessary to maintain his plea. The law takes no account of the practical difficulty which a party may have in procuring his testimony. *Ib.*

13. The difficulty, if any, of procuring the testimony which a person has given on his examination before a grand jury concerning an alleged violation of the Anti-Trust Act of July 2, 1890, does not render the immunity from prosecution, or forfeiture, given by the proviso to the act of February 25, 1903, insufficient to satisfy the guaranty of the Fifth Amendment against self-incrimination. *Ib.*

14. A witness can not refuse to testify before a Federal grand jury in face of a Federal statute granting immunity from prosecution as to matters sworn to, because the immunity does not extend to prosecutions in a State court. In granting immunity, the only danger to be guarded against is one within the same jurisdiction and under the same sovereignty. *Ib.*

15. The privilege against self-incrimination afforded by the Fifth Amendment is purely personal to the witness, and he can not claim the privilege of another person, or of the corporation of which he is an officer or employee. [To same effect *McAlister* v. *Henkel*, 201 U. S., 90 (2—919).] *Ib.*

16. A witness who can not avail himself of the Fifth Amendment as to oral testimony, because of a statute granting him immunity from prosecution, can not set it up as against the production of books and papers, as the same statute would equally grant him immunity in respect to matters proved thereby. *Ib.*

WITNESSES—Continued.

17. **Corporations Can Not Refuse to Answer Unless Protected by Immunity Statute.**—While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, a corporation is a creature of the State, and there is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. *Ib.*

18. Under the practice in this country the **examination of witnesses by a Federal grand jury need not be preceded by a presentment or formal indictment**, but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committed, and, if so, they may indict upon such evidence. *Ib.*

19. **In summoning witnesses** before a grand jury **it is sufficient to apprise them of the names of the parties with respect to whom they will be called to testify without indicating the** nature of the charge against them, or laying a basis by a formal indictment. *Ib.*

20. *Hale* v. *Henkel* (vol. 2, page 874) followed to the effect that **officers and employees of corporations can not**, under the Fourth and Fifth Amendments, **refuse to testify or produce books of corporations** in suits against the corporations for violations of the Anti-Trust Law of July 2, 1890, in view of the immunity given by the act of February 25, 1903. *Nelson* v. *United States*, 201 U. S., 92. 2—920

21. **Witnesses can not by objections to materiality of evidence be relieved from testifying.** The tendency or effect of the testimony on the issues between the parties is no concern of theirs. *Ib.*

22. **Objections to the materiality of the testimony are not open to consideration on a writ of error** sued out by witnesses to **review a judgment for contempt** entered against them for disobeying an order to testify. *Ib.*

23. **Refusal to Answer or Produce Books—Order of Circuit Court to Answer or be Held in Contempt Not Reviewable by Supreme Court.**—In a suit in a circuit court of the United States brought by the United States against corporations for violations of the Anti-Trust Law of July 2, 1890, a witness refused to answer questions or produce books before the examiner on the ground of immateriality, also pleading the privileges of the Fifth Amendment; the court overruled the objections and ordered the witness to answer the questions and produce the books; an appeal was taken to this court. *Held*, that while such an order might leave the witness no alternative except to obey or be punished for contempt it **is interlocutory** in the principal suit and not a final order, nor does it constitute a practically independent proceeding amounting to a final judgment, **and an appeal will not lie** therefrom to this court. *Alexander* v. *United States*, 201 U. S., 117. 2—945

24. **Same—But an Appeal from a Judgment of Contempt is Reviewable.**—If the witness refuses to obey and the court goes further and punishes him for contempt there is a right of review, and this is adequate for his protection without unduly impeding the process of the case. [*See* also *Nelson* v. *United States*, 201 U. S., 92 (2—920).] *Ib.*

CREDIBILITY. *See* JURY, 2.

IMMUNITY. *See* IMMUNITY.

WOODEN WARE. *See* COMBINATIONS, ETC., 38, 149.

WORDS AND PHRASES.

1. **"Boycott."**—A combination by employees of railway companies to injure in his business the owner of cars operated by the companies, by compelling them to cease using his cars by threats of quitting and by actually quitting their service, thereby inflicting on them great injury, where the relation between him and the companies is mutually profitable, and has no effect whatever on the character or reward of the services of the employees so combining, is a boycott, and an unlawful conspiracy at common law. *Thomas* v. *Cin., N. O. & T. P. Ry. Co.*, 62 F., 803. 1—267

2. **"Commerce."**—The word "commerce," in the statute, is not synonymous with "trade," as used in the common-law phrase "restraint of trade," but has the meaning of the word in that clause of the Constitution which grants to Congress power to regulate interstate and foreign commerce. *U. S.* v. *Debs*, 64 F., 724. 1—322

3. **Same.**—The word "commerce," as used in the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies, and in the Constitution of the United States, has a broader meaning than the word "trade." Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities. *U. S.* v. *Cassidy*, 67 F., 698. 1—452

4. **Same.**—Commerce is the sale or exchange of commodities, but that which the law looks upon as the body of commerce is not restricted to specific arts of sale or exchange. It includes the intercourse—all the initiatory and intervening acts, instrumentalities, and dealings—that directly bring about the sale or exchange. *U. S.* v. *Swift & Co.*, 122 F., 529. 2—237

WORDS AND PHRASES—Continued.

5. **"Conspiracy."**—The term "conspiracy," in section 1 of the act of July 2, 1890 (26 Stat., 209), is used in its well-settled legal meaning, and any restraint of interstate trade or commerce, if accomplished by conspiracy, is unlawful. *U. S.* v. *Debs*, 64 F., 724. 1—322

6. **Same.**—A conspiracy consists in an agreement to do something; but in the sense of the law, and therefore in the sense of this statute, it must be an agreement between two or more to do, by concerted action, something criminal or unlawful, or, it may be, to do something lawful by criminal or unlawful means. A conspiracy, therefore, is in itself unlawful, and, in so far as this statute is directed against conspiracies in restraint of trade among the several States, it is not necessary to look for the illegality of the offense in the kind of restraint proposed. Any proposed restraint of trade, though it be in itself innocent, if it is to be accomplished by conspiracy, is unlawful. *Ib.* (1—352)

7. **Same.**—A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. *Pettibone* v. *U. S.*, 13 Sup. Ct., 542; 148 U. S., 203, cited. *U. S.* v. *Cassidy*, 67 F., 698. 1—449

8. **Same.**—Unlike "combination," "conspiracy" is a term of art. In the Anti-Trust Law it is to be interpreted independently of the preceding words, and an indictment thereunder should therefore describe something that amounts to a conspiracy under the act conformably to the rules of pleading at common law, as perhaps modified by general federal statutes. *U. S.* v. *Mac Andrews & Forbes Co.*, 149 F., 831.

9. **"In Restraint of Trade."**—The words "in restraint of trade," in section 1 of the act of July 2, 1890 (26 Stat., 209), have, in connection with the words "contract," and "combination," their common-law significance, but the term "conspiracy" is used in its well-settled legal meaning, so that any restraint of trade or commerce, if to be accomplished by conspiracy, is unlawful. *U. S.* v. *Debs*, 64 F., 724. 1—322

10. **Same.**—The construction of the statute is not affected by the use of the phrase "in restraint of trade," rather than one of the phrases "to injure trade" or "to restrain trade." *Ib.*

11. **"Mail Trains."**—A mail train is a train as usually and regularly made up, including not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such train, as a mail train, would include the Pullman car as a part of its regular make-up. Therefore, if such a train is obstructed or retarded because it draws a Pullman car, it is no defense that the parties so delaying it were willing that the mail should proceed if the Pullman car were left behind. *U. S.* v. *Clark*, Fed. Cas. No. 14805, 23 Int. Rev. Rec., 306, followed. *U. S.* v. *Cassidy*, 67 F., 698. 1—449

12. **Same.**—Any train which is carrying mail under the sanction of the postal authorities is a mail train in the eye of the law. *Ib.*

13. **"Monopolize."**—The word "monopolize" can not be intended to be used with reference to the acquisition of exclusive rights under Government concession, but that the lawmaker has used the word to mean "to aggregate" or "concentrate" in the hands of few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word "pooling," which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. *Amer. Biscuit & Mfg. Co.* v. *Klotz*, 44 F., 724. 1—7

14. **"Monopolizing, or Attempting to Monopolize."**—To constitute the offense of "monopolizing, or attempting to monopolize," trade or commerce among the States, within the meaning of section 2 of said act, it is necessary to acquire, or attempt to acquire, as exclusive right in such commerce by means which will prevent others from engaging therein. *In re Green*, 52 F., 104. 1—55

15. **Monopoly of trade** embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58, 84. 1—218

16. **"Municipal Corporation."**—A municipal corporation engaged operating water, lighting, or similar plants, from which a revenue is derived, is, in relation to such matters, a business corporation, and may maintain an action under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F., 23. 2—290

17. **"More or Less."**—Where, **in a contract for the manufacture and delivery of goods**, the statement of quantity is qualified by the words "more or less," these, unless supplemented by language giving them a broader scope, apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such a transaction. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. 2—994

WORDS AND PHRASES—Continued.

18. "**Trust.**"—What is commonly termed a "trust" is a species of combination organized by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles and commodities, which were well known and fully understood when the Anti-Trust Act was approved. *U. S.* v. *Northern Securities Co.*, 120 F., 721, 724. 2—220

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FEDERAL ANTI-TRUST DECISIONS.

VOL. 2

1900–1906.

[354] UNION SEWER-PIPE CO. *v.* CONNELLY.[a]

(Circuit Court, N. D. Illinois, N. D. January 29, 1900.)

[99 Fed., 354.]

NOTE TO TRUST—AVOIDANCE.—A note made for a balance due on goods bought from a corporation cannot be avoided merely because the latter is a trust organized to create and carry out restrictions in trade contrary to the common law.[b]

SAME.—A note made for a balance due on goods bought from a corporation cannot be avoided merely because the latter is a trust organized to create and carry out restrictions in trade contrary to the "Sherman Act" (Act Cong. July 2, 1890), as that only covers contracts which are themselves in restraint of trade, and does not affect those which "merely indirectly, remotely, incidentally, or collaterally regulate, to a greater or less degree, interstate commerce between the states."

ILLINOIS TRUST LAW—CONSTITUTIONALITY.—Act Ill. July 1, 1893, defining trusts and conspiracies against trade, declaring contracts in violation of its provisions void, etc., provides (section 9) that it shall not apply to agricultural products or live stock while in the hands of producers. *Held*, that such section rendered the entire act void, as a violation of section 1 of the fourteenth amendment of the federal constitution, and the provision of Const. Ill. art. 4, § 22, that, in cases where a general law can be made applicable, no special law shall be passed.

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[a] Affirmed by Supreme Court (184 U. S., 540). See p. 118.
[b] Syllabus copyrighted, 1900, by West Publishing Co.

Herbert W. Hamlin and *Edwin Walker*, for plaintiff.

O'Donnell & Coghlan and *John R. McFee*, for defendant.

KOHLSAAT, District Judge.

Plaintiff in this case brings suit to recover on certain promissary notes given by defendant for balance due on purchases and deliveries of sewer pipe. Defendant pleads the general issue, and gives notices thereunder of three special defenses, all of which are based upon the theory that plaintiff was a trust or combination organized for the express purpose of creating and carrying out restrictions in trade, contrary (1) to the common law in force both in Ohio and Illinois; (2) to the act of congress of July 2, 1890, commonly called the "Sherman Act"; and (3) to the statute of the state of Illinois taking effect on July 1, 1893.

As to the matters set out in the first notice of special defense, it is undoubtedly true that by the common law contracts which are themselves directly in restraint of trade may, in a proceeding based thereon, be declared void and unenforceable by the courts; but there is no case brought to the attention of the court in which it has been held that at common law a contract not in itself in restraint of trade is void because one of the parties thereto is a party to a contract which is in restraint of trade, and the one contract is indirectly based upon the other. The fact that one party to a contract is engaged in illegal acts will not, at common law, avail the other party as a defense to the enforcement of a contract in itself legal. The first notice of special defense will therefore be stricken out.

It will be seen by an inspection of the so-called "Sherman Act," and of the opinion of Mr. Justice Peckham in the *Addyston Pipe & Steel Co. Case* (decided by the United States supreme court, Dec. **[355]** 4, 1899) 20 Sup. Ct. 96, Adv. S. U. S. 96, 44 L. Ed. ——, that the act only covers contracts which are themselves directly in restraint of trade, and does not affect those which "merely indirectly, remotely, incidentally, or collaterally regulate, to a greater or less

degree, interstate commerce among the states." It therefore follows that the second matter of special defense set up must be stricken out.

Now, coming to the ground of special defense set up in the third notice, to wit, the Illinois statute which went into effect on July 1, 1893: This statute, in terms, provides that the defense herein set up may be maintained as a bar; and, if the statute is valid, then plaintiff cannot recover in this case, if it be, as averred by defendant, a corporation organized in restraint of trade, and a trust, under the definition contained in said statute. Plaintiff contends that the said statute is unconstitutional (1) because it is obnoxious to section 1 of the fourteenth amendment of the federal constitution, which reads, in part, as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and also (2) because it is in contravention of section 22 of article 4 of the constitution of the state of Illinois, which reads, in part, as follows: "In all other cases where a general law can be made applicable, no special law shall be enacted." The said statute of July 1, 1893, after defining a trust, and setting out the various penalties provided for violation of the act, provides, in section 9, that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." Can it be claimed that, under this clause 9, every person within the jurisdiction of the state of Illinois has equal protection of the laws? Is not this class legislation? Is it in accordance with section 1 of the fourteenth amendment to the federal constitution that those who produce or raise agricultural products or live stock shall be exempted from the provisions of a statute which, by its terms, are binding on every other citizen or person within the state? I think clearly not. I am of the opinion that this statute contains both class and special legislation, and is in contravention of both the federal and state constitutions, and therefore void.

Statement of the Case.

It is urged that, granting the unconstitutionality of said ninth clause, yet it may be declared void without affecting the validity of the remaining clauses of said act. If this were so, then, by declaring said clause void, the courts would make the act binding upon those classes of persons within the state which the legislature had specially exempted from its provisions. This would be judicial legislation of the most flagrant character. In my opinion, the said clause 9 taints the whole act, and renders it all void. Therefore the special defense set up in the third notice must be stricken out. It follows upon the record, as it is with the said three matters of special defense stricken out, that a verdict must be given for the plaintiff for the face of the notes in suit, and interest thereon from maturity at 5 per cent., and the jury will be so instructed.

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[985] NATIONAL FOLDING-BOX & PAPER CO. *v.* ROBERTSON, ET AL.

(Circuit Court, D. Connecticut. February 9, 1900.)

[99 Fed., 985.]

PATENTS—INFRINGEMENT—FOLDING PAPER BOXES.—The Wilson patent, No. 286360, for an improvement in folding paper boxes, *held* not anticipated, and valid, on motion for a preliminary injunction.

SAME—SUIT FOR INFRINGEMENT—DEFENSES.—The fact that the owner of a patent is a corporation alleged to have been formed in violation of the anti-trust law, and that the patent is alleged to have been assigned to it in furtherance of the illegal purpose to create a monopoly and control the price of an article of commerce, is not available to an infringer of such patent to defeat a suit for the infringement.[a]

This is a suit in equity for the infringement of a patent. On motion for a preliminary injunction.

Walter D. Edmonds, for complainant.

Charles W. Comstock and *W. E. Simonds*, for defendants.

[a] Syllabus copyrighted, 1900, by West Publishing Co.

Opinion of the Court.

TOWNSEND, District Judge.

On motion for a preliminary injunction against infringement of the first claim of patent No. 286360, granted October 9, 1883, to Arthur Wilson, for improvement in folding paper boxes. This claim has been sustained by Judge Thomas, after exhaustive consideration of the issues of anticipation and noninfringement, in two opinions in the suit of this complainant against Robert Gair (C. C.; 91 Fed. 905, and 97 Fed. 813). The new evidence introduced related only to patents set up in the answer, but not discussed, in said Gair Case. The defendants relied chiefly on one only of said patents, namely, No. 269682, to Linnett, which they claim exactly corresponds with the boxes of the patent in suit, except in the use of what are known as the tongues and slits for securing the same, and that this construction was suggested by Linnett when he said, "the parts at the ends being attached together to secure them, as by pasting or otherwise [986] securing the parts," and they contend that the use of such slits and tongues was well known in the art. As pointed out by Judge Thomas in his carefully considered opinion, the merit of the invention in suit is that the end piece, with its tongues, when caught into said apertures and loosely held therein, closes and holds together the end of the box by means of its lever function. This construction dispensed with the exterior perforations of the boxes of the prior art, and reinforced the sides of the box against strain.

Counsel for complainant says the Linnett patent was not presented for Judge Thomas' consideration, because the patent to Arthur, May 15, 1877, No. 190803, which was discussed and considered, covered everything embraced in the Linnett construction. The construction of Arthur is nearer to the patented construction than that of Linnett. It is apparent that neither Arthur nor Linnett had any idea of the clutch invention which Wilson devised. All the other questions herein were before Judge Thomas, and were disposed of by him.

The defendants have also filed a plea in abatement alleging that certain partnerships and corporations which were

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rivals in business, situated in various states, engaged in the manufacture of these boxes, being articles of commerce and in great demand throughout the United States, for the purpose of stifling competition, and controlling and limiting the output of each of said manufacturing concerns, or lessening the amount of production of said goods and articles of commerce, entered into a conspiracy, for the purpose of stipulating and providing for uniform minimum prices of said articles of commerce sold throughout the states, and enhancing the price thereof, and limiting the production of the same, and that, in pursuance of said conspiracy, each of the parties entered into a contract to sell its plant to a new corporation, to be organized under the laws of the state of New Jersey. Said contract was set forth in full. It comprised an agreement between certain firms, persons, and corporations to take stock in said corporation, and provisions for the appraisal of the property of each of the constituent members, and for the allotment to each of them of stock in the new corporation in proportion to such appraisal. The plea in abatement further alleged that said parties further agreed that neither of the persons or companies mentioned in said agreement should engage in the manufacture or sale of said articles of commerce, or directly or indirectly continue in, carry on, or engage in said business of which said articles might form a part, independently of the said National Folding-Box & Paper Company, to be organized as aforesaid, for the period of 49 years, and that during said period the parties should refrain from entering into competition as rivals of said company; and that in pursuance of said conspiracy the parties abandoned the manufacture of such articles, and that said National Folding-Box & Paper Company has carried out all the designs of said parties; and that, in pursuance of said agreement and conspiracy, all the patents have been transferred to said corporation; and that "it was further agreed between the parties * * * that each of the parties to said agreement could and did [987] manufacture said articles of commerce under patents owned by them prior to the formation of said company," and that such articles "were sold by said parties * * * at uniform prices, and upon the same terms,

without respect to the cost of production or the merits of the respective articles"; and that the patent in suit was conveyed to the complainant corporation in pursuance of said conspiracy to restrain the trade in the states where said plants were located. The plea further alleges as follows:

"The direct tendency and the direct result of said conspiracy and agreement between said parties, as aforesaid, was and did, as intended by the parties thereto, create a scarcity of said articles of commerce, and enhance the price thereof, in the states where said plants were located, and throughout the several states where said articles were in use by the public to a great extent; and the said conspiracy, and the natural results of the same, as intended and designed by the parties to said agreement, and the acts of the parties thereto under the same, are all and each in violation of law, in restraint of trade and commerce between the several states, and are directly prohibited by the common law and the laws of the United States, and, as said illegal and unlawful combination of the parties to said agreement, the said National Folding-Box & Paper Company, have no right, power, or authority to sue or plead in the courts of the United States, in any civil action wherein it invokes the aid of the courts of the United States, to protect the plaintiff to further engage in or carry on the business for which it was illegally organized, and especially to protect it as demanded in this suit, and said combination is illegal and void, and your respondents, therefore, pray that the proceeding in the cause may be abated and dismissed."

This plea was argued under an oral stipulation to the effect that, for the purposes of the motion for a temporary injunction, the facts alleged in said plea should be taken as true, so far as they referred to the contents and execution of the agreements therein alleged, but that this admission should not be construed to extend to any innuendoes contained in the plea respecting the purposes of said agreements, except so far as they appeared on the face thereof, nor respecting the intent or animus of the parties thereto.

The conclusions reached dispense with the necessity of resting the decision on the legality of the agreement alleged in the plea in abatement. It does not appear that the original contract was illegal. There are no provisions therein which, directly or indirectly, refer to any restriction of trade or regulation of output or of prices. The parties thereto bound themselves not to engage in like business for 49 years. This was essential to effectuate the transfer of the good will, and is not unusual in such cases. The allegation that it was further agreed that the parties "could and did manufacture," etc., is in direct conflict with the previous allegation of the plea. To sustain this plea, it would be necessary to

hold, as claimed by defendants, that a corporation formed in restraint of trade in one state could not, in another state, maintain a suit to restrain the infringement of its patent.

The federal cases chiefly relied on by defendants are *Harrow Co.* v. *Hench* (C. C.) 76 Fed. 667, affirmed in 27 C. C. A. 349, 83 Fed. 36, 39 L. R. A. 299; *Harrow Co.* v. *Quick* (C. C.) 67 Fed. 130.

Harrow Co. v. *Hench*, *supra*, was a suit to enjoin licensees from violating a license contract by selling below the price agreed on therein, and for a decree for the specific performance thereof, which [988] contract was made with a combination controlling 90 per cent. of the manufacturers of certain harrows in the United States. Said contracts prevented licensees from selling their products at a price less than was set forth in a schedule annexed to the license, so that, as the court said, the corporation is simply clothed with the legal title to the assigned patents, while "the several assignors are invested with the exclusive right to manufacture and sell their old-style harrows under their own patents; but all of them must sell at uniform prices, and upon the same terms, without respect to cost or the merits of their respective styles of harrows, and all the members of the combination are strictly forbidden to manufacture or sell any other kind or style of float spring-tooth harrow than they are thus licensed to make and sell." Judge Acheson refused the injunction, and the court of appeals affirmed his decision, taking the ground that the prior owners were the beneficial owners, with right to continue their business, subject only to the restriction in its management imposed by the contract, and that "the result would be the same, in legal contemplation, if the corporation and licenses had been dispensed with, and the contract had provided simply, as it does, for combination and restraint of competition." This was not an infringement suit, but a suit to compel the performance of an unlawful contract. The decision rests upon the fact that the corporation was organized solely for the purpose of making a combination to restrain competition and trade and to enhance prices.

In the same line, Judge Coxe, in the suit of the same complainant against the same defendant (C. C.; 84 Fed. 226),

to restrain infringement of a patent which had been assigned in accordance with said contract, held that, as the contract was illegal and void, the assignment also was void, and solely on that ground dismissed the complaint.

The only opinion in the federal courts cited by defendant which would seem to support the doctrine that an infringer might defend his illegal acts, even in a case where the complainant was a combination formed for the purpose of restraining trade and competition, is *Harrow Co.* v. *Quick*, *supra*, in which the learned judge disposed of the question of infringement on the merits, but, in passing on the defense that this same harrow company was an illegal combination, said:

"It seems to me that the court cannot sustain the present bill without giving aid to the unlawful combination or trust represented by the complainant. The question is not free from doubt, but in a case of doubt I feel it my duty to resolve it in such a way as will not lend the countenance of the court to the creation of combinations, trusts, or monopolies."

The court of appeals, however, said on this point:

"While not prepared, in view of the authorities, to sanction the proposition that the infringer of a patent may escape liability by showing that the legal owner is engaged in a supposed unlawful combination or trust, we do not consider the point." 20 C. C. A. 413, 74 Fed. 239.

And in *Columbia Wire Co.* v. *Freeman Wire Co.* (C. C.) 71 Fed. 306, Judge Adams said:

"I would quite agree with the learned judge who wrote that opinion, that the correctness of his conclusion, even in that case, was not free from doubt."

[989] And he refused to apply said doctrine in a case of infringement.

The question here presented was discussed by Judge Wallace in *Strait* v. *Harrow Co.* (C. C.) 51 Fed. 819. Judge Wallace says:

"The proposition that the plaintiff, while infringing the rights vested in the defendant under the letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to letters patent, is a novel one, and entirely unwarranted."

The opinion in *Machine Co.* v. *Smith* (C. C.) 70 Fed. 383, is to the same effect. Judge Simonton says:

"The issues are these: Do the complainants hold letters patent of the United States giving them the exclusive right to make, vend,

and use certain patentable devices? Have the defendants infringed the rights thus granted? If in procuring these exclusive rights, or if, in their exercise, the complainants have been guilty of fraudulent or improper conduct towards these defendants, the fundamental principles relied on would debar them of any relief in this court. But if, in the absence of these, it is sought to deprive them of their remedy for the infringement of their rights because of their motives in asserting them, such motives are not the subject of judicial inquiry. *Strait* v. *National Harrow Co.*, 51 Fed. 819. 'The rule that one coming into equity must come with clean hands is confined to the conduct of the party in the matter before the court, and not to matters aliunde. Courts of equity, as well as courts of law, will not refuse redress to the suitor because his conduct in other matters not then before the court may not be blameless. It is enough if the suitor shows that he has acted justly, fairly, and legally in the subject-matter of the suit.' Beach, Mod. Eq. Jur. § 16, and cases cited."

The distinction between the cases where such a defense might and might not be interposed is stated as follows by Judge Wallace in *Strait* v. *Harrow Co.*, *supra:*

"If the defendant had brought suit against the plaintiffs for some breach of contract or violation of its alleged rights, founded upon the combination agreement, then it might become pertinent to inquire into the character of the combination, and ascertain whether the court would enforce any rights growing out of it. But, in a suit brought for the infringement of a patent by the owner, any such inquiry, at the behest of the infringer, would be as impertinent as one in respect to the moral character or antecedents of the plaintiff in an ordinary suit for trespass upon his property. Even a gambler, or the keeper of a brothel, cannot be deprived of his property because he is an obnoxious person or a criminal."

The court of appeals in this circuit said in *Light Co.* v. *Electric Co.*, 3 C. C. A. 605, 53 Fed. 598:

"They [the owners of the patent in suit] do not lose that right merely because they may have joined in a combination with others, holding other patents securing similar monopolies, which combination may, when judicially examined in a proper forum, be held to be unlawful. We do not feel justified in assuming, upon the facts before us in the present suit, that the use which the complainants propose to make of the injunction—an injunction which seems necessary to secure their monopoly and make their patent fruitful—will be such as to promote any other monopoly. When it shall be made to appear that some one, to whom in fairness and good conscience these complainants should sell their lamps, has been arbitrarily refused them, save upon oppressive and unreasonable terms, it will be time to consider whether the complainants should be allowed to continue in possession of the injunction."

In *Soda-Fountain Co.* v. *Green* (C. C.) 69 Fed. 333, Judge Dallas sustained exceptions to such a plea, and ordered it stricken out as irrelevant, immaterial, and impertinent. The motion for a preliminary injunction is granted.

[900] CITY OF ATLANTA *v.* CHATTANOOGA FOUNDRY & PIPE CO.[a]

MANION ET AL. *v.* SAME.

(Circuit Court, E. D. Tennessee, S. D. May 5, 1900.)

[101 Fed., 900.]

MONOPOLIES—ACTION FOR DAMAGES UNDER ANTI-TRUST ACT—LIMITATION.—An action under Anti-Trust Act (Act July 2, 1890; 26 Stat. 209) § 7, providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States, * * * and shall recover three fold the damages by him sustained," is not an action for a penalty or forfeiture, within Rev. St. § 1047, prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but one for the enforcement of a civil remedy for a private injury, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the state in which it is brought.[b]

SAME—TENNESSEE STATUTE.—An action brought under such section, in which the right of recovery is based on an alleged exorbitant charge made by defendant to plaintiffs for manufactured articles purchased, by reason of a combination or trust entered into by defendant with others for the purpose of monopolizing trade in violation of the act, is for an injury to personal property, and comes within Shannon's Code Tenn. § 4470, which prescribes a limitation of three years for "actions for injuries to personal or real property," being, in effect, the same as an action on the case for the recovery of the money which plaintiffs were illegally compelled to pay in excess of the fair market value of the articles purchased.

On Demurrers to Pleas Interposing the Defense of the Statute of Limitations of Tennessee.

Pritchard & Sizer, for Manion & Co.

C. P. Gore, *L. A. Dean*, *Westmoreland Bros.*, and *J. L. Faust*, for city of Atlanta, Ga.

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[a] Judgment reversed by the Circuit Court of Appeals, Sixth Circuit, with directions to grant a new trial (127 Fed., 23). See p. 299. Affirmed by Supreme Court Dec. 3, 1906 (203 U. S. ——). Not yet officially reported.

[b] Syllabus copyrighted, 1900, by West Publishing Co.

Brown & Spurlock, for Chattanooga Foundry & Pipe Co.

[901] CLARK, District Judge.

These suits are brought to recover damages under section 7 of the so-called "Anti-Trust Act" of congress of July 2, 1890, which reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The first-named case is a suit on behalf of the city of Atlanta, Ga., a municipal corporation, and the second on behalf of plaintiffs, who aver that they are contractors engaged in the business of furnishing and laying gas, water, and sewer pipes in the city of New Orleans, La. The defendant heretofore has been, and now is, engaged in the business of manufacturing and selling cast-iron pipe and fittings, used for the purposes of public drainage and sewerage, and by gas and water companies in the business of operating gas and water plants. The declarations in the two cases vary slightly in the form of statement of the case. Both suits are actions on the case, and, in substance, proceed upon the ground that the defendant entered into an unlawful trust or combination with others for the purpose of monopolizing trade in violation of the anti-trust act. The trade combination or trust complained of here was involved in *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, Adv. S. U. S. 96, 44 L. Ed. ——, and is there fully described. The plaintiffs in each case became purchasers of the manufactured product of the defendant in large quantities, and at prices set out in the declarations. It is charged with sufficient detail that by reason of the unlawful combination and trust contract entered into, the defendants were enabled to advance, and did advance, the price on their manufactured goods, and that the plaintiffs were, in consequence, compelled to pay an exorbitant and unfair price, which is called a "bonus," on the goods purchased. The estimated difference between the just and fair market price of the goods and the price actually

paid is stated in figures, and the specific damages claimed are laid at this difference between the fair price of the goods and the trust price paid, the declarations concluding with an averment of the right to increase the actual damages sustained threefold, as authorized by the act. Besides other pleas, the defendant interposes as a defense the state statute of limitations of one and three years, as found in the Code of Tennessee (Shannon's Revisal), §§ 4469, 4470,—the former section prescribing a limitation to actions for statute penalties, injuries to the person, and other civil wrongs, not necessary to be noticed; and the latter prescribing a limitation period of three years for injuries to property, real and personal. To these pleas the plaintiffs demur upon the ground that section 1047 of the Revised Statutes applies to the actions, and that the state statute is inapplicable.

The case, in respect of the issues thus presented, turns in part on the distinction between a penalty, as such, imposed by statute for a breach of its provisions, by way of punishment for the act, **[902]** and in the public interest on the one hand, and a private remedy conferred on a person specially injured by the unlawful act, and by way of compensation for the injury sustained, on the other. If the action authorized by section 7 is a penalty in the sense indicated, it might be conceded for the moment, or for the purposes of the question now to be decided, that section 1047 of the Revised Statutes would be applicable, and under that view the demurrer would be well taken. On the other hand, if the suit is not in its nature and substance a penal action, but a civil remedy for a private injury, compensatory in its purpose and effect, the action is subject to the state statute of limitations applicable to cases of this class, if there be such a statute. *Campbell* v. *City of Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 240; *Brady* v. *Daly*, 175 U. S. 148, 20 Sup. Ct. 62, Adv. S. U. S. 62, 44 L. Ed. ——. In the last case cited Mr. Justice Peckham, giving the opinion of the court, said:

"The court below was, as is stated in the opinion, somewhat influenced in its decision of this question by the belief that, if this were not a penal statute, there was no federal statute of limitations applicable to it, and said that it could hardly be supposed that it was the

intent of congress to permit such a statutory rate of damages to run without federal statutory limitation. If there were no such federal statute, then the state statute would apply. Although not an action to recover a statutory penalty or forfeiture, still, in the absence of any federal statute of limitations, it would be limited by the limitation existing for the class of actions to which it belongs in the state where the action was brought. *Campbell* v. *City of Haverhill*, 155 U. S. 610, 614, 15 Sup. Ct. 217, 39 L. Ed. 270."

See, also, *Cockrill* v. *Butler* (C. C.) 78 Fed. 679.

Section 1047 of the Revised Statutes prescribes limitations as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: provided, that the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property."

It is necessary, therefore, to determine the question whether the suits are essentially penal or civil actions in their object and result. This question whether the action authorized is intended as a punishment or as compensation obviously involves the distinction between a civil remedy and a penal action in its primary or international meaning, this being the sense which was under consideration in the leading case of *Huntington* v. *Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, in which Mr. Justice Gray, for the court, said:

"In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws."

In the previous case of *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, Mr. Justice Gray, for the court, had said:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, [903] but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties."

In *Huntington* v. *Attrill* [1893] App. Cas. 150, before the privy council of England, precisely the same question was in

judgment as that involved and decided in *Huntington* v. *Attrill*, *supra*, the suit being between the same parties. Lord Watson, delivering the judgment of their lordships, quoted the above passage from *Wisconsin* v. *Pelican Ins. Co.*, rendering in italics the words "but to all suits in favor of the state," and then went on to say:

"Their lordships do not hesitate to accept that exposition of the law which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the state whose law has been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the state law, as well as against individuals who may be injured by their conduct. But foreign tribunals do not regard these violations of statute law as offenses against the state, unless their vindication rests with the state itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the state, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an actio popularis pursued, not in his individual interest, but in the interest of the whole community."

In Dicey, Confl. Laws, p. 220, the general proposition is laid down (as rule 40) that the high court of justice in England cannot entertain an action for the recovery of a penalty due under the laws of a foreign country, or an action on a foreign judgment for such penalty. Upon the authority of leading cases cited, the rule is then commented on as follows:

"What is a penal law? The application of rule 40 raises the difficult question, when is a law to be considered a penal law? Or, what is really the same inquiry under another form, when is an action to be considered a penal action? These inquiries are to be answered as follows: A 'penal law' is strictly and properly a law which imposes punishment for an offense against the state; and a 'penal action' is a proceeding for the recovery, in favor of the state, of a penalty due under a penal law. A law, on the other hand, is not a penal law merely because it imposes an extraordinary liability on a wrongdoer, in favor of the person wronged, which is not limited to the damages suffered by him; and an action for enforcing such liability by the recovery of the penalty due to the person wronged is not a penal action. The essential characteristic, in short, of a penal action is that it should be an action on behalf of the government or the community, and not an action for remedying a wrong done to an individual. A proceeding, then, in order to come within rule 40, must be in the nature of a suit in favor of the state whose law has been infringed."

This question of distinction between penal actions brought

by a common informer, or on behalf of the state, to redress a public wrong, and remedial actions brought by the party injured to redress a private wrong, has been under consideration in many adjudged cases. 13 Am. & Eng. Enc. Law (2d Ed.) 52; 16 Enc. Pl. & Prac. 229, where the subject will be found fully treated, and the cases cited.

[904] It is quite obvious that no sound reason could be suggested why congress would have been concerned in prescribing a limitation to actions for penalties or forfeitures other than such as are prescribed in favor of the United States for breaches of public law, punishable by pecuniary mulct, or otherwise, at the instance of the United States. In *Campbell* v. *City of Haverhill*, the court said:

"Is it not more reasonable to presume that congress, in authorizing an action for infringement, intended to subject such action to the general laws of the state applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction."

This language is equally applicable to the remedy provided by section 7 of the act in question.

In examining the question of what "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," is within the purpose and meaning of section 1047, it would seem that reference may, with propriety, be made to section 919 as possibly throwing light on the inquiry, in which it is provided that:

"All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States."

The action provided for in section 7 of the act could neither be brought in the name of the United States, nor prosecuted as a popular or qui tam action, the remedy being expressly restricted to the party "injured in his business or property." The phraseology of the proviso in section 1047 must be regarded as somewhat significant as to the character of the prosecution within the legislative purpose.

In view of these and other provisions of the Revised Statutes, and of the doctrine of more recent cases, it seems permissible to entertain serious doubt whether section 1047 applies, or was intended to apply, to suits other than those prosecuted in behalf of the United States. But, be this as it may, I conclude that this is not a penal action, and the recovery sought is not a penalty within the sense here involved, which is substantially the same as the international sense.

In *Brady* v. *Daly* the case was considered with reference to jurisdiction, as well as the statute of limitations, and the case at bar, in principle, is undistinguishable from that case, and is governed by it. Mr. Justice Peckham, giving the opinion of the court (page 154, 175 U. S., page 64, 20 Sup. Ct., page 64, Adv. S. U. S., and page ——, 44 L. Ed.), said:

"The statutes, it will be perceived, all use the word 'damages' when referring to the wrongful production of a dramatic composition. No word of forfeiture or penalty is to be found in them on that subject. It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong, and to grant to the proprietor **[905]** the right to recover the damages which he has sustained therefrom. The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter."

The reasoning thus adopted is forcibly applicable to the cases at bar.

In *Pidcock* v. *Harrington* (C. C.) 64 Fed. 821, the main question was whether the anti-trust act conferred on a private person a right to sue in equity to restrain the act forbidden by the statute. It was determined that an action at law for damages was the only remedy of a private person. In analyzing the statute, Judge Coxe said:

"The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribes the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a

public act providing no private remedy. If it ended with section 6, there would probably be no pretense that it sanctioned a suit like the one at bar. What follows, however, in no way strengthens the complainant's position. The only section which gives a private remedy is the seventh, which is as follows." Then, setting out section 7 in the very language of the statute, the court proceeded to say: "But for this section, no private person would have any standing in court, and, as the only right conferred by it is the right to sue for damages in a court of law, it follows that the point presented by the demurrer is well founded. The precise question was decided in favor of the views here expressed in *Blindell* v. *Hagan* (C. C.) 54 Fed. 40, affirmed in 56 Fed. 696, 6 C. C. A. 86."

See, also, 14 Enc. Pl. & Prac. 55.

It is insisted by plaintiffs' counsel that, in so far as the statute authorizes the recovery of damages above those actually sustained, the actions must be regarded as penal. As, undoubtedly, the chief object of this section of the statute is remedial and protective, the fact that damages above actual compensation are allowed would not change the real character of the action. In many civil actions for the redress of private wrongs, exemplary or punitive damages may be allowed by the court or jury, but this does not make the action penal. As was said by the supreme court of the United States in *Railway Co.* v. *Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463:

"The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages."

In suits for the infringement of patents in the event a verdict is rendered for the plaintiff, the court is expressly authorized to enter judgment for any sum above the amount found by the verdict as actual damages, not exceeding three times the amount of the verdict, together with the costs (Rev. St. § 4919); and under section 4921, a court of equity, when exercising jurisdiction, is empowered in like manner to increase the damages found; the statute providing:

"And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case."

[906] Nevertheless, *Campbell* v. *City of Haverhill* was an action on the case for infringement of letters patent, in which it was adjudged that the statute of limitations of the several states applied to such actions, and the suggestion that the

action was penal evidently did not occur to counsel or the court.

Another view affecting the proper interpretation of the statute should be mentioned in closing the discussion of this point in the case. Section 3 of the statute declares unlawful and prohibits every trade combination or trust contract, and inflicts punishment for a violation of the statute by enacting that:

"Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

It would be unusual to discover that a statute inflicted punishment for infringement of its provisions by fine and imprisonment, or either, and again in the form of pecuniary penalty for the same act. A sound rule of interpretation would be that when a statute inflicts punishment by way of fine and imprisonment at the suit of the state for a public wrong affecting the whole community, and also confers a remedy on a party for private injuries resulting from breaches of the statute, the latter will not be regarded as a penalty unless the statute so declares. It was accordingly so decided by the supreme court of Ohio in *Railway Co.* v. *Methven*, 21 Ohio St. 586. A statute providing for a fine or penalty usually either fixes the amount, or prescribes maximum and minimum limits within which the amount must be fixed by the court or jury, as the punishment, and the amount bears no direct relation to damages sustained by private injury. The amount of damages which may be recovered in the remedial action afforded by section 7 of the act in question is determined by the injury sustained, and the actual compensation therefor increased to treble that amount. The damages actually claimed here in the first case are laid at the sum of $50,000, and in the second $20,000. The great disproportion between these sums and the maximum limit of the fine imposed by section 3 is a circumstance admitting of no rational explanation, if the damages recovered under section 7 must be regarded as a penalty inflicted as punishment, like the fine imposed under section 3. These and other characteristic points of difference between

penal and remedial actions support the conclusion arrived at that these actions are remedial and compensatory only.

The question now remains whether the statute of limitations of the state relied on is applicable to these actions, or actions of the class to which they belong. The statute (Shannon's Code, § 4466) expressly declares the legislative purpose and intent to prescribe a bar to "all civil actions other than those for causes embraced in the foregoing article," the limitation of real actions having been provided in the preceding article. Sections then follow prescribing a period of limitation to various suits, such as actions for injuries to the per- **[907]** son, and statute penalties, among which is section 4470, which reads as follows:

"Actions for injuries to personal or real property; actions for the detention or conversion of personal property, within three years from the accruing of the cause of action."

The words "personal and real property" are by the Code itself (section 63) thus defined:

"The word 'property' includes both personal and real property; the words 'personal property' include money, goods, chattels, things in action, and evidences of debt; 'real estate,' 'real property,' 'lands,' include lands, tenements and hereditaments, and all rights thereto and interests therein, equitable as well as legal."

A definition of "personal property," as given by a critical writer, and fully sustained by authority, is in these words:

"Personal property includes every kind of chose in action, using that term in its very widest sense. It includes, that is to say, every movable which cannot be touched, or intangible movable. Thus it includes 'debts,' in the strict sense of the term, and also everything (not an immovable) which can be made the object of a legal claim; as, for example, a person's share in a partnership property." Dicey, Confl. Laws, p. 313.

See, also, 1 Schouler, Pers. Prop. (3d Ed.) 2–17.

It will be observed that by the very terms of the act of congress, the remedy of a suit to recover damages is only conferred on "any person who shall be injured in his business or property." The suits in these cases must, therefore, necessarily be construed as actions to recover damages for an injury to "business or property."

The plaintiff in the first-named case is engaged in no business whatever, and the plaintiffs in the second case are engaged in the business of taking contracts to furnish and

place in position pipes and fittings. They do not deal in or handle pipes and fittings as merchants or dealers would do. It will admit of question whether, in an action under the statute for an injury to business alone, it would not be necessary for a plaintiff to allege that he was engaged in interstate trade or commerce, in order to come within the protection of the act. *Dueber Watch-Case Mfg. Co.* v. *E. Howard Watch & Clock Co.* (C. C.) 55 Fed. 851; *Bishop* v. *Preservers' Co.* (C. C.) 51 Fed. 272. In *Lowry* v. *Association* (C. C.) 98 Fed. 817, facts are disclosed which, in respect of both the character of business and method of injury to such business, bring the case within the anti-trust act. However, the injuries alleged in the declarations as grounds for recovery are not injuries to any business in which the plaintiffs were engaged. The suits are clearly for the recovery of the difference between the fair market value of the goods purchased and the unlawful prices arbitrarily fixed by the trust combination; or, stated in another form, the suits are to recover back, as damages, the sums of money unlawfully demanded and paid, increased threefold by the express direction of the act. Now, money has been declared to be personal property, not only by state statute, but again and again by text writers and in judicial statement. Confessedly, the declarations present no case of an injury to property at all unless it is personal property. I am unable to perceive that the actions are for injuries other than to personal property.

[908] The contention, finally, is that section 4470 of Shannon's Code of Tennessee is applicable only when the injury is direct. Such an interpretation would disregard all progress, and carry us back to the old action of trespass. Before the reformed code systems of pleading adopted in most of the states, the action on the case had, by wide application, become the remedy of every wrong or injury to personal property to which trespass would not apply. Trespass upon the case would lie for every civil wrong to chattels personal, whether corporeal or incorporeal, and whether the injury was direct and immediate or indirect and consequential. And. Steph. Pl. § 52; Bish. Noncont. Law, § 45; Cooley, Torts (2 Ed.) 510; Poll. Torts (5th Eng. Ed.) pp. 13, 22,

495. See, also, *Carrol* v. *Green*, 92 U. S. 509, 23 L. Ed. 738; *Railway Co.* v. *Clark*, 38 U. S. App. 573, 20 C. C. A. 447, 73 Fed. 76, 74 Fed. 362; *Cockrill* v. *Butler* (C. C.) 78 Fed. 679. No valid reason could be suggested for a construction of the statute which would restrict its application within such narrow limits in view of the wide and various applications of actions on the case. The words of the statute, "actions for injuries to personal or real property," are general, and in no wise restricted by the specific mention of actions for detention or conversion. If, indeed, money unlawfully obtained as alleged in these declarations is not a direct injury, the civil wrong belongs to a class for the redress of which trespass on the case had been a long-used remedy at the time of the adoption of the Code. In 1 Add. Torts (6th Ed.) § 27, it is said:

"If one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money is, in contemplation of law, not the money of the wrongdoer, but of the injured person, whose title to it cannot be destroyed and annulled by the fraudulent and unjust dispossession."

The author then, declaring that an action will lie to recover back money paid under such conditions, continues:

"Such an action also lies against all persons who extort money for doing what they are by law bound to do without payment or reward, or who receive, and have in their possession, and wrongfully detain, the money of another; 'for,' as it has been observed, 'no man will venture to take, if he knows he is liable to refund.'"

The doctrine is supported by reference to cases in which it was decided that money may be recovered back when wrongfully paid under different circumstances. Thus, excessive charges demanded by a carrier of goods for transportation, and paid by the consignee in order to get possession, would support an action to recover back the excess. So, of money paid under the coercion of threatened litigation, or money unlawfully demanded and received by a revenue officer for the release of goods seized, or other like payments wrongfully demanded and taken. In 2 Greenl. Ev. (16th Ed.) § 224, the distinction between an action of trespass and an action on the case is stated clearly, and in the fewest words possible, thus:

"By the former, redress is sought for an injury accompanied with actual force; by the latter, it is sought for a wrong without force."

[909] And in reference to the character of the injury which would support an action on the case it is further observed:

"So, though the property was forcibly taken, the force may be waived, and trover, which is an action on the case, may be sustained, for the value of the goods." Id. § 226.

The extended use of the action of trespass on the case is well indicated by the following definition, which has been generally accepted as accurate:

"The writ of trespass upon the case lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not apply." And. Steph. Pl. § 52.

See, also, upon this subject, *Cockrill* v. *Butler* (C. C.) 78 Fed. 679, and authorities there cited.

The circumstance that an exorbitant price for a commodity arbitrarily fixed by a trust combination is demanded and received through the medium of a contract of purchase in no wise affects or changes the real nature of the injury as an unlawful taking and detention. "The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment." Poll. Torts (5th Ed.) p. 23.

In *Conk* v. *Railroad Co.*, 1 Tenn. Cas. 409, possession of the goods was obtained through a contract for transportation, and the action was for the value of the goods. "The action," said the supreme court, "is for the detention or conversion of the plaintiff's property. It is true, the contract for carrying the goods is averred, and that the defendant failed to comply with it. Yet the gist of the action is the detention or conversion of the property, by which it was lost to the plaintiff." It was held that three years was the limitation.

In the light of this exposition of the law in respect of the form and proper application of the older and well-defined remedies, the inquiry into the legislative purpose disclosed in the section of the Code with which I am dealing ought not to

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involve a question of interpretation which will not admit of satisfactory answer. The Code of 1858 is a systematic compilation enacted as such, every part of which must be read in view of this circumstance, and not as an independent enactment. Forms of actions were abolished by the Code, and the statute of limitations does not depend on the form, but on the cause, of action. *Conk* v. *Railroad Co.*, 1 Tenn. Cas. 409. In construing the words "actions for injuries to personal or real property," as found in section 4470, it seems allowable to refer to sections 4437 and 4438 in the preceding chapter, under the same title, both chapters belonging to part 3 of Shannon's Code, which treats "Of the Redress of Civil Injuries." In the sections last referred to the Code undertakes to deal with all actions in the well-recognized classes of actions ex contractu and ex delicto, and to completely abol- **[910]** ish forms of action. Section 4437 declares that "all contracts may be sued on in the same form of action," and section 4438, dealing with the general subject of torts, provides that "all wrongs and injuries to the property, in which money only is demanded as damages, may be redressed by an action on the facts of the case." No valid reason could be offered to support an interpretation which would give to the words "actions for injuries to personal or real property," in section 4470, a meaning more restricted than the sense in which the words "all wrongs and injuries to the property" are used in section 4438. It is hardly to be doubted on any substantial ground that the legislative purpose in both sections was to include and provide for every species of injury to personal property included in the more general or collective name of torts or civil wrongs. The new remedy provided by congress must be enforced just as like actions within the same jurisdiction (*Campbell* v. *City of Haverhill; Cockrill* v. *Butler*), in accord with Rev. St. § 914. The actions are, therefore, prosecuted according to Shannon's Code Tenn. § 4438, as actions "on the facts of the case"; and, agreeably to Rev. St. § 721, as expounded in the cases last cited (also, *Brady* v. *Daly*), the state statute of limitations furnishes the rule of decision.

Having regard to the real nature and purpose of the actions, I conclude that they are suits for an injury to personal property, and within section 4470 of the state statute of limitations prescribing a period of three years as a bar to such suits. It follows, of course, that section 4469 is inapplicable. Accordingly, the demurrer as to the second plea is sustained, and as to the third plea overruled.

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[594] GIBBS *v.* McNEELEY ET AL.[a]

(Circuit Court, D. Washington, W. D. June 8, 1900.)

[102 Fed., 594.]

MONOPOLIES—ACTION UNDER ANTI-TRUST LAW—PLEADING.—A complaint in a civil action, based on the anti-trust law of 1890, alleging an illegal combination by defendants in restraint of trade, is fatally defective, where it fails to show that plaintiff has suffered damage by reason of such combination.[b]

SAME—ILLEGAL COMBINATIONS WITHIN THE STATUTE—RIGHT OF ACTION FOR DAMAGES.—An association of manufacturers of shingles within a particular state, formed for the purpose of securing concerted action between its members to prevent overproduction and establish uniform prices and grading, is not an illegal combination in restraint of interstate or foreign commerce, within the meaning of the anti-trust law of 1890, or subject to federal control; and the fact that through the action of the association the mills of its members were closed for a certain time, and the price of shingles was raised, but not to an extent alleged to be unreasonable or exorbitant, does not give a dealer in shingles for export a right of action against it or its members under such law.

SAME.—The action of an association of manufacturers in adopting a resolution denouncing a dealer in the product they manufactured, who bought and shipped such product to customers in other states and foreign countries, and in printing such resolution in circulars, and mailing the same to other manufacturers and customers of the dealer, whereby his business was injured, constituted an illegal combination or conspiracy in restraint of interstate and foreign commerce, and gives the person injured a right of action in a circuit court of the United States, under the anti-trust law of 1890, to recover the damages sustained.

[a] Verdict for defendants directed by Circuit Court (107 Fed., 210). See p. 71. Reversed by Circuit Court of Appeals, Ninth Circuit (118 Fed., 120). See p. 194.

[b] Syllabus copyrighted, 1900, by West Publishing Co.

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Action to recover damages claimed on account of an unlawful combination to restrain interstate and foreign commerce, and a conspiracy on the part of the defendants to establish and control prices of the product of the mills employed in manufacturing red-cedar shingles, in the state of Washington, and to limit the production of red-cedar shingles so as to prevent demoralization of the market by overproduction, and also to recover damages alleged to have been caused by the defendants and others, forming an unincorporated association of shingle manufacturers under the name and style of the Washington Red-Cedar Shingle Manufacturers' Association, by the circulation through the mails and publication of false and defamatory statements concerning the plaintiff, and intended to injure him in his business as a buyer and exporter of red-cedar shingles. Demurrer to complaint overruled.

T. O. Abbott, for plaintiff.

Bates & Murray, for defendants.

HANFORD, District Judge.

The plaintiff's amended complaint sets forth four separate causes of action. The material allegations to be considered may be condensed into a few sentences. The plaintiff shows that for several years he was engaged in business at Tacoma, in the state of Washington, as a buyer and exporter of red-cedar shingles; that red-cedar shingles are a staple article of manufacture in the state of Washington, the market for which is mostly in other states and in Canada; that the defendants, and other persons, firms, [595] and corporations named in the complaint, are manufacturers of red-cedar shingles, owning and operating mills in several different places in this state, and that they have formed and constitute an unincorporated association having for its object the prevention of injurious competition, and that the organization and maintenance of said association is in violation of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (1 Sup. Rev. St. [2d Ed.] 762). For a second cause of action the complaint alleges, in addition to

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the matters already recited, that the association has established prices for red-cedar shingles below which members are not allowed to sell, said prices being a little higher than the market prices prior to the formation of the association; that the plaintiff's customers refused to buy at the prices fixed by the association, causing him damage in the loss of trade to the amount of $1,200. For a third cause of action the complaint alleges, as additional matter, that the association caused all the shingle mills owned and operated by its members to shut down for a period of 60 days for the purpose of preventing an oversupply, and that by restricting the production of red-cedar shingles the plaintiff sustained further damages by loss of trade to the amount of $1,000. For a fourth cause of action the plaintiff charges that the defendants and other members of the association, with intent to injure the plaintiff and to destroy his business, at a meeting of the central committee of the association, adopted certain resolutions containing false and defamatory statements concerning the plaintiff, charging that the plaintiff was endeavoring to injure the market for Washington red-cedar shingles; that plaintiff had no money invested in his business as a dealer in shingles; that he was without credit, and was irresponsible, and was not an honorable and legitimate dealer in shingles; that the officers of the association caused said resolutions containing said false and defamatory matters to be written and made a part of the records of the association, and caused the same to be printed as a circular, and to be distributed through the United States mails, addressed to each manufacturer of shingles in the state of Washington, and to various wholesale and retail dealers, including customers of the plaintiff in the United States and Canada, and to a number of newspapers and trade journals having circulation among the plaintiff's customers; that as the result of said combination and conspiracy among the defendants and other members of said association, and of the acts and things complained of, odium and discredit were cast upon the plaintiff, and his customers thereafter refused to buy shingles of him, and the manufacturers of shingles who theretofore had transacted business with him refused

to sell shingles to him, and by that means his business was totally destroyed, to his damage in the sum of $15,000.

1. The complaint in its statement of the first cause of action is radically defective, in this: that it does not allege that any damage has resulted to the plaintiff from the acts complained of, and for that reason the demurrer will be sustained.

2. The gist of the second cause of action is that the plaintiff has been damaged by diminution of trade in consequence of the action of the association in raising the price of shingles; and the third cause of **[596]** action is similar, the complaint being that a shrinkage of the plaintiff's business was caused by the action of the association in suspending the operation of mills controlled by it, so as to prevent an overstocking of the market. Both of these causes of action appear to be predicated upon a notion that because the plaintiff was a buyer and exporter of shingles he had a vested right to the benefit of unrestrained competition for trade among manufacturers, and that the plaintiff has a vested right at all times to have a surplus of shingles on the market so that he may enjoy that advantage in buying to supply the demands of his customers, and that by depriving him of these benefits and advantages the association has committed a legal wrong, and deprived him of valuable property rights, for which he is entitled to recover damages. There is no allegation in the complaint that the price of shingles fixed by the association is higher than the reasonable price, considering the necessary cost of production, and allowing something for the value of the timber to the owners of the land upon which it grows, and a reasonable profit to the manufacturers, nor that the wants of consumers have not been promptly supplied. On the contrary, the pleader has boldly advanced the selfish theory that, unless conditions are maintained so that a middleman or speculator may operate with profit to himself, he has a right to compensation in damages from the owners of mills who refuse to operate for his benefit, or to sell the product at prices satisfactory to him, regardless of losses which may result to them from such operation. It is a well-known and lamentable fact that for half a century loggers have been permitted to cull the magnificent

forests of this state, wasting the greatest of her natural endowments, by cutting fir and cedar trees recklessly, sending only the best logs to the mills to be manufactured into lumber for shipment to market in distant states and countries, leaving the residue to decay upon the ground, or give additional energy to the destructive force of forest fires in the summer months. They have paid but little for stumpage, and frequently their hired laborers have been defrauded of their wages. Unrestrained competition has been the means by which this state has been stripped of its wealth. Cedar trees standing and growing in our forests are a blessing to the state, and they ought to be preserved, at least until their value is appreciated, so that the crop which has required many centuries of time for its perfection will be worth to owners of the land something more than the price which a farmer may reasonably expect for his annual production. It seems ridiculous that while land producing wheat, hay, vegetables, or fruit in this state usually brings annual returns over and above expenses of cultivating and harvesting of from $10 to $50 per acre, the average market price for a fee-simple title to timber land in western Washington has never yet been above $10 per acre. An association which will check the wanton destruction of cedar trees in this state, by reckless lumbermen, for the benefit of speculators, instead of being condemned, deserves the gratitude of the commonwealth. No principle of natural justice is appealed to by that part of the complaint now under consideration, and I do not think that the act of congress commonly designated as the "Anti-Trust Law of 1890," to which the complaint refers, can be fairly construed so as **[597]** to make the Washington Red-Cedar Shingle Manufacturers' Association a criminal organization, so long as its operations are properly conducted, and kept within the scope of the object for which the association was formed, as set forth in its constitution, the first article of which reads as follows:

"The title of this organization shall be the Washington Red-Cedar Shingle Manufacturers' Association, and its object shall be to secure a full understanding of the conditions surrounding the red-cedar shingle market throughout the United States; the establishing of uniform rules for grading and manufacturing; the establishing of uniform rates and prices; and for purpose of carrying out such other measures as

may be deemed for the welfare and in the interest of the manufacturers of red-cedar shingles."

There is in this declaration no hint of a purpose to create a monopoly, or to place any burden upon interstate or foreign commerce. The association, judged by the instrument which defines its object and circumscribes its powers, is innocent of any wrong intent, because its object is to influence the conduct of its members, and not to assail the rights of others. Concert of action for mutual protection among farmers or craftsmen or miners whose operations are entirely within the state may indirectly affect the prices or the abundance of commodities brought for sale within the state by importers, as well as commodities produced within the state for sale elsewhere; but associations of persons not themselves engaged in interstate commerce, having no object other than to protect their own rights and serve their own interests in business operations wholly confined within the state, cannot be held to be amenable as violators of the anti-trust law, which is necessarily so limited as to reach only combinations intended to prevent competition in interstate or foreign commerce.

The distinction between the business of manufacturing staple commodities for sale to whomsoever will buy, whether for home consumption or transportation to distant markets, and interstate commerce, is very clearly brought into view, and the principle upon which I intend to rest in making this decision is explained, in the opinion by Chief Justice Fuller in the case of *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1–11, 15 Sup. Ct. 253, 39 L. Ed. 329. The sense of that decision is epitomized in the following excerpts:

"The relief of the citizens in each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with, and this court has recognized their possession of that power, even to the extent of holding that an employment or business carried on by private individuals, when it became a matter of such public interest and importance as to create a common charge or burden upon the citizen,—in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by the means of which a tribute can be exacted from the community,—is subject to regulation by state legislative power. On the other hand, the power of congress to regulate commerce among the several states is also exclusive. The constitution does not provide that interstate commerce shall be free, but, by the grant of this legislative power to regulate it, it was left free except as

congress might impose restraints. * * * 'Commerce undoubtedly is traffic,' said Chief Justice Marshall; 'but it is something more; it is intercourse. * * * That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.' *Gibbons* v. *Ogden*, 9 Wheat. 189–210, 6 L. Ed. 23; *Brown* v. *Maryland*, 12 Wheat. 419–448, 6 L. Ed. 678; *License Cases*, 5 How. 505–599, 12 L. Ed. 256; [598] *Mobile Co.* v. *Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Bowman* v. *Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *In re Rahrer*, 140 U. S. 545–555, 11 Sup. Ct. 865, 35 L. Ed. 572. * * * Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not a primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. * * * The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state, and belongs to commerce. * * * Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade; but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy. * * * It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such, or to limit and restrain the right of corporations created by the states or citizens of the states in the aquisition, control, or disposition of property, or to regulate or prescribe the price or prices at which such property or the product thereof should be sold, or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted."

See, also, *Kidd* v. *Pearson*, 128 U. S. 1–26, 9 Sup. Ct. 6, 32 L. Ed. 346.

The more recent decision of the supreme court in the case of *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211–248, 20 Sup. Ct. 96, Adv. S. U. S. 96, 44 L. Ed. ——, does not conflict with the decisions above cited. That case is to be distinguished from the one under consideration by the fact that it involved an agreement between manufacturing firms and corporations located in several states, binding themselves to refrain from all competition with each other for

the sale of iron pipe in the 36 states and territories named in the agreement.

The history of the hop industry in this state may be referred to as an illustration. There was a time when the production of hops was a favorite industry in this state, but during several years past it has grown more and more into disfavor because it has been unprofitable, and interstate commerce in this commodity has been diminished by reason of the conversion of many hop fields into meadows and vegetable gardens. It may be true that the hop farmers, acting individually and without advice from any one, have, one after another, converted their hop fields; but if they had joined an association of farmers who for general welfare had adopted efficient measures to obtain true information with regard to the supply and demand for hops and other products of the state, and had conformed to an intelligent resolution of the association to meet an increasing demand for onions, potatoes, and hay, instead of continuing to lose the value of their labor and the use of their farms, year after year, by producing **[599]** hops in excess of the requirements of the market, it would certainly be tyrannical for the courts to punish them for resulting losses of profit by dealers and speculators in hops. In my opinion, it would be equally absurb to apply coercive measures to compel shingle manufacturers to operate their mills without profit to themselves, or to forbid them to have the benefit of cooperation for their own advantage. The demurrer to the second and third affirmative defenses will be sustained on the ground that the object of the association is not unlawful. The anti-trust law was not intended to oppress any class, and it cannot be so construed as to prohibit the right of manufacturers, whether acting individually or in concert, to be prudent, and use common sense in maintaining reasonable prices, and avoiding losses by overproduction.

3. According to the statement of the fourth cause of action, the association appears to have been used for a purpose not suggested by its constitution, and highly prejudical to the plaintiff. In my opinion the complaint states a good cause of action to recover damages for libel, and the only

question as to the right of the plaintiff to maintain the action in this court is whether the facts alleged make a case of which jurisdiction is given to this court by the terms of the anti-trust law. The first and second sections of the act declare contracts, combinations, and conspiracies in restraint of trade or commerce among the several states or with foreign countries, and all attempts of persons to monopolize intersate and foreign commerce, to be illegal, and the seventh section reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fees."

It is essential to a right of action pursuant to this law to show that the defendants have entered into a combination or conspiracy to restrain or monopolize interstate or foreign commerce, and that the plaintiff has been injured in his business or property by an act of the defendants pursuant to their agreement with each other, and intended to affect interstate commerce, and the injury must be of a pecuniary nature, involving a loss of business or damage to property. I find that all the requirements of the statute are met in the plaintiff's statement of his fourth cause of action. He does directly and positively charge that the defendants have entered into a combination to restrain interstate and foreign commerce, and constitute an organization; that at a meeting of the central committee, controlling the affairs of the association, a resolution denouncing the plaintiff was adopted, and recorded, so as to be preserved in the records of the association; that said resolution was printed and widely distributed as a circular, and especially directed to persons, firms, and corporations in the state of Washingon, and in other states, and in Canada, with whom the plaintiff had theretofore transacted business as a buyer and exporter of shingles. The resolution was obviously intended to create a prejudice against the plaintiff, and to have the effect to impair his credit, **[600]** and to destroy his business, by in-

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ducing his customers to forsake him; and the claimant alleges that the plaintiff has been injured in his business by reason of what the defendants have done in pursuance of their unlawful combination against his business. The resolution is not a regulation of the conduct of the association or it members, and they were not minding their own business when they adopted it, but is an agreement on their part to assail the character of a man engaged in interstate commerce, for the purpose of crippling him as a competitor for trade. By annihilating a man of experience and skill in a particular branch of commerce, the restraint upon commerce is quite as effectual as would be any contract binding him to abstain from competition.

Demurrer to fourth cause of action overruled.

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[93] UNITED STATES EX REL. GRIGGS, ATTY. GEN., ET AL. *v.* CHESAPEAKE & O. FUEL CO. ET AL.[a]

(Circuit Court, S. D. Ohio, W. D. August 31, 1900.)

[105 Fed., 93.]

MONOPOLIES—CONTRACTS AFFECTING INTERSTATE COMMERCE.—A contract by which a corporation agrees to take the entire product of a number of persons, firms, and corporations engaged in mining coal and making coke in a certain district, which is intended for "Western shipment," to sell the same at not less than a minimum price, to be fixed by an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds above a fixed sum per ton, to be retained as "compensation,"—the stated purpose being "to enlarge the Western market,"—and under which the shipments are made into other states, is one affecting interstate commerce, and is subject to the provision of the anti-trust law.[b]

SAME—ANTI-TRUST LAW.—It is the declared policy of congress to promote individual competition in relation to interstate commerce, and to prevent combinations which restrain such competition between their members; and it is no defense to an action to dissolve such a

[a] Affirmed by Circuit Court of Appeals, Sixth Circuit (115 Fed., 610). See p. 151.

[b] Syllabus copyrighted, 1901, by West Publishing Co.

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combination as illegal under the anti-trust law that it has not in fact been productive of injury to the public, or even that it has been beneficial, by enabling the combination to compete for business in a wider field.

SAME—COMBINATION IN RESTRAINT OF TRADE.—By a contract between a fuel company and an association composed of 14 persons, firms, and corporations, engaged in producing coal and coke in a certain district, the company was to handle for a term of years the entire output of the mines intended for the Western market, and bound itself not to sell the product of any competing mines. A minimum price at which the coal should be sold was to be fixed by the executive committee of the association from time to time, and the company agreed to pay such price, to obtain as large a profit as possible, and to account to the association for all of the same, above a fixed sum per ton, which it was to retain as compensation. The amount to be furnished by each member of the association was also to be fixed by the executive committee, and each was to receive payment at the same rate, to be based on the average price realized for the particular grade furnished during the current month. *Held*, that such provisions were in restraint of trade, and rendered the contract illegal, under the anti-trust act of July 2, 1890 (26 Stat. 209), in so far as it related to interstate commerce.

In Equity. Suit to annul a contract and to dissolve a combination as illegal under the anti-trust law.

Wm. E. Bundy, United States Attorney, and *Sherman T. McPherson* and *Edward P. Moulinier*, Assistant United States Attorneys.

Paxton & Warrington, *Brown, Jackson & Knight*, *St. Clair, Walker & Summerfield*, and *Richard P. Ernst*, for defendants.

THOMPSON, District Judge.

This suit was brought by the United States district attorney for this district, by direction of the attorney general of the United States. The bill alleges that the defendants, other than the Chesapeake & Ohio Fuel Company, 14 in number, are producers and shippers of coal, and that some of these are makers and shippers of coke in the counties of Fayette and Kanawha, in the state of West Virginia, in what is known as the "Kanawha District," and that they produce nearly if not all of the coal, and make nearly if not all

of the coke, shipped from said district; that a [94] great portion of the coal and coke so produced and made is shipped for sale and consumption into the states of Ohio, Kentucky, Indiana, Illinois, Michigan, Minnesota, Montana, and the Dakotas; that prior to the 15th of December, 1897, each of the defendants, other than the Fuel Company, sold their product in the several states mentioned without any restriction other than the natural and necessary competition between themselves and others, but that on that day they entered into a contract and combination in the form of a trust and conspiracy in restraint of trade and commerce among the several states mentioned, in regard to the sale and production of coal and coke, of which the following is a copy:

"This agreement, made this 15th day of December, 1897, between the C. & O. Fuel Company, a corporation created, organized, and existing under and pursuant to the laws of the state of West Virginia, and hereinafter caller the 'Fuel Company,' of the first part, and the St. Clair Company, a corporation of West Virginia; John Carver and Enoch Carver, partners in business under the firm name and style of Carver Brothers; W. R. Johnson, M. T. Davis, doing business as M. T. Davis & Co.; John Carver and Enoch Carver, partners in business under the firm name and style of the Mecca Coal and Coke Company; S. H. Montgomery, doing business under the name of the Montgomery Coal Company; the Chesapeake Mining Company, a corporation of West Virginia; the Belmont Coal Company, a corporation of West Virginia; the Kanawha Splint-Coal Company, a corporation of West Virginia; the Robinson Coal Company, a corporation of West Virginia; Harry B. Smith, special receiver of the Lens Creek Coal and Coke Company; Joseph Renshaw, special receiver of the Big Black Band Coal Company; the Charlmore Coal Company, a corporation of West Virginia; and Robert Brabbin, Jr., and L. N. Perry, partners in business under the firm name and style of the Brabbin Coal Company; Jasper McCallister, Samuel Moore, and James Kelsoe, doing business as McCallister & Co.,—and together constituting the C. & O. Coal Association, and hereinafter collectively mentioned as the 'Coal Association,' of the second part: Whereas, the members of the said Coal Association are all miners and shippers of coal, and part of them makers and shippers of coke, on the line of the Chesapeake & Ohio Railway, in Fayette or Kanawha counties, West Virginia, and have formed and organized said association for the promotion of their common business interests in the mining of Kanawha coals and cokes; and whereas, the said Fuel Company has been incorporated and organized for the purpose of placing said Kanawha coals and cokes upon the Western market, its prime object to promote the sale of, and enlarge the Western market for, said coals and cokes: Now, therefore, this agreement witnesseth:

"(1) That the parties of the second part agree, in consideration of the covenants and agreements on the part of the party of the first part herein contained, each firm, individual, or corporation severally, for themselves, himself, or itself, and not for any other, and each of them doth hereby agree, to sell to the said Fuel Company exclusively the entire coal and coke output of the mine or mines operated by each of

them respectively on said C. & O. Ry., or branches thereof, for Western shipment, for a period of not less than five years from and after the date of January, 1898, subject to all the provisions, terms, and conditions hereinafter contained, except as to such coal as may be sold by any member of said Coal Association to the Chesapeake & Ohio Railway Company for the consumption of said railway company, which said coal such member shall have the right to sell to said railway company direct, it being understood that this contract applies only to the coal and coke to be sold west of the respective mines of the members of said Coal Association, and shall not in any way apply to or interfere with the Eastern trade of the members of said association.

"(2) The minimum price f. o. b. mines of all the various grades of coal and coke sold and to be shipped West by the members of said association, and embraced in this contract, shall be fixed by the executive committee of said Coal Association from time to time, as it shall see proper, after consultation with the executive committee of the Fuel Company. The said Fuel Company [95] covenants, agrees, and binds itself that it will make no contract for the sale of any coal or coke of any members of said association at a price lower than such minimum prices to be fixed by such committee, and, further, that it will at all times endeavor to obtain the maximum price for such coal and coke. It is understood and agreed that the minimum prices hereinbefore mentioned are net prices f. o. b. mines, and not including any profit to the said Fuel Company, which is to get its profit over and above said prices.

"(3) That the said Fuel Company shall make its sales direct, and shall not make any contract for the sale of coal and coke to a third party in the name of any member of the said Coal Association, and shall have no right by any contract to bind any member of said association to any third party, except for river business, as hereinafter provided for.

"(4) The executive committee of said Fuel Company, who shall administer and have charge of its affairs, shall be composed of three (3) persons, one of whom shall at all times be a member of or officer of a member of said Coal Association, and shall from time to time, according to the by-laws or articles of association of said association, be designated as a member of such executive committee, and shall thereupon be appointed such member of such executive committee by said Fuel Company in the place and stead of the member of or officer of a member of said Coal Association previously occupying such office. The executive committee of said Coal Association shall consist of three members of or officers of members of said Coal Association, to be selected as such from time to time by the members of said Coal Association according to their by-laws or articles of association.

"(5) The said Fuel Company covenants, agrees, and binds itself to sell for shipment by rail via the said Chesapeake & Ohio Railway, and pay for to the members of said Coal Association as hereinafter agreed, not less than 600,000 tons per annum of coal and 75,000 tons per annum of coke; such sales and shipments to be disposed of in as nearly equal monthly quantities as possible. But in case said Fuel Company is unable for any time to make sales of coal or coke by reason of the failure or inability of the members of said association to make prices sufficiently low to enable said Fuel Company to meet the prices in the market where said coal or coke is sought to be sold, and to compete with other sellers of coal or coke in such markets, then there shall be an abatement of the minimum amount of coal or coke hereinbefore agreed to be taken annually by said Fuel

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Company, bearing the same proportion to such minimum amount of coal or coke as such time during which such inability to meet such market prices shall continue does to one year. The executive committee of said Coal Association shall, not later than the 20th day of each month, designate the percentage of the total product of each class and grade of coal and coke which they deem best to be shipped by each member of said association by rail as aforesaid during the succeeding month, which apportionment so made shall be furnished the general manager of said Fuel Company not later than the 20th day of said first-mentioned month, and all orders received to be shipped by rail as aforesaid during such succeeding month shall be distributed between the members of said Coal Association by said general manager according to such apportionments: provided that, if any member of said Coal Association shall be unable or shall not desire to ship West the full amount of any kind or grade of coal or coke apportioned to such member for any month, the said Fuel Company shall distribute the order for the deficiency so caused among the other members of said association who are shippers of such grade of coal or coke, in the proportion as between such other members fixed by said committee for such month: provided, further, that only actual inability shall excuse a member of said association from shipping so much of the apportionment for any month [as (?)] shall be required by the said Fuel Company for contribution to contracts previously taken by said Fuel Company.

"(6) The said Fuel Company shall make and render to the members of the Coal Association accurate and complete reports of all coke and coal shipped by rail as aforesaid, as follows: (a) A daily report of all sales, showing the net prices of such sales. (b) A monthly report showing the tonnage of the various kinds and grades of coal and coke shipped by members of said Coal Association and weighed during the month, or weighed during such month though shipped during a preceding month, together with the average price [96] for each grade or kind of coal or coke so shipped and weighed, which average price shall be computed upon the basis of the actual price, less gross profits, if any, received for all coal or coke sold, and the minimum price, fixed as hereinafter provided, for such month for coal or coke not sold in such month; said report to be made not later than the 10th day of each month for all coal and coke weighed, or weighed during the previous calendar month. The coal and coke shipped and weighed or weighed during such month shall be paid for by said Fuel Company to the members of said Coal Association according to the average prices, determined as aforesaid, and upon the sale after the end of each month of any coal or coke shipped and weighed, or weighed but not sold during such month, the surplus, if any, arising after deducting from the actual price received the minimum price for such kind and grade of coal or coke for such month and profit shall be paid forthwith to the shippers of such grade of coal or coke for such month according to their tonnage of such kind or grade of coal or coke for such month. And the said Fuel Company agrees and binds itself to pay as aforesaid, in cash, on or before the 20th day of each month, for all coal and coke during the previous calendar month.

"(7) The said Fuel Company further covenants, agrees, and binds itself to handle only such coal and coke as are produced by the abovementioned members of said Coal Association, and not to handle, buy, or sell, for itself or on commission, any coal or coke produced by any other operator along said Chesapeake & Ohio Railway or branches thereof, or any coal or coke wherever produced, of the same grade as, or competing with, coal or coke produced by any of the members

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of said association, the prime object of this contract being to enlarge the sale of, and extend the Western market for, Kanawha coal and coke; and this shall not prevent the said Fuel Company from dealing in anthracite coal or New River coal or coke: provided, that New River coal or coke shall not be dealt in to the prejudice of, or sold as a substitute for, Kanawha coals and cokes: and provided, further, that in an emergency, and when absolutely necessary, other coals and cokes may be handled by said Fuel Company to meet such emergency. But no dealing in such anthracite, New River, or other coal or coke shall be done by said Fuel Company to an extent or in a manner incompatible with the prime object of this agreement, as hereinbefore recited.

"(8) That at any time, by a vote of two-thirds (⅔) of the members of said Coal Association, said Fuel Company may be allowed to handle any other coal or cokes for such time and upon such terms and conditions as may be prescribed by such vote.

"(9) The said Fuel Company is to receive a gross profit on all rail coal and coke sold, which shall not exceed ten (10) cents per ton of two (2,000) thousand pounds on any sale, which compensation shall be retained by said Fuel Company out of the monthly settlements of coal and coke sold; the true intent and meaning of this clause being that the Fuel Company shall get its profit over and above the net minimum price of said coal and coke f. o. b. mines as hereinbefore fixed, and, if the price at which said coal and cokes is sold by said Fuel Co. shall be sufficient to yield a sum exceeding said minimum price and gross profit of ten (10) cents per ton as aforesaid, then the difference shall be paid over to the members of said association in the manner and at the time hereinbefore mentioned, as they may be entitled under this agreement, as part of the purchase price to be paid for coal and coke by said Fuel Co.

"(10) The members of said association shall not be required to mine and ship coal when hindered or prevented by causes beyond their own control, such as strikes, accidents, refusal or inability of the carrier to provide transportation, &c.

"(11) The said Coal Association shall have the right once per month, through a committee not exceeding three in number, or a person designated by said committee, to examine the order, sales, and tonnage books of said Fuel Company.

"(12) The coal or coke of members of said Coal Association shipped in barges by river shall be handled by the said Fuel Company, as an agent, on the same terms and under the same conditions as are now established or may be hereafter established and prevail in Cincinnati market for the sale of river [97] coal, but the said Fuel Company shall not make time sales or extend credit without the consent of the shippers of such coal.

"(13) All settlements for coal or coke shipped by rail as aforesaid shall be made upon the scale weights of the Chesapeake & Ohio Railway Company, as ascertained at its weighing stations now established or that may hereafter be established.

"(14) It is distinctly understood that nothing herein contained shall be construed to render the said members of said association liable as partners, in any way, manner, or form, either as between themselves or with the said Fuel Company; each of said firms, corporations, and individuals contracting herein for themselves, itself, or himself, and not one for the other.

"(15) The said Fuel Company further covenants, agrees, and binds itself that neither it nor any of its officers, employés, or servants will, with its knowledge, directly or indirectly, in any way, manner, or form, engage or become interested in the buying or selling of

bituminous coal or coke in competition with the coal or coke of any of the members of said Coal Association, except under the terms and conditions of this agreement.

"(16) The members of said Coal Association above named, each for himself, itself, or themselves, and not one for the other, covenant and agree that the said members of said association will not sell or consign any coal or coke bound to points west of their respective mines, except under the terms and conditions of this agreement, during the period covered by this agreement, and that there shall be no pretended sale or lease of the property of the members of the said association made to evade this contract; but it is further understood and mutally agreed that this contract shall not be construed to prevent any bona fide sale, assignment, or lease of the respective properties operated by the members of said association, respectively, or the interest therein of any member of said association. And in case of such sale, assignment, or lease, the members of said association are not to be held responsible under this contract for the sale and delivery of any coal from such properties after such sale, assignment, or lease takes place. But in case the vendee, assignee, or lessee of any coal or coke property of any member of the Coal Association desires, he shall have the right to take the place of such member in this agreement.

"(17) And whereas, some of the members of said association have contracts for the sale of coal or coke, which cannot be completed until after this agreement goes into operation; and whereas, it is to the advantage both of such members and of said Fuel Company that such contracts be filled through said Fuel Company, it is further agreed that the members of said association having existing contracts to be completed during the period of this agreement shall on or before the 24th day of December, 1897, file with the general manager of said Fuel Company a memorandum of each of said contracts, and such of said contracts as are uncompleted on the first day of January, 1898, shall be completed through said Fuel Company; the Fuel Company to make no charge for its services in connection with such contract and collecting the proceeds of the same; said Fuel Company not to guaranty the collection of such proceeds, or be responsible for same unless collected by it. Such coal or coke so shipped on existing contracts shall not be taken into account in any way as a part of the traffic hereinbefore provided for in this contract, nor its prices taken into account in computing the average price for any month, but such as shall be shipped by rail shall be considered part of the minimum tonnage mentioned in the fifth clause of this agreement for the year in which it is shipped.

"(18) The said Fuel Company shall keep at its own expense one or more inspectors to examine and inspect from time to time, as often as may be necessary, the coal and coke produced, with a view of keeping up a proper standard of excellence. Should said inspector find coal or coke badly or improperly prepared, he shall immediately report all the facts in writing to the Fuel Company and to the operator preparing such coal or coke, and shipments from mine or mines producing such alleged improperly prepared coal or coke may be suspended after five (5) days' notice in writing to such operator, at the discretion of the executive committee of the Fuel Company, until such time as such operator may prepare such coal or coke properly. In any case such [98] operator shall have the right to refer the question whether such coal or coke is improperly prepared or not, or, if not so prepared, whether the same be so prepared at reasonable cost, to arbitration, as herein provided, which decision as to the preparation of such coal shall be final and binding on both parties; and in case

said arbitration shall find such coal or coke improperly prepared, and shall further find that it is impossible or impracticable for such operator to remedy such faults at reasonable cost, he shall have the right to withdraw from, and have this agreement annulled as to him. If said Fuel Company shall make default in payment for any coal or coke shipped under this agreement according to the terms hereof, and said default shall continue for the space of fifteen (15) days, unless payment shall be withheld by reason of attachment, suggestion, garnishment, or other legal process against the member of said Coal Association on whose claim default is so made, such default shall, at the option of such member on whose claim such default it is so made, work an annulment of this contract as to such member: provided such member shall within ten (10) days after the expiration of said fifteen (15) days give notice in writing to said Fuel Company of the election of such member to exercise such right of annulment; and a failure to exercise this right for any such default shall not prevent the exercise of the same for any subsequent default. And a violation or failure to keep, observe, and perform any covenant or covenants herein contained by any party to this agreement shall, at the option of the party or parties thereby aggrieved, work an annulment of this agreement as to such party or parties on thirty (30) days' notice in writing. And no waiver of this right, in case of any violation or failure to keep, observe, and perform any covenant hereof, shall prevent the exercise of the same for any subsequent violation of, or failure to keep, observe, and perform, the same, or any other covenant hereof; provided, that upon any notice for the annulment of this agreement as hereinbefore provided being given by any parties or party, the party or parties to whom it is so given, if desiring to contest the rights of the parties or party giving said notice to annul this agreement, shall have the right to submit the question to arbitration, as herein provided, and the decision of such arbitrator shall be final and binding on all parties to such arbitration. But any withdrawal or annulment as to any member or members under this, or clause No. 18 hereof, shall not affect this contract as to the parties remaining, between themselves.

"(19) Any person, firm, or corporation now or hereafter producing coal to be shipped on the Chesapeake & Ohio Railway may become a party to this contract by signing the same, or an exact copy hereof, with the Fuel Company, or by an indorsement attached hereto may accept the provisions hereof; and, upon becoming such party hereto, such person, firm, or corporation shall be entitled to all the rights and privileges, and be subject to all the duties and liabilities, hereunder, the same as if he, it, or they had been named in said contract as one of the parties of the second part, and had duly signed and executed it with the others named therein: provided, that said association shall agree to such person, firm, or corporation becoming a party hereto by a majority vote of a quorum of its members.

"(20) It is understood and hereby agreed that in any matter or thing connected with this agreement, where any party hereto shall assert, maintain, or set up any claim, right, privilege, liability, or penalty in his, its or their favor, or against any other party or parties hereto, and thereby a controversy shall arise hereunder, then and in that event either party or parties to such controversy shall have the right to submit the said controversy to arbitration in the manner hereinafter set forth. There is hereby constituted and appointed an arbitration committee, which shall be composed of two persons and such third person as shall be by such two selected from time to time as any controversy may arise. Such two persons shall be selected as follows: Each and every year during the continuance

of this contract the said Fuel Company shall appoint some person to serve upon said arbitration committee, and the parties of the second part shall also appoint one to serve upon said committee, of which appointment the Fuel Company and the association shall have notice, and the two persons so appointed shall continue to serve until their successors shall be appointed in the same manner. Whenever a controversy shall arise hereunder, the party desiring to submit such controversy shall notify the other party or parties to such controversy of the same, in [99] writing, and shall designate in such notice the time and place when said two arbitrators shall meet to hear the matter in controversy, and he or they shall also notify the said arbitrators to meet at said time and place. And at the time and place so designated said two arbitrators shall meet, and they shall select a third arbitrator, who, with the other two, shall constitute the full arbitration committee to hear and determine the said controversy, and whose award in all matters of law and fact shall be final, and shall be binding upon each and all of the parties to that controversy. Such notice may be served as a legal notice is served, or it may be mailed to the party, to be served at his or their post-office address. And any notice to any one or more of the parties of the second part may be served upon or sent by mail to the president and secretary of said association. If at the time and place said two arbitrators are required to meet, either one or both of them should fail or refuse to attend or serve, then the Fuel Company, by its agent or attorney, on the one side, may fill the vacancy caused by its arbitrator being absent or refusing to serve, and the association, by its officer, agent or attorney, may fill the vacancy caused by the absence of its arbitrator or his refusing to serve; and the arbitrator or arbitrators so selected by either or both of said parties as aforesaid shall select the third, which three shall, for that controversy, constitute the arbitration committee, and shall have the same powers, and their award shall be as final, as if the two arbitrators herein first provided for had attended and selected a third. If, upon having notice to attend at a time and place to settle a controversy, either party shall fail or refuse to attend, or shall fail or refuse to select an arbitrator when required hereunder so to do, the said association by its president, other officer or attorney, may select an arbitrator in the place or stead of the absent one; and, if such association shall fail or refuse to make such appointment, in that event the Fuel Company, by its agent or attorney, may make such appointment or appointments, and the two when so appointed in any of said modes shall select a third, and the three shall constitute the arbitration committee to hear and determine said controversy, whose award shall be final. A notice to arbitrate hereunder shall not fix a time longer than fifteen (15) days nor less than five (5) days from the time of giving said notice, unless by mutual consent. The place of such meeting of the arbitrators shall be at Cincinnati, Ohio, or Charleston, W. Va., unless by mutual consent. Said arbitrators shall have the right to adjourn their session from time to time or to such place or places as they may determine. And they shall make their award in not less than three days from the time the evidence is finally taken before or submitted to them; such award to be valid if signed by two of the arbitrators. Every award shall be executed in duplicate, and a copy thereof furnished to each of the executive committees herein mentioned. The failure of a regular arbitrator to attend at a time and place designated in any notice to him, and the appointment of another in his stead for any controversy, shall not for that reason vacate his general appointment as an arbitrator until his successor is appointed. If the two arbitrators appointed as above provided shall at any time

fail or refuse for two days to appoint the third arbitrator, the latter shall be appointed by the judge of the circuit court of Kanawha county, West Virginia.

"Witness the following signatures:

"The C. & O. Fuel Co., Donald Macdonald, Pt.
"Robinson Coal Co., by Neil Robinson.
"W. R. Johnson.
"The Kanawha Splint-Coal Company, by F. E. Lair.
"Carver Bros.
"Enoch Carver.
"Jos. Renshaw, Special Receiver Big Black Band Coal Co.
"Charlmore Coal Co., Herndon & Renshaw, Mgrs.
"McCallister & Co., per James Kelsoe.
"Mecca Coal & Coke Co., by John Carver.
"Chesapeake Mining Co., by J. B. Lewis.
"Coalburg Colliery Co., by J. B. Lewis.
"Montgomery Coal Co., by S. H. Montgomery.
"Belmont Coal Co., by T. E. Embleton, Pt.
"Harris B. Smith, Spl. Receiver Lens Creek Coal & Coke Co."

[100] That this contract went into effect on the 1st day of January, 1898, and that the defendants, acting thereunder, monopolized and controlled the amount of coal and coke produced in the Kanawha district, and only permitted such amount of coal to be mined and coke to be made as could be sold by the Fuel Company in accordance with the provisions of the contract, the producers being permitted to ship only such amounts as should be apportioned among them by an executive committee of three selected by members of the association; that the defendants, acting under said contract, not only controlled the amount of coal and coke shipped into the states mentioned from the Kanawha district, but wholly destroyed competition in the sale of the same. And it is alleged generally that the said contract, and the operations thereunder, constitute an unlawful combination, in the form of a trust, in restraint of trade and commerce among the said several states, and that said defendants have combined and conspired with one another to monopolize, and have attempted to monopolize, by reason of said contract, and their acts and operations thereunder, a part of the trade and commerce in coal and coke among the said several states, all in violation of the act of congress of July 2, 1890. And the prayer of the bill is that the defendants be restrained from selling or shipping any coal or coke into any state, other than the state in which they reside, under said contract, and that they be restrained from continuing in any like combination or agreement, and from further agreeing and combining and

acting in any manner as set out in said contract, and that the contract be declared void and illegal, and that said trust and combination be dissolved by decree of the court.

At the hearing no evidence was introduced by the complainant, but the case was submitted upon the bill and answer, and the evidence introduced by the defendants. The circumstances under which the contract was made, and the facts in relation to the operations of the defendants thereunder, as shown by the allegations of the answer and the evidence, are, in substance, as follows: The defendants other than the Fuel Company are owners of coal mines and producers and shippers of coal, and some of them are makers and shippers of coke. Their mines and coke plants are situated along the line of the Chesapeake & Ohio Railway, in the counties of Fayette and Kanawha, in the state of West Virginia, and in the territory known as the "Kanawha District." The counties of Fayette and Kanawha embrace nearly all of the district. A part of Putnam county is within this district. Besides the mines of the defendants, there are in the same district, on the Chesapeake & Ohio Railway, or south side of the Kanawha river, the mines of the following companies, viz.: The Great Kanawha Colliery Company, the Mt. Carbon Company, Limited, the Diamond Mine, the Forest Hill Coal Company, the East Bank Coal & Coke Company, the Polsue Coal Company, the Coalburg Colliery Company, the Stevens Coal Company, the Acme Mines, the Coal Valley Mining Company, and the Winifrede Coal Company,—and on the Kanawha & Michigan Railway, or north side of the river, the Boomer Mine, the Long-Acre [101] Mine, the Harwood Mine, the Cannelton Coal Company, the Kelly's Creek Coal Company, the Riverside Coal Company, the Peal Splint-Coal Company, the Marmet-Smith Company, the Plymouth Mines, and the Big Mountain Operating Company. The capacity of the mines of the defendants is about 4,800 tons of coal a day, and of the other mines on the same side of the river about 4,300 to 4,500 tons a day. The defendant coke producers make about 440 tons a day, and the other coke producers of the district about 300 tons a day. Some of the defendants operate mines on both sides of the Kanawha river, but none of the mines on

the north side are covered by the contract in question. Macdonald, the president of the Fuel Company, prior to the organization of that company and the making of the contract had been engaged in selling coal and coke in Cincinnati and its vicinity from mines along the Chesapeake & Ohio Railway; but the Fuel Company, under the contract, has been selling coal and coke in West Virginia, Kentucky, Ohio, Indiana, Illinois, Michigan, Wisconsin, Missouri, Iowa, Nebraska, North Dakota, South Dakota, Arizona, and Mississippi. The extent and the places of the Western shipment by the defendants, other than the Fuel Company, prior to the making of the contract, are not shown; but the answer alleges that they "had no trade whatever in most of said states, and had very little in the others, except in Cincinnati, Ohio." The other districts and localities competing with the defendants in the Western market are: The New River fields, of West Virginia, with the capacity of about 2,000 tons of coke a day; the Flat Top fields, of West Virginia, on the Norfolk & Western Railway; the fields along the Baltimore & Ohio Railway, the West Virginia & Pittsburg Railroad, and the Ohio, West Virginia & Pittsburg Railroad, in West Virginia; the coal fields of Western Pennsylvania; the Hocking, Wellston, and Nelsonville coal fields, of Ohio; and the coal fields of Kentucky, Tennessee, Illinois, Iowa, and Missouri. The aggregate production of all these fields is said to be 115,000,000 tons of coal annually. The defendants' shipment West in 1897 was about 450,000 tons. In 1898 it was about 550,000 tons of coal and from 60,000 to 65,000 tons of coke. The twelfth clause of the contract, in relation to coke and coal shipped by river, was rescinded in June, 1898. Prior to the making of the contract there was a lack of uniformity in the preparation of coal and coke. Under the contract this has been remedied, and the quality of the product has been improved. The minimums of coal and coke which the Fuel Company was required to take and pay for, as provided in the fifth clause of the contract, was in excess of the production of the defendants' mines during the year preceding the making of the contract; the excess of coal being about 60,000 tons, and of coke about 30,000 tons. A man employed by the producers, the defendants

other than the Fuel Company, and known as the "equalizer," makes the distribution of orders and cars to the shippers. About 3,000,000 tons of coal is shipped East over the Chesapeake & Ohio Railway from the New River and Kanawha districts annually. What portion is shipped from the Kanawha district does not appear. The facilities for placing coal and coke on the Western **[102]** market have been increased by the operation of the contract, and the monthly payments by the Fuel Company have relieved the operators from losses by bad debts, and have furnished the means for promptly paying the men in their employ. River shipments from the whole Kanawha district are double the shipments of defendants by rail. Prior to making the contract, single operators were sometimes not able to take and fill large contracts. It does not appear that under the contract prices have been materially increased or diminished, but have been maintained.

Two questions have been presented: (1) Does the contract in question relate to interstate commerce? (2) And, if so, will its performance restrain interstate commerce, within the meaning of the act of congress known as the "Anti-Trust Law?"

1. If it be assumed that the Fuel Company was to become the purchaser of the coal produced by the other defendants, and not their agent for its sale to others, with an interest in the profits, yet by the terms of the contract the coal and coke are to be delivered to the Fuel Company for "Western shipment,"—to markets in states other than West Virginia,—there to be sold for not less than a minimum price to be fixed by the executive committee of the association; and the Fuel Company is required to account and pay over to the members of the association all profits made over and above 10 cents per ton, which it is to retain as "compensation" for the use of its capital and for its services. The contract, read in the light of the circumstances under which it was made, shows that it contemplates and provides for the sale of coal and coke in states other than West Virginia; and the evidence shows that, in the performance of the contract, coal and coke have been sold in the states mentioned in the bill. Indeed, the prime object of the contract, as repeatedly expressed therein, is "to enlarge the sale of, and extend the Western market for, Kanawha coal and coke." The contract, therefore, and the combination thereunder formed by the defendants, have direct relation to interstate trade and commerce, and in carrying out its purpose interstate commerce has been directly affected.

2. This being so, the question is whether the provisions of the contract which give exclusive control of the output of the mines to the Fuel Company; which prohibit competition between the members of the association; which prohibit the Fuel Company from handling competing coals and cokes; which authorize the executive committee of the association to apportion to its members the class, grade, and quantity of coal and coke to be shipped each month; which fix a mimimum price below which the Fuel Company is prohibited from selling coals and cokes in the Western market; and which fix the settlement price between the Fuel Company and the association by a method of monthly averages,—are lawful regulations for the conduct of the business of the defendants, or whether they are regulations in restraint of interstate commerce, as charged in the bill. It is claimed by the defendants "that restriction of competition among only a small proportion of the coal and coke operators or other producers of a particular state, which is ancillary to a main, lawful purpose, and which in fact results in **[103]** keener and larger competition and greater freedom and volume in interstate trade and commerce, violates no provision of the federal anti-trust act." The "main, lawful purpose" to which the noncompetitive features of the contract are ancillary, as claimed by the defendants, is "to enlarge the sale of, and extend the Western market for, Kanawha coal and coke." But, as is well said in the Addyston Case, "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *U. S.* v. *Addyston Pipe & Steel Co.*, 29 C. C. A. 151, 85 Fed. 282, 46 L. R. A. 131. Here no relationship between

the parties to the contract exists which calls for the protection of the Fuel Company against the association, by the enforcement of the noncompetitive clauses of the contract. The alleged main purpose of the contract is a provision mainly for the benefit of the association, and incidentally for the benefit of the Fuel Company, by enabling it to earn a commission on sales; and the enforcement of the noncompetitive clauses of the contract would benefit the parties accordingly, but would afford no counterbalancing benefits to the public. It is said, however, that the increase in the volume of trade, the competition in a larger field of operations, the better condition of the product, and the maintenance of reasonable prices, resulting from the performance of the contract, benefit the public, and justify the partial restraint of trade. But the policy of the law looks to competition, as the best and safest method of securing these benefits, and not to combinations which restrain trade. It is opposed to the methods of combination, and will not suffer competition to be destroyed under the pretense that the public will be better served by combination. In the exercise of the power of regulation conferred upon it by the constitution, congress has chosen competition, in preference to combination, as the best factor for the maintenance of the life and the promotion of the ends of interstate commerce, and has prohibited "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations," and has declared that "every persons who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor." Now, it is provided in the contract in question that the Fuel Company shall have exclusive control of "the entire coal and coke output of the mine or mines operated by each of them [members of the association], respectively, on said C. & O. Railway, or branches thereof, for Western shipment, for a period of not less than five years, * * * except as to such coal as may be sold by any member of said coal association to the Chesapeake & Ohio Railway Company for the

consumption of said railway company;" and it is provided further "that the said members of said association will not sell or consign any coal or coke bound to points **[104]** west of their respective mines, except under the terms and conditions of this agreement, during the period covered by this agreement," and that the Fuel Company, "nor any of its officers, employés, or servants, will, with its knowledge, directly or indirectly, in any way, manner, or form, engage or become interested in the buying or selling of bituminous coal or coke in competition with the coal or coke of any of the members of said Coal Association, except under the terms and conditions of this agreement." And it is further provided that the minimum price shall be fixed by the executive committee of the association for "all the various grades of coal and coke sold and to be shipped West by the members of said association," and that the Fuel Company "will make no contract for the sale of any coal or coke of any members of said association at a price lower than such minimum price to be fixed by such committee." And it is further provided "that the Fuel Company shall make a monthly report showing the tonnage of the various kinds and grades of coal and coke shipped by members of said Coal Asociation and weighed during the month, or weighed during such month though shipped during a preceding month, together with an average price for each grade or kind of coal or coke so shipped and weighed, which average price shall be computed upon the basis of the actual price, less gross profits, if any, received for all coal or coke sold, and the minimum price, fixed as hereinafter provided, for such month, for coal or coke not sold in such month; said report to be made not later than the 10th day of each month for all coal and coke weighed, or weighed during the previous calendar month. The coal and coke shipped and weighed or weighed during such month shall be paid for by said Fuel Company to the members of said Coal Association according to the average prices determined as aforesaid." And it is further provided that the executive committee of the Coal Association "shall, not later than the twentieth day of each month, designate the percentage of

the total product of each class and grade of coal and coke which they deem best to be shipped by each member of said association by rail as aforesaid during the succeeding month." Under these provisions the extent of the production of the mines, the shipment and sale of the product, and the making and regulation of the prices thereof, are subject to the control of the executive committee of the association. All competition among the members of the association in the production, shipment, and sale of their product is eliminated, and the combination enters the Western markets clothed with powers which enable it to exercise a large influence in those markets in regulating the supply and the prices of coal and coke. These provisions are in restraint of trade, and tend to monopoly, within the meaning of the act of congress, and render the contract illegal, in so far as it relates to interstate commerce. The important question is not whether the performance of the contract so far has resulted in actual injury to trade, but whether the contract confers power to regulate and restrain trade, upon those charged with its performance. The attempt to confer power to regulate and restrain interstate commerce by contract is a usurpation of the functions of congress, and **[105]** cannot be sustained upon the ground that trade has not in fact been injured. It is for congress to determine what regulations of trade will best promote the public good. It is the policy of congress to encourage and promote individual effort. It looks to individual competition, rather than to combinations, for the benefits which are to follow and flow from commerce between the states, and, in the exercise of its constitutional power, has prohibited all combinations which restrain trade. It is for congress to determine whether the policy it has adopted shall be maintained as the one which will best promote the interests of the country, or whether it shall abandon that policy and place the interstate commerce of the country in the hands of combinations. But until congress takes that course, as long as this act remains upon the statute books, it is the duty of the courts to condemn every contract which necessarily in its performance involves a restraint of trade, although it may not extend to the point of a monopoly of all that trade. The

recent discussion of these questions in the cases of *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S.* v. *Joint-Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *U. S.* v. *Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; Id., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, render their further discussion here unnecessary. The contract in question here, and the combination of the defendants thereunder, are in restraint of trade and commerce among the several states, and such trade has in fact been restrained in the performance of the contract; and the defendants, and each of them, therefore, will be enjoined from selling or shipping under this contract coal or coke into any state other than the state in which they reside, and the contract, in so far as it affects interstate trade and commerce, is declared to be void and illegal, and the combination of the defendants thereunder will be dissolved.

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[845] BISHOP *v.* AMERICAN PRESERVERS CO. ET AL.[a]

(Circuit Court, N. D. Illinois, N. D. October 19, 1900.)

[105 Fed., 845.]

MONOPOLIES—ANTI-TRUST LAW—ACTION FOR DAMAGES.—Section 7 of the anti-trust act (26 Stat. 209), giving to any person injured by any other person or corporation by reason of anything forbidden in the act the right to recover treble damages, does not authorize an action against an alleged trust corporation, by one who was a party to its organization and a stockholder therein, to recover damages resulting from the enforcement by defendant of rights given it by the alleged unlawful agreement.[b]

On Demurrer to Amended Declaration.

Lynden Evans and *Frederick Arnd*, for plaintiff.

Moran, Mayer & Meyer, for defendants.

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[a] See also vol. 1, page 49 (51 Fed., 272).

[b] Syllabus copyrighted, 1901, by West Publishing Co.

Opinion of the Court.

KOHLSAAT, District Judge.

This matter comes on to be heard upon demurrer to the declaration herein as amended. A demurrer was sustained to the original declaration in 1892 by Judge Blodgett (51 Fed. 272), and the suit seems to have remained dormant since that year. The suit is for the purpose of recovering treble damages under section 7 of the Sherman act, the facts set forth in the declaration on which plaintiff seeks such recovery being substantially as follows: That plaintiff was prior to the year 1888 engaged in the business of manufacturing preserves, etc.; that in said year he entered into an agreement with certain of the defendants and others to form a trust or combination, which combination was subsequently formed, and to which he conveyed his said business; that defendant American Preservers Company was subsequently organized under the laws of the state of West Virginia for the purpose of acquiring title to the property controlled by said trust, and for the purpose of forming a channel through which said trust could purchase and control the business of plaintiff, and purchase and control the entire manufacture of preserves, etc., in the United States; that plaintiff was forced to execute a bill of sale of his said manufacturing plant and business to said American Preservers Company, but continued to conduct said business under the name and style of A. D. Bishop & Co.; that subsequently differences arose between him and the managers of said trust, and thereupon the said American Preservers Company brought a suit in replevin against plaintiff, and by means thereof obtained possession of plaintiff's entire plant, stock in trade, and business, and still retains the same. In the amended declaration it is averred that the products so controlled by said trust are products used in trade and commerce among the several states of the United States and with foreign nations, and that such products constitute articles of interstate commerce. It would seem that this case would come within the rules of law established by the Supreme Court in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, although it might be a debatable question as to whether or not the question could be determined on demurrer. However, I am of the opinion that the demurrer should [846] be

Syllabus.

sustained on the ground that the damage which plaintiff claims to have suffered is not of the nature contemplated in section 7 of the Sherman act, when considered in connection with the remaining sections thereof. Whatever damages plaintiff may have sustained in the premises are the result, not of the alleged unlawful combination, but of the exercise of the right, which every citizen possesses, to bring a lawsuit. There is another ground which might well be considered as placing plaintiff without the provision of said act, to wit, the fact that plaintiff was himself a party to the unlawful combination, and was injured by reason of his illegal connection therewith. The demurrer is sustained on the ground that the declaration as amended states no cause of action.

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[38] LOWRY ET AL. *v.* TILE, MANTEL & GRATE ASS'N OF CALIFORNIA ET AL.[a]

(Circuit Court, N. D. California. December 26, 1900.)

[106 Fed., 38.]

MONOPOLIES—ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.—The Tile, Mantel & Grate Association of California was organized for the purpose, as declared in its constitution and the preamble thereto, of uniting "all acceptable dealers" in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles), and all American manufacturers of tiles and fireplace fixtures. Its constitution and by- [39] laws provided that its active members should consist of dealers in such articles in San Francisco and vicinity, carrying a stock of a stated value, who should be elected to membership, each of whom should pay an entrance fee and annual dues, and the nonresident members should embrace all manufacturers throughout the United States who signed the constitution and paid the entrance fee. They provided that no dealer and active member should purchase from any manufacturer or his agent who was not a member of the association, nor sell any unset tiles to any person not a member for less than the list price, and that no manufacturer who was a mem-

[a] Demurrer of defendants overruled (98 Fed., 817). See vol. 1, p. 995. Charge to the jury (106 Fed., 38). Judgment affirmed by Circuit Court of Appeals, Ninth Circuit. Case there and subsequently entitled Montague & Co. *v.* Lowry (115 Fed., 27). See p. 112. Affirmed by the Supreme Court (193 U. S., 38). See p. 327.

Charge to the Jury.

ber should sell his products to any dealer who was not a member. *Held*, that such association was illegal and in violation of sections 1 and 2 of the anti-trust act of July 2, 1890, being a combination in restraint of trade and commerce among the states, by imposing a tax on such commerce between its members, to the extent of the membership fees and dues, and an attempt to monopolize a part of the trade in the articles named between the manufacturers in other states and the dealers in San Francisco, which, in operation, did effect such monopoly, and that under section 7 of such act such association and its members were liable in treble damages to a dealer, not a member of the combination, whose business was injured thereby.[a]

Action at Law to Recover Treble Damages under the Anti-Trust Act.

Campbell & Metson, for plaintiffs.

Walter H. Linforth and *P. F. Dunne*, for defendants.

MORROW, Circuit Judge (charging jury).

This is an action at law brought to recover damages alleged to have been sustained by the plaintiffs by reason of injury to their business as dealers in tiles and fireplace fixtures, caused by the forming of an association by the defendants as dealers in such articles, and which association, the plaintiffs claim, is within the prohibitory provisions of the act of congress of July 2, 1890, commonly known as the "Sherman Anti-Trust Act." That act provides, among other things, as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. * * *

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or foreign nations, shall be deemed guilty of a misdemeanor. * * * "

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

[a] Syllabus copyrighted, 1901, by West Publishing Co.

Charge to the Jury.

You will observe that the things forbidden and declared to be unlawful by the act are: First, every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states; and, second, the act of monopolizing, or attempting to monopolize, or combining or conspiring to monopolize, any part of the trade or commerce among the several states. The charge against the defendants, under these prohibitions, is the organization of an association called the Tile, Mantel & Grate Association of California, under an agreement and combination in restraint of trade and commerce. The printed document **[40]** introduced in evidence, and entitled, "The Constitution and By-Laws of the Tile, Mantel & Grate Association of California," shows that this association was organized on July 7, 1898, and that the constitution and by-laws were adopted on July 14, 1898. Under the title of "Preamble and Resolutions" the objects of the association are declared to be "to unite all acceptable dealers in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of two hundred miles), and all American manufacturers of tiles, and, by frequent interchange of ideas, advance the interests and promote the mutual welfare of its members." Article 1 of the constitution provides as follows concerning membership in the association:

"Section 1. Any individual, corporation, or firm engaged or contemplating engaging in the tile, mantel, and grate business in San Francisco, or within a radius of two hundred miles thereof (not manufacturers), having an established business, and carrying not less than $3,000 worth of stock, and having been proposed by a member in good standing, and elected, shall, after having signed the constitution and by-laws governing said association, and upon the payment of an entrance fee as hereinafter provided, enjoy all the privileges of membership.

"Sec. 2. All associated and individual manufacturers of tiles and fireplace fixtures through the United States may become nonresident members of this association upon the payment of an entrance fee as hereinafter provided, and after having signed the constitution and by-laws governing said association."

Article 2 provides as follows concerning fees and dues:

"Section 1. The initiation fee of this association shall be, for active members twenty-five dollars, and for non-resident members ten dollars, which amounts must accompany each application for membership.

"Sec. 2. Each active member of the association shall pay ten dollars per year as dues, payable in advance on the third Monday in August of each year. No dues shall be charged against nonresident members."

Article 6 makes provision for amendments to the constitution, as follows:

"All proposed alterations or amendments to this constitution shall be submitted in writing at a regular meeting, and no action thereon shall be taken until the next succeeding regular meeting. Due notice of such alterations or amendments shall be mailed to each member at least one week prior to the meeting at which action is to be taken thereon, and such alterations or amendments must receive the approval of two-thirds of the active members of the association."

The document introduced in evidence as the constitution and by-laws of the association contains the provisions which have been quoted, and there is no evidence in the document itself of any amendment thereof. But there is testimony to the effect that that part of article 1 of the constitution limiting the qualification of membership to those persons engaged in the tile, mantel, and grate business in San Francisco, having an established business, and carrying not less than $3,000 worth of stock, has not been enforced, as to the requirement that the member shall have a stock of goods of the value of $3,000. There is also testimony to the effect that the provision of article 2 relating to the fees and dues, and fixing the initiation fee for active members at $25, has been changed to provide that the initiation fee for such membership shall be $10.

The real purpose and object of the association appears to be declared in sections 7 and 8 of the by-laws. Section 7 provides that:

[41] "No dealer and active member of this association shall purchase directly or indirectly any tile or fireplace fixtures from any manufacturer, or resident or traveling agent of any manufacturer, not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association."

Section 8 provides as follows:

"Manufacturers of tile or fireplace fixtures, or resident or traveling agents of manufacturers, selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel & Grate Association of California, shall forfeit their membership in the association."

The uncontroverted evidence in this case shows that the active members of the association consist of a number of dealers in tiles, mantels, and grates in San Francisco, and that they are not manufacturers of any of these articles; that

the nonresident members of the association consist of a number of manufacturers of tiles and fireplace fixtures situated in different parts of the United States outside of California. The plaintiffs were not members of the association, and have not been at any time during its existence. Is it the apparent purpose and the natural and direct consequence of this provision of the constitution and by-laws of the Tile, Mantel & Grate Association to restain trade and commerce between the dealers in tiles, mantels, and grates in San Francisco and the manufacturers of such articles in the Eastern States? Or do these provisions operate in such a way that the members of the association have monopolized or have attempted to monopolize any part of the trade or commerce in these commodities between the manufacturers in the East and the dealers in San Francisco? The purpose of the organization, as declared in the preamble and in section 2 of article 1 of the constitution, was to embrace "all American manufacturers" of tiles and fireplace fixtures, as nonresident members, and the "acceptable dealers" in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles) as the active resident members. It does not appear that the declared purpose of the association has actually been accomplished, in the completeness of its membership. Not all American manufacturers of tiles and fireplace fixtures have become nonresident members. Whether all "acceptable dealers" in San Francisco have become members is not entirely clear, nor is it certain what constitutes an "acceptable member." But the natural effect and necessary consequence of the agreement and combination, so far as completed and actually enforced, is to limit the San Francisco dealer who is a member of the association in his purchase of tiles and fireplace fixtures to those manufacturers in the United States who are nonresident members of the association. The San Francisco dealer who has become a member of this association cannot purchase tiles and fireplace fixtures from any outside manufacturer except under penalty of forfeiting his membership in the association, and the manufacturer belonging to the association as a nonresident member cannot sell to any dealer in San Francisco who is not a member of the association, except under the same

penalty of forfeiture of membership. If all the manufacturers of tiles and fireplace fixtures in the United States should [42] become members of the association, then no dealer in tiles or fireplace fixtures not a member of the association could carry on his business in San Francisco, because there would be no manufacturer of those articles from whom he could purchase the goods; and as he could not purchase from another dealer in San Francisco who, as a member of the association, is entitled to buy from the Eastern manufacturer, except at list prices for unset tiles, he could not compete with other dealers, these list prices being so high. He would thus be practically debarred from continuing his business. On the other hand, if all the dealers in San Francisco should prove to be "acceptable members" of the association, and not all the manufacturers of tiles and fireplace fixtures in the United States should become nonresident members, such manufacturers remaining out of the organization would be deprived of all customers in San Francisco, because no dealer in San Francisco could purchase tiles from such a manufacturer except under penalty of forfeiture of his membership in the association. In other words, the Eastern manufacturer who becomes a member of this association is restricted in his selling market to members of the association in San Francisco, and the San Francisco dealer who is a member of the association is restricted in his purchasing market to manufacturers who are members of the association. But this is not all. The Eastern manufacturer who is not a member of the association is also restricted in his selling market to the dealers in San Francisco who are not members of the association, and the dealers in San Francisco who are not members of the association are also restricted in their purchasing market to those manufacturers who are not members of the association. It will be said, however, that all manufacturers of tiles and fireplace fixtures in the United States may become members of the association. But upon what terms? The manufacturer must apply for and obtain membership in the association, and pay a fee of $10, and, in order that the San Francisco dealer may have the privilege of purchasing tiles and fireplace fixtures from the manufacturers who are members of the association, he must

first prove himself to be an "acceptable member" to the other members of the association; and, if he finds himself to be an "acceptable member," he must pay a fee of $10, and thereafter must continue to pay annual dues in the sum of $10.

It has been held that an ordinance of a municipal corporation requiring persons or firms soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax is an exercise of the taxing power, and, when enforced against a person or firm soliciting orders for a manufacturer of goods in another state, it imposes a tax upon and is a regulation of interstate commerce, in violation of the provisions of the constitution of the United States.

In *Robbins* v. *Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, a statute of Tennessee declared that all drummers and all persons not having a regularly licensed house of business in the taxing district, offering for sale or selling goods therein by sample, should be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege. Robbins was engaged in soliciting in the city of Memphis, Tenn., the sale of goods for a Cincinnati [43] firm, exhibiting samples for the purpose of securing orders for the goods. He had no license, and was prosecuted and convicted for a violation of the statute. The statute made no discrimination between those who represented business houses out of the state and those who represented like houses within the state. There was, therefore, no element of discrimination in the case. But, notwithstanding this equality of the tax upon all dealers, the conviction was set aside by the supreme court of the United States on the ground that, whatever the state might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the state, it could not impose upon those who acted as drummers for houses outside of the state any burden by way of a license tax, for the reason that such persons were engaged in interstate commerce, which must be left free from any restrictions or impositions whatever. Negotiations in the conduct of interstate commerce could not be taxed by the state, or by a municipal corporation under its authority.

In *Corson* v. *Maryland*, 120 U. S. 502, 7 Sup. Ct. 655, 30 L. Ed. 699, the same question arose with respect to a provision of the Code of Maryland, and the same doctrine declared as in the preceding case.

In *Asher* v. *Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368, a statute of the state of Texas required any commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, to pay an annual occupation tax of $35. This statute was declared to be unconstitutional, and the case of *Robbins* v. *Taxing Dist.* was expressly affirmed, to meet the vigorous assault made by the court of appeals of Texas upon the doctrine of that case.

In *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637, an agent of a firm doing business in the city of Baltimore solicited orders in the District of Columbia without having taken out a license there as required by an act of the legislative assembly of that District. The supreme court held that this law was invalid, as construed to include the business of an agent soliciting orders for a business house located outside the District.

In *Brennan* v. *City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719, an order of the city of Titusville provided "that all persons canvassing or soliciting within said city orders for goods, books, paintings, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the said treasurer therefor the following sums, according to the time for which said license shall be granted," etc. The facts of the case were these: One Shephard was a manufacturer of picture frames and maker of portraits, residing in Chicago, in the state of Illinois, in which city he had his manufactory and place of business. The defendant, Brennan, was an agent of Shephard, employed by him to travel and solicit orders for said pictures and frames. Upon receiving orders for such goods, Brennan forwarded the same to Shephard, at Chicago, where the goods were made, and from there shipped to the purchasers, in Titusville, in the [44] state of Pennsylvania, by railroad, freight and express; and the price of the goods was collected and forwarded to Shephard, sometimes by the express company, and at other times by the agent of Shephard. Brennan was engaged in conducting the business in the manner stated at the time of his arrest, without having obtained a license as required by the municipal ordinance. He was convicted, and sentenced to pay a fine of $25 and costs. From that judgment he appealed to the supreme court of the state, where the judgment was affirmed; the court holding that the ordinance was enacted in the exercise of the police power of the state. *City of Titusville* v. *Brennan*, 143 Pa. St. 642, 22 Atl. 893, 14 L. R. A. 100. Brennan thereupon sued out a writ of error to the supreme court of the United States. The whole question was again reviewed by that court, and all the previous cases in that court relating to the subject carefully considered. The court declared that commerce between the citizens of the several states must be absolutely free from restraint. The court said:

"It must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of congress, and that the silence of congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

In *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, the supreme court held that a state statute prohibiting the sale of intoxicating liquors, except for certain purposes and under license from a county court, was unconstitutional and void when applied to a sale by an importer of liquors brought from another state in the original packages, because the operation of the law was repugnant to the power of congress to regulate commerce among the several states. The court, in passing upon the question, said:

"The power vested in congress 'to regulate commerce with foreign nations and among the several states and with the Indian tribes' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered."

Charge to the Jury.

And further, to make this limitation on state authority over interstate commerce more clear, the court said:

"It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

In the case of *United States* v. *Coal Dealers' Ass'n* (C. C.) 85 Fed. 252, this court, referring to the case just quoted from, said:

"If a law of a state regulating the sale of intoxicating liquors, so as to prohibit their sale except for certain purposes and under license from a county court, is unconstitutional and void when applied to a sale by an importer of liquors brought from another state in the original packages, because the law in that relation is in restraint of trade and commerce 'among the several states,' what shall be said of the constitution and by-laws of the Coal Dealers' Asso- [45] ciation, and the agreement of that association with the wholesale dealers respecting the sale of imported coal in San Francisco under the anti-trust act? If one is in restraint of commerce, is not the other?"

In *United States* v. *Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 54 U. S. App. 723, 767, 46 L. R. A. 122, Judge Taft considered the effect of such state statutes in the same relation, and said:

"If, then, the soliciting of orders for, and the sale of, goods in one state, to be delivered from another state, is interstate commerce in its strictest and highest sense,—such that the states are excluded by the federal constitution from a right to regulate or tax the same,—it seems clear that contracts in restraint of such solicitations, negotiations, and sales are contracts in restraint of interstate commerce."

These observations appear to the court to be applicable to the effect of the constitution and by-laws of the Tile, Mantel & Grate Association of California involved in this case. If an ordinance of San Francisco imposing a tax of $10 upon a solicitor who should seek orders for tiles and fireplace fixtures for an Eastern manufacturer would be contrary to law, because a restriction upon interstate commerce, then a like fee and the conditions of membership imposed by this organization upon Eastern manufacturers for the privilege of selling to San Francisco dealers who are members of the association is also a restriction upon interstate commerce, and would for the same reason be contrary to law.

This brings us to the question as to the effect this organization had upon the price of tiles in this market. Mr. W. B.

Charge to the Jury.

Webster, the secretary and treasurer of the Tile, Mantel & Grate Association of California, testified as follows, on cross-examination:

"Q. After the formation of the corporation, and the adoption of the list price of the American Tile Company by your association, that did raise the price of tile in this market, did it not? You can answer that easy. A. Yes, sir; it raised the price. The Eastern factories raised the price also on us. Q. The Eastern factories raised the price on you? A. Yes, sir; the price was raised twice since that time on us; that is, not the list, but the discount for orders. They are less to-day than they were at that time. Q. That is, the factories from whom you buy? A. Yes, sir; and other factories that notified us of the raise. Q. Did you not state to your counsel that the price had been practically the same for the same character of goods by all the factories? A. From the time of the society up to the present time. Q. Before the formation of the society up to the present time? A. No, sir. Q. You did not so state? A. I did not understand the question, if I did, because it is a known fact that the prices have been raised three or four times. Q. The prices, then, since this formation, have been raised? A. Yes, sir."

As was said by the supreme court of the United States in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 246, 20 Sup. Ct. 96, 44 L. Ed. 149:

"Any combination among dealers in that kind of commodities, which in its direct and immediate effect forecloses all competition, and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another state, would be one in restraint of trade or commerce among the states."

Under these conditions, the dealing in tiles and fireplace fixtures between the manufacturing members of the association in the East and the dealers in San Francisco, also members of the association, [46] is in effect a monopoly of at least a part of the trade and commerce between California and the Eastern states in those articles; and this monopoly, excluding as it does the outside manufacturer and the outside dealer, except upon conditions, is also in restraint of trade and commerce between the several states. The uncontroverted testimony fully supports this practical operation of the agreement and combination, as disclosed by the constitution and by-laws of the association, in whatever light it may be considered. It follows, therefore, that the court is called upon to instruct you that, under the law, the members of this organization have, in violation of law, entered into a contract and combination in restraint of trade and commerce, and that they have attempted to monopolize and have monopolized a part of the trade and commerce between the manufacturers

Charge to the Jury.

in the East and the dealers in San Francisco in the article of tiles.

Under these instructions, there is left for your consideration the single question of damages; and, under the provisions of the statute, if you find that the plaintiffs have been injured in their business by reason of this unlawful combination and association of the defendants, you will find for the plaintiffs in such a sum as shall be equivalent to and represent the actual damages sustained by the plaintiffs. It is for the court, in executing the provisions of the statute in entering judgment upon the verdict (if you shall find for the plaintiffs), to treble the amount of the damages; that is to say, any verdict rendered by you, and upon which a judgment will be entered by the court, will be multiplied by three, and a judgment entered for such treble damages. Your verdict will, however, be limited to the actual damages which the evidence shows the plaintiffs have sustained by reason of the acts of the defendants in violation of the act of congress. The sole question, then, as to damages, in this case, relates to any injury which the plaintiffs may have sustained in their business by reason of the association in question. It is not enough, in an action of this kind, which is one at law, for the plaintiffs to establish the existence of an association which comes within the inhibition of the act of congress. Plaintiffs must go still further, and the burden of proof is upon them to show some real and actual damage to their business by reason of such an association. There is no duty imposed by the law upon the association, even if within the statute, to show that its acts have not worked injury to the business of plaintiffs. On the contrary, the duty and burden of proving damage to their business is imposed by law upon the plaintiffs, and, unless they prove this damage to their business by a preponderance of evidence, the verdict must be for the defendants. Mere speculation as to the possible profits of a mercantile business, in the absence of evidence directed to such conditions, cannot be indulged in by the jury for purposes of finding a verdict in damages. The damages which the law contemplates, and which the act of congress provides for, must be reasonable damages ascertainable upon the evidence presented in the case. There must

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be facts, transactions, actual evidence of some material and pertinent character, relating to a business from which the jury can ascertain with reasonable certainty that damage has actually been worked to such business, before any [47] verdict in damages can be returned, other than nominal damages. It is the duty of a party, under the law applicable in this case, to use all reasonable efforts to make any damage to his business as small as possible. The plaintiffs in an action of this kind are not permitted to claim damage to their business by reason of an association contrary to the statute, where it was within their own power, in the exercise of reasonable diligence, to avert any such damage, and to avoid any consequences of injury to their business; that is to say, a party claiming damages is bound, in the exercise of reasonable diligence, to safeguard himself against any aviodable consequence of the act of another as to which he claims a right to recover damages. It is not material in this case, so far as damages are concerned, that the Columbia Encaustic Tile Company, or some other nonresident member of the association, refused at any point of time to sell tiling to the plaintiffs, if, as a matter of fact, the plaintiffs, by applying to other manufacturers of tile in the same market, whether members of the association or not, could have procured such tiles as may have been necessary in the transaction of their business at the same price. And, if there was a difference in price, the amount of the damages would be limited to such difference in price. If, therefore, you find from the evidence that at any point of time when tiles were refused the plaintiffs by the Columbia Encaustic Tile Company, or any other member of the association, there were in the market other manufacturers from whom at the same price and charges the plaintiffs could have procured such tiles as they needed, you must consider that it was their duty to apply to such manufacturers for tiles; and if they failed to use reasonable diligence in making such application, and thereby failed to provide themselves with the necessary tiles, they are not entitled to any damages by reason of the refusal of such tiles on the part of any member of the association. If the evidence in the case in the matter of damage to the business of the plain-

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tiffs has not shown any real and substantial damage to their business by reason of the association, apart from conjecture or mere speculation, then they are not entitled to any substantial compensation, and no verdict in damages should be rendered in their favor, except a verdict for nominal damages; that is to say, a verdict in the sum of one dollar, or other trifling amount. If you believe from the evidence in this case that in the month of August, 1898, the plaintiffs ordered from the Columbia Encaustic Tile Company of Anderson, Ind., a certain lot of tiles, and said Columbia Encaustic Tile Company agreed to ship the same to them in accordance with the terms of prior agreements, and if you further believe from the evidence that, by reason of the said Columbia Encaustic Tile Company joining the Tile, Mantel & Grate Association of California, they failed and refused to ship said tiles to the plaintiffs, and broke their contract with them, you are instructed that the plaintiffs are entitled to recover, by reason of said breach of contract, the difference between what the tiles would cost them laid down in this market and the market value of the tiles in this market. And. if you find as above, you should find for the plaintiffs in whatever amount you find to be the difference between the cost of said **[48]** tiles here in San Francisco and the market value of the tiles in San Francisco.

The jury returned a verdict in favor of the plaintiffs, fixing their damages in the sum of $500.

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[131] OTIS ELEVATOR CO. *v.* GEIGER ET. AL.

(Circuit Court, D. Kentucky. March 30, 1901.)

[107 Fed.. 131.]

PATENTS—INFRINGEMENT—DEFENSE—ANTI-TRUST LAW.—In an action for the infringement of elevator patents, a private defendant was not entitled to urge as a defense that plaintiff was a corporation organized merely for the purpose of holding the legal title to various elevator patents alleged to have been infringed, for the purpose of controlling sales and enhancing prices of elevators and apparatus, without itself engaging in the manufacture and sale of such appliances, in violation of the Sherman anti-trust law (26 Stat. 209).

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since, until the United States has acted and sought to prosecute the plaintiff for violation of such act, an infringer of the plaintiff's patent will not be permitted to raise such issue as a defense thereto.[a]

SAME—PLEADING—INDEFINITENESS.—In an action by a corporation for the infringement of elevator patents, an answer alleging as a defense that the plaintiff is an unlawful combination in restraint of trade and in violation of the Sherman anti-trust law (26 Stat. 209), but which fails to state who are in the combination in the agreement characterized as unlawful, and does not disclose fully and in detail that the combination was entered into after the act took effect, and all the facts necessary to show its illegality, is insufficient for indefiniteness.

Bill for infringement of patents. On exceptions to answer. Exceptions sustained.

Brown & Darby, for complainant.

A. E. Willson and *E. H. Hunter*, for defendants.

EVANS, District Judge.

The complainant, a corporation organized under the laws of New Jersey, in its bill charges that it is the owner, by mesne conveyances duly recorded, of certain letters patent, **[132]** which the defendants have infringed and will continue to infringe; and the usual prayer for an injunction and accounting of profits is contained in the bill. The defendant has filed an answer, the third paragraph of which is in this language:

"These defendants have no knowledge of the assignments alleged to have been made of the said letters patent, and therefore deny the same, and deny that any right or interest in the said letters patent has been acquired or is now possessed by the complainant; but, upon information and belief, these defendants aver that the complainant, the Otis Elevator Company, is a corporation or association created by the owners of several distinct patents relating to the construction and operation of elevators, for the sole purpose of restraining manufacture, controlling sales, and enhancing prices of elevators and apparatus used in connection therewith,—the Otis Elevator Company not itself engaging in the manufacture and sale of such appliances, but being merely provided to hold the legal title to the said distinct and various letters patent while the original owners thereof are licensed thereunder,—and that by reason thereof no title enforceable in a court of equity has been or is now vested in the complainant."

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The complainant has filed exceptions to this paragraph, and the interesting question thereby raised is to be determined.

Possibly the act of congress approved July 2, 1890 (26 Stat. 209), and commonly known as the "Sherman Anti-Trust Law," is the only statute upon which the courts of the United States, ordinarily speaking, could adjudge such an agreement as the third paragraph of the answer describes to be void. Certainly I do not recall any other which would authorize the courts of the United States to declare a state corporation to be unlawful ab initio, as a prohibited combination. We may probably assume that prior to July 2, 1890, there was no law of the United States which provided that such combinations should be invalid. But the act of that date, by its terms, is made to operate only through the penalties which are therein prescribed, or through the direct proceedings which it authorizes the United States to institute to declares certain prohibited arrangements void, or by giving any person who is injured in his business the right to recover multiplied damages, though, in addition, while these statutory remedies, being the ways expressly prescribed for enforcing the act, are otherwise exclusive, it may be quite true that the policy of the United States, as manifested by this legislation, would authorize the courts of the United States, upon more general principles, to refuse to enforce, as between the parties thereto, such combinations as are denounced by this legislation. But, as matter of pleading, it seems to the court that until the United States has acted it does not lie in the mouth of a mere infringer to urge any of these objections as matter of defense to a suit for infringement, and thus divert attention from his own wrongful acts by raising an independent and altogether collateral issue as to the manner in which the complainant acquired title to the patent alleged to have been infringed. If the paragraph showed that the United States, by a direct proceeding in its courts, had already caused the alleged agreement to be adjudged void, though the complainant possibly in that event could not recover for the infringement complained of, the real owner of the patent, whose assignment to the complainant might thus be shown to have been void, could do so. A judgment in this case in favor of this complainant [133] before such proceedings as have been referred to had taken place would, through the recorded deed of assignment, protect the defendant against another suit by the assignor for the same cause of action, and it therefore seems to the court that the only legitimate issues pertinent to the charge of infringement are very different from the one sought to be raised in paragraph 3 of the answer. It might, indeed, be quite possible for the general objects of the alleged combination to be unlawful, and such as could be enjoined at the suit of the United States, without necessarily affecting other special acts, such as a conveyance to the complainant of the patent. And, as there is no doubt that the conveyance of this patent was in fact made and recorded, it seems to the court that the defendant, under those circumstances, and in an action of this character, cannot be allowed to question the title of the complainant to the patent upon this ground, and the weight of the authorities supports this view. The apparent conflict in the decisions may be somewhat reconciled by ascertaining whether the suits in which they were rendered grew out of contracts or out of torts, as in the former case they may approach nearer the line where the act of congress might operate upon them than in the latter. Chief upon one side of the question are the decisions in the cases of *Strait* v. *Harrow Co.* (C. C.) 51 Fed. 819; *Edison Electric Light Co.* v. *Sawyer-Man Electric Co.*, 3 C. C. A. 605, 53 Fed. 598; *Soda-Fountain Co.* v. *Green* (C. C.) 69 Fed. 334; *Saddle Co.* v. *Troxel* (C. C.) 98 Fed. 620. And upon the other side are the cases of *Harrow Co.* v. *Hench*, 27 C. C. A. 349, 83 Fed. 36, 39 L. R. A. 299; Id. (C. C.) 76 Fed. 667; *Harrow Co.* v. *Quick* (C. C.) 67 Fed. 130. The first of the last three cases named, it will be observed, was one in which a portion of the contract was sought to be enforced by certain of the parties to the illegal combination, and the court doubtless thought (though it does not very clearly appear from the opinion precisely what relief had been invoked) that, as their contract was vicious, it would leave the parties as it found them, and decline to enforce the agreement. But it is conceived

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that very different principles would apply to parties who sought to enforce portions of the vicious contract from those which would apply to a case like the one before us.

But, whether these views of the court are correct or not, there are certain rules of pleading which apply to paragraph 3 of the answer which must control the action of the court upon the exceptions, because its allegations are too vague and inexplicit, even if another view should be taken of the main question argued upon the exceptions. The paragraph in no way states who are in the combination with the complainant in the agreement characterized as unlawful. Such a defense, if maintainable, should very explicitly and exactly show how the complainant is an unlawful association, giving all the necessary particulars, in order that the complainant can know precisely what it is to meet, and so that the court can determine whether all the rights of the complainant to protect its claim to a patent have been forfeited, ipso facto, the entering into such an association; and the averments of the answer should be made in such clear terms as to show that the defendants, under the law and upon the facts they state, can thereby defeat an action against them which might otherwise be **[134]** meritorious. The court should take nothing for granted in such a case, and the pleading should disclose fully and in detail not only that the combination was made after July 2, 1890, but all the facts necessary to show the illegality of the association. And the fact that the complainant is a corporation organized under the laws of a state may make these requirements all the more exacting and emphatic.

The initial statements in the paragraph, being mere denials, are sufficient; but from either point of view the court is of opinion that the exceptions to the third paragraph of the answer should be allowed so far as they apply to those parts of the paragraph beginning with the words, "But, upon information and belief, these defendants aver that the complainant, the Otis Elevator Company, is a corporation or association created by the owners of several distinct patents relating," etc., and continuing to the close of the paragraph. An order can be prepared accordingly.

[210] GIBBS ET AL. *v.* McNEELEY ET AL.[a]

(Circuit Court, D. Washington, W. D. March 15, 1901.)

[107 Fed., 210.]

ANTI-TRUST LAW—RESTRAINT OF INTERSTATE COMMERCE.—A combination controlling not only the manufacture of an article in the state, but also the sale of the manufactured article, is not one in restraint of interstate commerce, so as to give a right of action against it, under the anti-trust law of July 2, 1890, to one injured by a resolution passed and circulated by it denouncing him for cutting prices, its sales being within the state, and any transportation and sale of the article in other states being by other agencies.[b]

T. O. Abbott, for plaintiffs.

C. O. Bates, *Chas A. Murray*, and *J. H. McDaniels*, for defendants.

BELLINGER, District Judge.

This case is being tried on what is known as the "fourth cause of action." In this cause of action it is alleged, in effect, as follows: That the defendants, with the intent to injure and destroy the plaintiff's business, and to bring plaintiff into public odium and discredit, and to provoke him to wrath, and to induce his patrons in the various states to withdraw their patronage from him, and to destroy his credit and business, did maliciously compose and declare a certain communication of and concerning plaintiff and his business, as follows: Said committee did adopt, and enter upon the records of the association, and did distribute and publish, certain resolutions, whereby it was falsely and maliciously alleged that plaintiff was endeavoring to injure the market for Washington red cedar shingles, and whereby it was further falsely and maliciously stated that plaintiff had no money invested in said business, and that he was without credit, and irresponsible, and was not an honorable and legitimate dealer in said shingles. That, thereafter the said

[a] Demurrer overruled as to fourth cause of action (102 Fed., 594). See p. 25. Verdict for defendants in error directed (107 Fed., 210). Reversed by Circuit Court of Appeals, Ninth Circuit (118 Fed., 120). See p. 194.

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committee, by its officers, etc., with intent to induce all wholesale and retail dealers in the states and foreign countries named to refuse to buy shingles of plaintiff and do business with him, and to induce the manufacturers to refuse to sell shingles to plaintiff, did publish said resolutions by print- [211] ing the same in circular form, and addressed the same to various wholesale and retail dealers throughout the state of Washington and other states, and to a large number of newspapers and trade journals in Washington and other states, etc. That by virtue of said conspiracy and of the advertising so done the defendants did bring the plaintiff into odium and discredit with said manufacturers, so that they refused to sell him Washington red cedar shingles, and did also bring him into odium and discredit with a large number of his patrons and clients, so that they refused to buy shingles of him, and did totally destroy plaintiff's business.

In the case of *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the supreme court held that, although the American Sugar-Refining Company had obtained a practical monopoly of the business of manufacturing sugar, yet the act of congress did not touch the case, because the combination only related to manufacture, and not to commerce among the states or foreign countries; that a combination which directly related to manufacture only was not brought within the purview of the act, although, as an indirect and incidental result of such combination, commerce among the states might be thereafter somewhat affected. The court in that case says:

"The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce."

In the more recent case of *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 239, 20 Sup. Ct. 96, 44 L. Ed. 136, the principle was recognized that a combination to control manufacture is not a violation of the act of congress, since such a combination does not directly control or affect interstate commerce. The court distinguishes such a combination from

one having for its object the sale and transportation to other states of specific articles. Combinations of the latter class are held to be proper subjects for regulation, because they enter into such commerce. To which class does the case on trial belong? Plaintiff contends that, inasmuch as the combination under consideration controls not only the manufacture, but the sale, of the maufactured product, this case belongs in the latter class; that defendants' combination affects interstate commerce, and is therefore made unlawful by the act of congress. The reason why the manufacture within a state of an article of commerce is not within the purview of the act, although the manufacturing combination constitutes a monopoly, being that it involves nothing in the way of interstate commerce, does it alter the case that the combination includes the sale of its product among its objects? I am of the opinion that it does not; that the lawfulness of what is done depends upon the place directly affected, and not upon the character in other respects of what is done. It makes no difference that the manufacturer intends his product for sale in other states and foreign countries. Such an intention does not alter the character of the combination to manufacture, and upon this principle it makes no difference that the contract or combination is for the manufacture and sale of [212] specific articles. It must go further, and provide for the sale and transportation to other states of the specific articles; otherwise, what is proposed cannot be said to look to interstate commerce. Mere state commerce is a matter of state control. In this case the action of the defendants in providing for the sale of their product is without reference to interstate commerce. The defendants manufacture and sell within the state, with the intention that the product sold shall all be used within the state, or transported and sold out of it, as the purchaser shall decide. The sale and the manufacture cannot be distinguished, so far as the question of state control is concerned; both take place within the state; both are equally within its police power; both affect interstate commerce in the secondary sense merely; neither affects it in the primary sense. If the shingles manufactured are transported and sold in other states, it is done by other agencies and com-

binations not responsible to the Washington Red Cedar Shingle Manufacturers' Association, and not provided for by their contract of association. If the plaintiff has suffered injury by reason of the alleged combination, it is within the province of his state to provide him a remedy. This court is without jurisdiction in the premises.

The learned judge of this district, in passing upon the demurrer filed in this case (102 Fed. 594), expresses the opinion that the plaintiff is entitled to recover upon the fourth cause of action set out in the complaint. The proof submitted, however, does not sustain this cause of action. The only charge affecting the plaintiff made out by the evidence is that he is a rate cutter. All else contained in the circular complained of is merely inference, more or less doubtful, drawn from the alleged fact that plaintiff was engaged in cutting rates. It is stated in the circular that the plaintiff was endeavoring to injure the market for Washington red cedar shingles, but it is plainly enough stated that he is endeavoring to do this by cutting rates. It is stated that he has no money invested in the business, and his own testimony is to that effect. But, whether true or false, it does not affect his business integrity or capacity. The circular announces the purpose of those issuing it to deal with responsible, honorable, and legitimate dealers; and, having announced a purpose not to deal with the plaintiff, this statement is construed to mean that the plaintiff is an irresponsible and dishonorable dealer, whose methods are not legitimate. But the only inference admissible as to this is the inference that the authors of the circular intend to have nothing to do with rate cutters, because they regard the practice of rate cutting as an illegitimate and dishonest practice; an opinion based upon a fact stated, and not injurious unless the fact to which it is related is of that character. The plaintiff, with many years' experience in the shingle business, is presumed to know whether the charge of rate cutting involves the integrity of those against whom it is made, and it appears that some years ago he advertised himself to his customers in a circular issued in behalf of a firm to which he belonged as a rate cutter, and sought to attract business by the announcement. I am of the opinion that a verdict based upon such testimony ought not to stand, [213] and, if so, a verdict for the defendants should be directed. But with the utmost respect for the opinion of the learned judge just referred to, I am convinced that the allegations in the fourth cause of action are not sufficient. The allegations are of a libel, and the damages alleged do not result from any combination, or conspiracy, or monopoly denounced by the act of July 2, 1890. No such combination or conspiracy or monopoly is shown. And, if the parties to the circular in question can be said to have conspired to libel the plaintiff and injure his business, their conduct was not in restraint of trade, and within the mischief intended to be prevented by the act of congress.

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[909] METCALF *v.* AMERICAN SCHOOL-FURNITURE CO. ET AL.[a]

(Circuit Court, W. D. New York. May 13, 1901.)

[108 Fed., 909.]

CORPORATIONS—SUIT BY STOCKHOLDER—MULTIFARIOUSNESS OF BILL.—A minority stockholder in a corporation may maintain a suit in equity in behalf of himself and all other stockholders similarly situated to set aside an alleged unlawful transfer of the property of the corporation in pursuance of a conspiracy between its officers and the transferee in restraint of trade and commerce, where it is alleged that the corporation, on demand, has refused to bring such suit; but a bill for such relief which also seeks the recovery of treble damages under the anti-trust act of July 2, 1890, is multifarious, since such damages are only recoverable in an action at law by the plaintiff as an individual, and not as a stockholder, while the equitable relief prayed for is in behalf of the corporation, and, if granted, would inure to the benefit of all the stockholders.[b]

In Equity. On motion for temporary injunction and demurrers to bill.

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[a] Affirmed by Circuit Court of Appeals, Second Circuit (113 Fed., 1020), and plaintiff allowed thirty days in which to amend. Memorandum decision. See p. 111. Amended bill dismissed (122 Fed., 115. See p. 234.

[b] Syllabus copyrighted, 1901, by West Publishing Co.

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Seymour, Seymour & Harmon, for orator.

Davies, Stone & Auerbach (*Joseph Auerbach* and *Brainard Tolles*, of counsel), for defendants American School-Furniture Co. and *Oakman and Turnbull*, trustees.

Maulsby Kimball, for defendants Buffalo School-Furniture Co. and others.

HAZEL, District Judge.

The orator, Caroline Metcalf, holder of 569 shares of stock in the Buffalo School-Furniture Company, is a citizen of Connecticut. She brings this bill in equity in behalf of herself and all other stockholders having like interests with her, not citizens of New York, against the Buffalo School-Furniture Company, incorporated in the state of West Virginia, but transacting its business and having its property in the state of New York; Oliver S. Garretson, Henry R. Hoffeld, Frederick C. Garretson, Edward C. Shafer, Robert L. Cox, and Albert D. Garretson, directors of that corporation, owning 80 per cent. of the capital stock, all of whom are residents of the state of New York; the American School-Furniture Company, a corporation of the state of New Jersey; and Walter G. Oakman and George R. Turnbull, residents of the state of New York, who claim to have an interest in the property described in the complaint, as trustees for the holders of bonds of the defendant American School-Furniture Company. She alleges that the directors of the defendant Buffalo School-Furniture Company, without her consent, **[910]** and the defendant American School-Furniture Company, on the 2d day of March, 1899, entered into an unlawful combination and conspiracy whereby it was agreed that there should be no competition in the United States in the purchase and sale of school furniture and similar articles, and that the defendants contracted, combined, and conspired to restrict, restrain, monopolize, and control trade and commerce among the several states in school furniture; that this was done to increase and control the price in contracts for the delivery of school furniture and the like among the several states and with foreign nations, and within the several states. The bill, at great length, alleges conspiracy, and after stating

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that the nominal capital of the defendant American School-Furniture Company is $10,000,000, all of which, after the formation of that corporation, was issued for property, or for options for property, held by promoters of the company, not exceeding $3,000,000 in value; that the defendant American School-Furniture Company borrowed $1,000,000, which still constitutes a liability, and which loan the promoters were able to obtain on the property acquired; that a large secret profit was made out of the transaction; that the consideration for the transfer of the property of the Buffalo School-Furniture Company to the American School-Furniture Company was the sum of $137,461 in cash, $15,000 in notes, 1,300 shares of the common stock, and 1,300 shares of the preferred stock, of the American School-Furniture Company,—it is further alleged that no business whatever has been actually carried on by the defendant Buffalo School-Furniture Company since the transfer; that its board of directors, acting beyond their power, intend to wind up and dissolve the company and distribute all of its assets, including the stock of the American School-Furniture Company, among its stockholders, pro rata, although the American School-Furniture Company and the aforesaid directors know said stock to have no value. It is further alleged that the total capital stock of the Buffalo School-Furniture Company is $350,000, divided into 3,500 shares, of the par value of $100 each; that the complainant requested the Buffalo School-Furniture Company to bring an action in equity to undo the transactions herein complained of, and recover its real estate and other assets from the defendant American School-Furniture Company; that she has exhausted all the means within her reach to obtain within the corporation itself the redress of her grievances; that the property and earning capacity of the Buffalo School-Furniture Company will be destroyed; and that she brings this bill for the benefit of herself and all the stockholders of the Buffalo School-Furniture Company who may be similarly situated who are not residents of the state of New York. It is further alleged that this fraudulent combination and scheme were fully consummated by the defendant directors and the American School-Furniture Company, and that complainant has never consented thereto; that she, being without remedy

by the strict rules of the common law, prays that the American School-Furniture Company and the defendants the directors of the Buffalo School-Furniture Company may be decreed to be personally liable to her in the premises for treble [911] the damages which she has sustained, and that the transfer of the real estate and all of the property and assets of the Buffalo School-Furniture Company may be set aside; that it be restored, reconveyed, and again vested in the Buffalo School-Furniture Company, and that her damages may be ascertained and trebled; that a receiver be appointed; that the treble damages that may be adjudged and awarded to her may be charged as a lien upon said real estate formerly of the Buffalo School-Furniture Company; that the lien may in this proceeding be foreclosed; and that she be paid the damages and treble damages awarded and adjudged to her out of the proceeds of such sale.

The defendants have all demurred to the bill on grounds of multifariousness and want of equity. This suit is properly brought by the plaintiff as a shareholder in the Buffalo corporation, suing, as she alleges, for herself and for and on behalf of all other stockholders not residents of the state of New York. The Buffalo School-Furniture Company is under control of the guilty parties, and they have refused to sue when requested by the complainant so to do. *Hawes* v. *City of Oakland*, 104 U. S. 450, 26 L. Ed. 827; 2 Cook, Corp. § 701; *De Neufville* v. *Railroad Co.*, 26 C. C. A. 306, 81 Fed. 10; *Porter* v. *Sabin*, 149 U. S. 478, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Weir* v. *Gas Co.* (C. C.) 91 Fed. 940.

The primary question immediately arises whether this individual demand for damages is not inconsistent and antagonistic to the equitable relief sought in the bill, and whether these are not demands for equitable and legal relief upon distinct and independent grounds. Innumerable acts are alleged to have been committed in pursuance of the conspiracy. It is also claimed that the conspiracy formed and carried out by the directors was and is in violation of the act of congress of July 2, 1890. Her grievance for which she demands relief is that of a minority stockholder suing for herself and several other stockholders. The damages alluded to in the bill, which she demands for her sole and individual benefit, appear to be the treble damages awarded to a person who is injured in his business or property by the acts of any other person or corporation forbidden or declared to be unlawful by the federal anti-trust law. It is strenuously insisted that the subject-matter of this case, because of the diverse citizenship of the parties, is properly before the court, irrespective of the act of 1890, and that, as the bill states a cause of action in favor of the dissenting stockholder without reference to that statute, a court of equity, having thus obtained jurisdiction of the subject-matter, may administer all the relief which justice demands; that the damages sought are incidental to the demand for equitable relief, and the court has power to completely adjust all the rights of the parties. *Madison Ave. Baptist Church* v. *Oliver St. Baptist Church*, 73 N. Y. 96. It is a general rule that a court of equity, having acquired jurisdiction of the subject-matter, may mold its decrees according to the circumstances of each case. The damages, however, sought to be recovered in this suit, in the light of the demand set out in the complaint, at paragraphs 24, 26, 28, and 31, cannot be re- [912] garded as supplemental to the revesting of the property or incidental to the relief sought by the bill. The relief sought, other than the individual demand for treble damages, is in equity. Section 7 of the federal act of 1890 is declaratory of a common-law right which existed in favor of parties injured by wrongs enumerated in other sections of that act, and confers jurisdiction to seek a remedy, and with treble damages, in a federal tribunal. The character of the right of action is in no way changed, and still remains one in tort. *Blindell* v. *Hagen* (C. C.) 54 Fed. 40; *Pidcock* v. *Harrington* (C. C.) 64 Fed. 821; *Gulf, C. & S. F. R. Co.* v. *Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407; *Block* v. *Distributing Co.* (C. C.) 95 Fed. 978. It inures in the case at bar to the complainant individually, and not to her as a stockholder, as an additional asset of the corporation. All other relief sought, if granted, must in the end belong and come into the hands of the corporation, to the advantage of the stockholders thereof. Cook, Corp. § 701, and cases cited; *Church* v. *Railroad Co.* (C. C.) 78 Fed. 526; *Whitney* v. *Fairbanks* (C. C.) 54 Fed. 985. This case is clearly distin-

guishable from *De Neufville* v. *Railroad Co.*, 26 C. C. A. 306, 81 Fed. 10, cited by counsel for complainant. In that case the relief was demanded in form in favor of the complainant individually, but in law belonged to the corporation of which the complainant was a stockholder, while in this case the treble damages sought by virtue of the anti-trust act would belong to the individual complainant, and not to the corporation of which she is a stockholder. In the case of *Pidcock* v. *Harrington*, *supra*, Judge Coxe said, in relation to the anti-trust act:

"It is clear that the right to maintain in such a suit [in equity] is not expressly conferred by the act. Indeed, such right is by implication denied: * * * First, because a private person is given (section 7) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the attorney general (section 4), are charged with the duty of commencing suits in equity. If it were the intention of the lawmakers to vest in every irresponsible individual who may deem himself aggrieved the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose they would have said so in unambiguous terms?"

To the same effect is the decision of Judge Baker in *Southern Indiana Exp. Co.* v. *United States Exp. Co.* (C. C.) 88 Fed. 659, affirmed by the circuit court of appeals in 35 C. C. A. 172, 92 Fed. 1022. The learned district judge said:

"The anti-trust law of July 2, 1890, has wrought no such change in the law as will enable the court to enforce its provisions in favor of a private party by a bill in equity. Under this act, the only remedy given to any other party than the government of the United States is an action at law for threefold damages, with costs and attorney's fees; and the only party entitled to maintain a bill in equity for injunctive relief for an alleged violation of its provisions is the United States, by its district attorney, on the authorization of the attorney general."

Without deeming it necessary to specifically set out all of the grounds of demurrer of the various defendants interposed herein, it may be said that the chief grounds argued by counsel were the multifariousness of the bill, and want of equity in favor of the orator gen- **[913]** erally. The bill, at great length, alleges conspiracy in restraint of trade and commerce, negligence, and ultra vires acts of the directors of the Buffalo School-Furniture Company, resulting in the depreciation of the value of its stock and property. I think that the bill, with its inferences, sufficiently avers a conspiracy in restraint of trade and commerce to enable the

complainant to give proof of the charge in support of her allegation. If these alleged unlawful acts are proven, injury has been sustained by the corporation, and therefore equity will afford relief. This would entitle the plaintiff, as a stockholder, to equitable relief.

The objection that the bill is demurrable because it lacks equity fails. The defendants Oakman and Turnbull have filed a plea in addition to their demurrer. It is not strictly necessary for the court to pass upon the sufficiency of this plea, having come to the conclusion that the demurrer filed by these same defendants must be sustained. The court is of the opinion, however, that the benefit of the plea should be saved to the hearing, in accordance with the rule laid down in Story, Eq. Pl. §§ 697, 698. The motion for a temporary injunction is denied. Demurrers sustained, with costs to the various defendants; complainant having leave to amend within 30 days.

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[689] DELAWARE, L. & W. R. CO. *v.* FRANK ET AL.

(Circuit Court, W. D. New York. August 26, 1901.)

[110 Fed., 689.]

CARRIERS OF PASSENGERS—SPECIAL TICKETS—CONTRACT PROHIBITING TRANSFER.—A common carrier has a right to issue and sell special tickets at a reduced rate of fare in consideration of the purchaser's agreement to certain conditions and limitations contained therein, among which it may be stipulated that the ticket shall not be transferred, and the use of such a ticket by another to whom it has been transferred in violation of the contract is an actionable wrong.[a]

SAME—CONTRACT MADE BY TICKET—INTERFERENCE WITH PERFORMANCE BY THIRD PARTIES.—A railroad ticket broker who induces the purchaser of a special ticket, in which he has agreed, for a valuable consideration, not to transfer the same, to violate such agreement by selling the return portion of the ticket for the purpose of having it used by another, is guilty of an actionable interference with the performance of the contract.

FEDERAL COURTS—PARTIES TO SUIT IN EQUITY—DISMISSAL AS TO CERTAIN DEFENDANTS.—A federal court may dismiss a suit as

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against defendants between whom and the complainant the requisite diversity of citizenship does not exist, and retain it as to remaining defendants over whom it has jurisdiction, where the defendants dismissed are not indispensable parties, and their dismissal will not prejudice the rights of the others.

INJUNCTION—PARTIES—JOINDER OF DEFENDANTS.—In a suit by a railroad company for an injunction to restrain the purchase from passengers of partly-used tickets, nontransferable by their terms, and their resale for use in violation of the contract contained therein, where different brokers are engaged in dealing in the same class of tickets, all or any number of them may be joined as defendants.

JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—SUIT FOR INJUNCTION.—In a suit for an injunction the amount involved for the purpose of determining the jurisdiction of a federal court is the value of the right to be protected, or the extent of the injury to be prevented, by the injunction.[a]

INJUNCTION—GROUNDS—INADEQUACY OF LEGAL REMEDY.—A court of equity has jurisdiction of a suit to enjoin wrongful acts by defendants where the complainant's legal remedy involves numerous actions against irresponsible defendants, to recover small sums, in which the damages would not be clearly susceptible of proof, and which, if successful, would not result in any practical benefit to complainant.

EQUITY—RIGHT TO INVOKE JURISDICTION—PROTECTION OF CONRACTS ARISING OUT OF UNLAWFUL COMBINATION.—In a suit by a railroad company to enjoin the defendants, who were ticket brokers, from dealing in special tickets issued by complainant on account of the Pan-American Exposition, which were by their terms nontransferable, it appeared from the showing made on a motion for a preliminary injunction that complainant was a member of a combination known as the "Trunk Line Association," formed by a number of railroads operating in different states for the purpose of preventing competition; that the passenger receipts of all such roads were pooled and divided on an agreed basis; and that the special rates made on account of the Exposition were fixed, and the terms of the tickets which were the basis of the suit prescribed, by such association through its passenger committee. *Held*, that such combination was illegal, as in violation [690] of the federal anti-trust law (26 Stat. 209), and that complainant could not invoke the aid of a federal court of equity for the protection of rights claimed under contracts which were the direct result and evidence of such unlawful combination.

In Equity. On motion for preliminary injunction.

Rogers, Locke & Milburn, for complainant.

[a] Jurisdiction as affected by amount in controversy, see notes to *Auer* v. *Lombard*, 19 C. C. A. 75; *Shoe Co.* v. *Roper*, 36 C. C. A. 459.

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Roberts, Becker, Messer & Groat, Laughlin & Ewell, Louis L. Ullman, and *George F. Schultz* (*Tracy C. Becker* and *Louis Marshal*, of counsel), for defendants.

HAZEL, District Judge.

The injunctive relief of this court is invoked by the complainant on the ground of diverse citizenship, and on the further ground that, by the wrongful and fraudulent action and threatened continuance of the wrongful and fraudulent sale of special coach excursion tickets, account Pan-American Exposition, by the defendants, the complainant is damaged far in excess of the sum of $2,000. The complainant is a citizen of Pennsylvania. The bill alleges that the complainant believes the defendants are citizens of New York. A restraining order was heretofore allowed on the bill and accompanying affidavits, with an order to show cause why an injunction pendente lite should not be granted. Sixty-one defendants are proceeded against, many of them under the name of John Doe. By the bill it is claimed that the complainant railroad corporation is greatly wronged and damaged by the fraudulent and unlawful acts of the defendants, who are railroad ticket brokers engaged in business at Buffalo, N. Y. After reciting that the complainant operates a railroad for the carriage of passengers and freight for hire between Hoboken, N. J., and Buffalo, N. Y., and branch lines connecting with its main line and various other railroad lines with which it interchanges freight and traffic, the bill alleges that there is now being held in the city of Buffalo, within the jurisdiction of this court, the Pan-American Exposition; that, shortly before the opening of the Exposition, application was made by the officers thereof to the complainant and other railway companies connecting with it, to reduce their usual and ordinary rate of fare charged for passenger transportation from points along their lines to Buffalo and return to the initial point. To this request, it is alleged, complainant consented, and thereafter caused to be sold at its various stations tickets for special round trips and excursions to Buffalo at greatly reduced rates. The bill further alleges that, in consideration of such reduced rates, such tickets provide that the same shall not be transferable nor

be valid or accepted for transportation in the hands of any person other than the original purchaser; that the same shall be good for only a specified number of days from the date of sale stamped thereon, and before being presented for return passage shall be stamped by a validating agent at Buffalo not later than the day canceled thereon,—that being the day on which said ticket shall be used for return to the initial point, and then to be used by continuous passage on the same train. The ticket has printed on its face the words, "Special Excursion Ticket, Account Pan-American Exposition." The conditions as above set **[691]** forth are printed thereon, and the purchaser is required to subscribe to the following contract:

"In consideration of the reduced fare at which this ticket is sold, I, the purchaser, hereby accept and agree to be governed by all the conditions as stated in the above contract."

It is further alleged that the New York Central & Hudson River Railroad Company and the West Shore Railroad Company, connecting roads, have issued like tickets, which are good in part over complainant's road. The bill then alleges broadly that defendants are engaged as ticket brokers or ticket scalpers at Buffalo, and in the conduct of their business procure from the original purchasers, and other persons in many instances, the return portions of such tickets purchased by them from Buffalo to the initial point, and that, when the same are procured, such tickets are sold to other persons, who, by falsely impersonating the original purchaser before the validating agent of complainant, and signing the original purchaser's name to such ticket, are enabled to use such tickets for transportation over complainant's railroad. It is further alleged that defendants, by billboards and placards placed over and in front of their various offices, give notice that they buy and sell such tickets at cut rates; that they employ solicitors to intercept persons originally purchasing such Pan-American special-rate tickets, on their arrival at Buffalo, for the purpose of purchasing the return portions of such tickets, and that such tickets are disposed of to the traveling public; that the purchaser is instructed how to impersonate the original purchaser so as to escape detection. It is also charged that forgeries and other fraudulent and wrongful acts are committed by the defendants, the original purchaser of the ticket, and the purchaser from the defendants, for the purpose of hindering and impeding the complainant in its business, and to deprive it of the sale of tickets at the regular and ordinary rate from Buffalo to other points along its line, and to defraud it out of the amount of the fare which the person fraudulently using such ticket would otherwise pay for such transportation. It is also alleged that the defendants are pecuniarily irresponsible, that it is impossible for complainant to establish from which of the defendants fraudulent tickets are purchased, and that no practicable means exist by which the frauds of the defendants can be detected or prevented. The bill also alleges that the defendants, or many of them, are united in an association and band and conspire together to carry on the business of purchasing and disposing of said tickets, and that complainant's business is thereby greatly injured, and its earnings and profits lessened. At the time of the hearing on the motion to continue the injunction, 36 defendants appeared, by counsel, specially, to object to the jurisdiction of the court. Other defendants appeared in person. The ground of objection is that a diversity of citizenship does not exist between complainant and many of the defendants. Affidavits of two defendants were read and filed, showing that they are citizens of the same state as the complainant. Affidavits of other defendants were also read and filed, from which it satisfactorily appears that such defendants are not citizens of New **[692]** York. The affidavits denying diversity of citizenship are, upon this application, treated as a plea to the jurisdiction of the court to grant the provisional relief sought.

Defendants contend (1) that the bill cannot be dismissed as to any defendant not within the jurisdiction of the court without a dismissal of the bill as to all defendants; (2) that the bill does not state a cause of action, either in law or equity, against any of the defendants; (3) that complainant is engaged in an open violation of the anti-trust law of congress in maintaining in combination with other railroads a rate of fare to the Exposition and return to the initial point; (4) that the bill ought to be dismissed on the further ground that its essential allegations and those of the accompanying

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affidavits are made on information and belief, or by a person who has no actual knowledge of the facts alleged.

This application is based mainly upon the bill of complaint. The bill, however, is positive in many of its allegations, and being verified, may therefore be considered an affidavit as a basis for provisional remedy. *Hecker* v. *Mayor*, etc., 28 How. Prac. 212, and cases cited. The defendants' counsel contend that the allegations of complainant's papers are not made in such a direct and positive manner that the writ of injunction may issue. An examination of the averments of the bill and the affidavits submitted convinces me, however, that this objection is untenable. I deem it quite uniformly settled by the courts of the United States and by the state courts, where the question has been considered, that a common carrier has a right to issue and sell tickets along and over its line or road at reduced rate of fare in consideration of the purchaser's agreement to on his part conform to conditions and stipulations expressed by the ticket and furnished to the purchaser. The conditions to which the purchaser of complainant's ticket assented were, substantially, that the ticket should not be transferred to another for use; that the purchaser would present the return portion of the ticket for use within a specified time; that he would affix his signature in the presence of the joint agent on the reverse side of the return portion on or before the day limited for return use. It was held in the case of *Railroad Co.* v. *McConnell* (C. C.) 82 Fed. 65, that the right to make and issue a special form of ticket, furnishing a reduced rate of fare, and thereby aiding in a great public purpose, is fully recognized both at common law and by legislation, and that the use of one of these tickets in violation of the contract by a person other than the original purchaser is a fraud upon the common carrier. It follows that the right to impose conditions upon its passengers in consideration of the acceptance of a ticket at reduced fare carries with it a right to limit the ticket as to time, the train on which it is to be used, and to prohibit a sale and transfer thereof to another person. Defendants admit a right of limitation as to time, restrictions as to train to be used, and that a railroad company may require the ticket issued by it to be stamped.

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They insist, however, that, as the ticket is property, a prohibition of its sale is equivalent to depriving its owner of acquired property; that he obtains by the purchase thereof an assignable right, and also the right to authorize another to indorse his name **[693]** on the ticket whenever it is required by the contract of purchase. I cannot accept this view. No substantial reason presents itself why a purchaser of transportation from a common carrier in consideration of the reduction of fare from the ordinary rate should not abide faithfully by reasonable restrictions and limitations contained in the contract of purchase. While a person may obtain an assignable right in a railroad ticket, yet, when the right obtained is curtailed or limited, the purchasing party, assenting to the limitation for a valuable consideration, must hold his obligation as inviolate as he has a right to hold that of the railroad company. In consideration of the price paid for the ticket the purchaser obtains the right of passage, and as well obligates the common carrier to other responsibilities. Where a right of passage is obtained by special contract and at a reduced rate of fare, carrying with it restrictions and limitations, the purchaser receives a consideration which makes it obligatory on him to in good faith carry out his agreement. A violation of the contract of transportation by the common carrier lays it open to legal liabilities and consequent remedies. The contract is binding on both. If the time in which a return part of the ticket may be used has lapsed, the purchaser of the ticket has failed to accept a right guarantied him by the contract. Failure to use the return portion of the ticket by him must be deemed his own voluntary act or neglect. The common carrier is required to transport the purchaser on his return without additional compensation. It may be required to provide for his use such comfort and conveniences as are usually allotted to the traveling public. This question was only recently before the Fourth department, appellate division of the supreme court of New York. *People* v. *Caldwell*, 71 N. Y. Supp. 654. Justice McLennan, speaking for the court, said:

"We think the decision in the case of *People ex rel. Tyroler* v. *Warden*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763, must be regarded as decisive of the proposition that it is not competent for the legislature to prohibit the purchase and sale of

passage tickets over transportation lines when such sale is not in violation of any contract made with the transportation companies upon the sale of such tickets by them."

This was a case brought before the court on appeal from a final order in habeas corpus proceedings discharging the relator from arrest. The relator was arrested for violating an act of the legislature passed in 1901, which by its terms provided, in substance, that no person shall sell a passage ticket giving any right to a passage or conveyance upon any railroad train, unless it be an authorized agent of the company running such train, or unless he has received a certificate of authority therefor, in writing, from such company. The court followed a decision of the court of appeals (*Tyroler* v. *Warden*, *supra*) holding such a penal statute unconstitutional. It will be seen that the appelate division limited its decision, and interpreted the decision of the court of appeals, to tickets issued over railroad lines whenever such sale is not in violation of contractual obligations. It is clear that a limitation upon the use of a ticket as to time and its use by another than the original purchaser may be restricted and limited to the fair and true intendment of the contract. When, therefore, a subsequent purchaser of a ticket from a broker, who pur- **[694]** chased the ticket from the original purchaser, uses the same, he becomes liable to the railroad company wronged, in an action at law, for any damage sustained. No obligation exists on the railroad company to transport a passenger holding such a ticket. *Mosher* v. *Railway Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249. It is equally clear that the interference of the ticket broker in inducing a person holding the return part of a ticket purchased by him from the railroad under special contract arrangements not to transfer or permit the use of such ticket by another person, in consideration of the sale of such ticket at a reduced rate of fare, in order to break the contract, is actionable. *Angle* v. *Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Railroad Co.* v. *McConnell*, *supra*. An examination of the authorities convinces me that it is quite well settled that jurisdiction may be retained over defendants as to whom a diversity of citizenship exists, and a dismissal of the complaint may, and in a proper case will, be permitted against defendants who are not found to be

within the jurisdiction of the court, unless such defendants are indispensable to the entry of a decree against the remaining defendants, and when it may be done without prejudice. *Horn* v. *Lockhart*, 17 Wall. 570, 21 L. Ed. 657; *Oxley Stave Co.* v. *Coopers' International Union of North America* (C. C.) 72 Fed. 695; *Mason* v. *Dullagham*, 27 C. C. A. 296, 82 Fed. 689; *Grove* v. *Grove* (C. C.) 93 Fed. 865; *Smith* v. *Oil Co.*, 30 C. C. A. 103; 86 Fed. 359.

The contention of counsel for defendants that the bill imperfectly and defectively charges fraudulent and wrongful acts by 61 defendants, rendering it impossible to separate any one of them or dismiss the bill as to any of them without injury and prejudice to the remaining defendants, is untenable. The defendants who are not diverse citizens from the complainant are not indispensable.

The question now arises, can this proceeding be maintained against the remaining defendants, and by a single bill? These objections are removed by the language of Judge Clark in the McConnell Case, where the facts are similar to the case at bar, at page 75, where he says:

"I think the defendants may properly be joined in one suit. Plaintiffs' business is the subject-matter in each bill, and the right claimed is exactly the same against all the defendants. The injury complained of is the same, and is being inflicted by defendants in the same method and at the same time."

The objection that the suit fails of jurisdiction because it is not shown that the defendants against whom the action may be continued have damaged complainant in a sum in excess of $2,000 is overruled. It has been frequently held that in a suit in equity, where an injunction is sought, the amount in dispute is not the amount in controversy, but the value of the object to be gained by the bill. In the case of *Humes* v. *City of Ft. Smith* (C. C.) 93 Fed. 862, where an objection was made to the jurisdiction of the court because the amount in controversy did not exceed the sum of $2,000, the court said:

"Jurisdiction is not determined in that way. Jurisdiction is determined by the value of the right to be protected, or the extent of the injury to be prevented, by the injunction."

[695] A court of equity will not require a pursuit of a legal remedy which foreshadows annoyance, accompanied

by uncertain results and multiplicity of suits, to recover small sums from irresponsible defendants, where, as in this case, the damages caused by the alleged wrongful acts are not clearly susceptible of proof, and where the legal remedy that is afforded falls short of being complete and efficient. *Railroad Co.* v. *McConnell*, *supra*; *Insurance Co.* v. *Clunie* (C. C.) 88 Fed. 167; *Smith* v. *Birens* (C. C.) 56 Fed. 352; *Smyth* v. *Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *De Forest* v. *Thompson* (C. C.) 40 Fed. 375. The complainant's papers, standing alone, disclose a proper case for the exercise of equitable relief.

I now come to consider a ground of objection to a preliminary injunction, not free from difficulty. I have given the subject most serious consideration, and am conscious of the great importance and far-reaching effect that its decision involves. Defendants contend that the complainant, in determining on the reduced rate of fare for a round-trip ticket on its road during the continuance of the Pan-American Exposition at Buffalo, ending with October 31, 1901, in conjunction with other railroad lines having facilities for transportation of passengers over its road to Buffalo, violated the provision of the act of congress of July 2, 1890, by which it is provided:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." 26 Stat. 209.

It appears from the affidavit of Mr. Lansing: That the complainant is a party to a combination which is engaged in pooling railroad rates and in fixing fares for railroad transportation in order to avoid competition between the several lines constituting the association known and distinguished as the "Trunk Line Association." This association has among its membership a constituted committee known as the "Trunk Line Committee." It is claimed that its membership consists of the complainant and eight other railroad corporations, citizens of different states, operating in the Middle states. The Trunk Line Association acts through a trunk line passenger committee, which is composed of the general passenger agents of the principal railroads operating in the territory reached by the several railroads which they

represent. That the special Pan-American tickets referred to in the bill of complaint have been issued pursuant to such combination and conspiracy. That the rates and conditions of the tickets were previously arranged, and are a product of this combination organized to stifle competition in railroad rates. It further appears that the complainant and other railroads in combination are pooling the first and second class passenger business of their respective roads upon an agreed division of the receipts. The representative of the joint agency testified before the police court of the city of Buffalo in a proceeding brought against a ticket broker. It appears from his testimony, which is produced by the defendants, that the rates are fixed by the association, and that the complainant is a member thereof; that he is employed by this association in conjunction with the Central Passenger Association. The defendants' affidavits and exhibits have not been questioned or controverted on **[696]** the part of complainant. They stand admitted, therefore, upon this application for a continuance of the injunction. Defendants charge that the very ticket which is the ground of this application is the result and the evidence of an unlawful agreement between the different railroads composing the Trunk Line Association. This is not denied. The court cannot at this time pass upon the existence of this unlawful agreement, other than as it appears in the papers submitted. Were this at final hearing, when all the facts known to the complainant were divulged, the court might not be bound to seemingly protect the defendants in the pursuit of their nefarious practices, for such they admittedly are. The defendants do not deny the charges of wrongdoing. A court of equity would therefore be bound to raise its arm in defense of a complainant suffering wrongs which could be properly righted by the exercise of its power. But can the aid of a federal tribunal be invoked to protect the complainant in the issuance of a ticket over its railroad, which, as far as it appears to the court, is the culmination as well as the evidence of an agreement between railroad corporations specifically forbidden by an act of congress which has been sustained by the supreme court of the United States? *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540,

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41 L. Ed. 1007; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. The complainant contends that this charge made by the defendants does not avail, as the wrongdoing, if any exists, does not relate to the subject-matter. I am not convinced as to the soundness of this contention. Can the railroad complainant conspire unlawfully to fix rates, and then come into a court of equity and invoke its aid to protect those rates which are represented by the ticket presented to the court, and which is wrongfully used by the defendants? The evil practice which stands admitted by the papers is the very practice in which the court's protection is invoked. As was well said in *Insurance Co.* v. *Clunie* (C. C.) 88 Fed. 170:

"The maxim that he who comes into equity must come with clean hands has its limitations. It does not apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct, unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought."

See, also, Beach, Mod. Eq. Jur. 14–16; Pom. Eq. Jur. 397, 398; *Beck* v. *Real Estate Co.*, 12 C. C. A. 497, 65 Fed. 30; *Weiss* v. *Herlihy*, 23 App. Div. 608, 49 N. Y. Supp. 81; *Sinsheimer* v. *Garment Workers*, 77 Hun, 215, 28 N. Y. Supp. 321.

In the Sinsheimer Case an injunction was sought by plaintiffs, who were a combination of clothing manufacturers formed for mutual protection from the demands for higher wages of their employés, who were also organized for protection and for advancing their wages. The court said:

"Under the circumstances disclosed by the papers in this case, if the defendants were guilty of any violation of law, the plaintiffs were certainly equally implicated, and under this condition of affairs it is difficult to see [697] how they would have a right to the intervention of a court of equity. In dealing with questions of this nature the court should be studious to see that the rights of all parties are protected, and that the forms of law should not be permitted to be used on behalf of one party against another, when the party seeking the intervention of the court has been endeavoring to secure his ends by means similar to those which he seeks to enjoin on the part of his antagonist."

The wrongdoing of complainant, admitted by the papers,

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is not remote. It has given birth to the combination whose tickets have been wrongfully diverted by the defendants. This court has no sympathy with, nor would it lend its aid willingly to, those indulging in practices admitted by the defendants. But, sitting as a court of equity, it is bound by those rules which are the very foundation of that branch of our jurisprudence. The complainant does not come before the court with clean hands in the transaction complained of. The court can, therefore, not grant it equitable relief upon the state of facts before it at this time. The complainant must therefore be relegated to its remedies at law, and the injunction vacated. Let an order be entered accordingly.

ON REHEARING.

(October 14, 1901.)

Motion for reargument on notice to defendants was heard by me September 30, 1901. Affidavits were read in behalf of complainant, denying the charge of violation of the anti-trust act, the alleged pooling of business, and the apportionment or division of money received by various railroads for sale by them of reduced-rate Pan-American tickets. Defendants, in reply, read additional affidavits, corroborative of their charge of iniquitous conduct by the complainant with respect to the tickets in question. Answers in behalf of 38 defendants were served and filed, denying the commission of the wrongful acts charged in the complaint.

Important and difficult questions of law are involved in the determination of this motion. A disposition of it on the affidavits presented may fail of having the facts carefully examined and deliberately heard. The original motion for injunction was denied, for the reasons stated in the opinion of the court filed August 26, 1901. The Pan-American Exposition, on account of which the reduced-rate ticket was issued by the complainant and other roads associated with it, will close its gates on October 31st,—within 17 days. It is doubtful whether the necessity for immediate protection from alleged wrongful acts now exists. Inasmuch as the defendants have read additional affidavits and filed an

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answer corroborative of the charge of the existence of a combination in violation of law, the issues now raised ought not at this time to be disposed of summarily.

Motion for reargument denied as to defendants who have appeared and answered. Defendants who have not answered, of course, may be proceeded against in accordance with the ordinary rules of equity procedure.

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[96] CENTRAL COAL & COKE CO. ET AL. *v.* HARTMAN.

(Circuit Court of Appeals, Eighth Circuit. September 30, 1901.)

[111 Fed., 96.]

MONOPOLIES—COMBINATIONS IN RESTRAINT OF TRADE—DAMAGES.—Only actual damages, established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable [under the Sherman anti-trust law (26 Stat. 209)]. Speculative, remote, or contingent damages cannot form the basis of a lawful judgment.

SAME—SPECULATIVE DAMAGES—EVIDENCE—SUFFICIENCY.—The estimates, speculations, or conjectures of witnesses unfounded in the knowledge of actual facts from which the amount of the damages could have been inferred with reasonable certainty will no more sustain a judgment than the conjectures of a jury.

SAME—ANTICIPATED PROFITS—WHEN RECOVERABLE.—The general rule is that the anticipated profits of a commercial business are too remote, speculative, and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to [97] this rule that the loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was.

SAME—PROFITS OF ESTABLISHED BUSINESS—EVIDENCE—INDISPENSABLE TO RECOVERY.—Proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.

SAME—LOSS OF PROFITS.—The plaintiff testified that the acts of the defendants had greatly diminished his business, prevented him from making contracts for future delivery of coal, and diminished his sales from 15 to 20 carloads per month, on which he would have made a profit of from $12 to $20 per car; that he could not tell

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what the volume of his business was before or after the acts complained of, and that he had no books or papers which would show this fact. He produced no evidence of the expenses or income of his business before or after the acts complained of. *Held*, that the evidence was insufficient to sustain a verdict for damages for the loss of anticipated profits.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Western District of Missouri.

W. C. Perry (*Daniel B. Holmes*, *Adiel Sherwood*, and *John O'Grady*, on the brief), for plaintiffs in error.

Charles H. Nearing (*J. S. West* and *J. B. Campbell*, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and ADAMS and LOCHREN, District Judges.

SANBORN, Circuit Judge.

This was an action brought by Samuel Hartman against the Central Coal & Coke Company and several other corporations for three times the damages which he claimed that the defendants had inflicted upon his business by their violation of the inhibitions of the act to protect trade against unlawful combinations and monopolies, commonly called the "Sherman Anti-Trust Law" (26 Stat. 209, c. 647). His complaint was that he had been engaged in the sale of coal in Kansas City, in the state of Kansas, since 1893; that in September, 1896, he and the defendants had formed a coal club to establish and control the prices at which coal should be sold in Kansas City, Kan., and Kansas City, Mo., and to restrain commerce among the states; that they had accomplished their purpose; that he withdrew from the club in 1897; that thereafter the defendants and their associates would not sell him Salt Fork coal or Cherokee coal at any other prices than those which they had established for the sale of coal at retail to consumers; that this action of the defendants caused him a loss of all his trade in Salt Fork coal, of a large portion of his business in Cherokee coal, and made it impossible for him to make contracts for the future

delivery of coal, because he was uncertain whether or not he could obtain it; so that he suffered damages in the sum of $2,500. The defendants denied these averments, and at the close of the trial the jury found that the plaintiff's damages were $130, and judgment was thereupon rendered [98] against the defendants for three times this amount, $500 attorney's fees, and the costs of the action.

The assignment of errors challenges rulings of the court upon the construction of the act of congress upon the nature and extent of interstate commerce, and upon the sufficiency of the evidence of damages to warrant a verdict against the defendants. If no real legal injury was proved in this case, if there was actually no subject of this controversy, if this is really nothing but a moot case, any opinion we might render upon the grave questions relating to the construction of the act of congress and the character and extent of commerce among the states would be mere obiter dicta, and any discussion or decision of these questions in this action would be useless. For this reason the sufficiency of the evidence of damages to sustain the verdict will first be considered. The only damages claimed in the petition, and the only losses which the plaintiff sought to prove at the trial, were the loss of some of the expected profits of his business of buying and selling coal between January 1, 1897, and January 25, 1899. Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. *Howard* v. *Manufacturing Co.*, 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; *Cincinnati Siemens-Lungren Gas Illuminating Co.* v. *Western Siemens-Lungren Co.*, 152 U. S. 200, 205, 14 Sup. Ct. 523, 38 L. Ed. 411; *Trust Co.* v. *Clark*, 92 Fed. 293, 296, 298, 34 C. C. A. 354, 357, 359; *Simmer* v. *City of St. Paul*, 23 Minn. 408, 410; *Griffin* v. *Colver*, 16 N. Y. 489, 491, 69 Am. Dec. 718. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly income he derives from it for a long time before, and for the time during the interruption of which he complains. The interest [99] upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff has lost. One, however, who would avail himself of this exception to the general rule, must bring his proof within the reason which warrants

the exception. He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced. 1 Sedg. Dam. § 183; *Red* v. *City Council*, 25 Ga. 386; *Kenny* v. *Collier*, 79 Ga. 743, 8 S. E. 58; *Greene* v. *Williams*, 45 Ill. 206; *Hair* v. *Barnes*, 26 Ill. App. 580; *Morey* v. *Light Co.*, 38 N. Y. Super. Ct. 185. And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery. In *Goebel* v. *Hough*, 26 Minn. 252, 258, 2 N. W. 847, 849, the supreme court of Minnesota said:

"When a regular and established business, the value of which may be ascertained, has been wrongfully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are."

The truth is that proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business. *Gobel* v. *Hough*, 26 Minn. 252, 256, 2 N. W. 847; *Chapman* v. *Kirby*, 49 Ill. 211, 219; 1 Sedg. Dam. § 182; *Ingram* v. *Lawson*, 6 Bing. N. C. 212; *Shafer* v. *Wilson*, 44 Md. 268, 278.

Did the plaintiff make any proof of this character at the trial below? The only evidence he offered relating to the damages which he claimed was his own testimony, and he directed this to four elements of injury which he evidently thought tended to show loss of profits, viz. loss of customers, diminution of supply of coal, decrease of volume of business, and the amount of his anticipated profits on sales that he did not make. According to his testimony, he had been in the business of buying and selling coal at Kansas City since 1893. He became one of the board of control of the coal club in 1896,

and [100] withdrew from it in 1897. After his withdrawal he could not procure two kinds of bituminous coal known as "Salt Fork coal" and "Cherokee coal" unless he paid for it a price only 50 cents a ton less than the price to the consumers, notwithstanding the fact that the retail dealers who were members of the club could buy this coal at a price about $1.25 per ton less than the price to the consumers. The reason why he could not buy this coal at the same rate as the members of the club was that they controlled the coal and its price, and they would not sell it to him at that price. His only testimony as to his loss of customers was that before he left the club he could and did make contracts for the future delivery of this coal; that after he withdrew he did not dare to do so, because he did not know that he could secure it; that there was some trade that would come to him for certain grades of coal; that he could not give these grades to those who came; that they did not want to come back, because they did not know whether they could get the coal or not; that his contract business on car-load lots before he withdrew from the club was one or two car loads a month, and that he did not know what it was on wagon loads. He produced no contracts he had ever made. He named no customer with whom he had ever had a contract, no customer whom he had lost. He did not testify how many customers had left him, nor the amount of coal which any or all of them had been accustomed to buy during the years from 1893 to 1897, when he had been receiving all this coal which he wished to procure. Here are no facts—no data—from which the number of customers or the amount of custom which he had lost can be lawfully inferred, none which make the amount of the contracts for future delivery which he did not make either reasonably or unreasonably certain, no basis for even a fair conjecture. He testified that he did not know himself what his customary contract business was and he produced no evidence from which the jury could learn. As to his transactions in Salt Fork and Cherokee coal, he testified that before he left the association he was selling from two to three car loads of Salt Fork coal per week during the winter time, and that this was the biggest part of his business,—nearly half of it. But, when the account books of the cor-

poration from which he bought this coal were produced, they disclosed the fact that he purchased only four car loads during November and December, 1896, and only four car loads between December, 1896, and August, 1897, and he admitted that this might be a true statement of the amount of this coal which he handled during that winter, and he produced no books of account, no bills, no checks, no other evidence to explain the wildness of his conjecture that his business in this coal the winter before its interruption was from 26 to 39 car loads, when in fact it did not exceed 8. He testified that after he left the club he had a hard time to get Cherokee coal, but that he got some through other dealers, and that his business in this coal was two or three cars a week in the winter before he withdrew. But he produced no evidence to verify this statement, and no proof of the amount of the decrease of this business, if any, caused by the action of the club. There is no evidence in the record that the coal club in any way diminished his trade in any other coals **[101]** than the Salt Fork and the Cherokee. The plaintiff testified that their action did not disturb his trade in the anthracite and semianthracite coals, and that his business in these increased after the interruption of his trade in the Salt Fork and Cherokee. As to the volume of his general business and its decrease he testified that the better grades of coal he handled were in the association, and his failure to get them caused his business to run down so that he had hardly any; that he had only one grade of coal one winter; and that he could not do business after he left the club as he could the winter before. But he produced no evidence of the volume of his business, of its income, or of its expenses before or after the interruption. The only evidence he produced as to his expected profits was his own testimony that his ordinary profit on a car load of coal was from $12 to $20, and that he had his own place of business and his own teams. But the evidence disclosed the fact that this $12 to $20 was the difference between the amount he paid for a car load of coal and the amount which he retailed it for, and that it would be necessary to deduct from this alleged profit the proper proportion of the expenses of hiring the teamsters, maintaining the teams and the office, handling the coal, and

operating the business, before the actual profit could be ascertained; and there was no evidence of the amount of these expenses. The plaintiff testified that he kept a ledger, in which he entered the charges of coal sold on credit, and that he had a bank account and a bank book, but he said that he had no books that would show how much coal he handled before or after the interruption, and he did not produce either his ledger or his bank book. Here are a few extracts from his testimony on cross-examination:

"Q. Now, you can't give us any details as to the amount your business was damaged, can you? A. Yes, I think I can make an estimate that it was three or four cars a week less during the season. Q. That would be your estimate? A. Yes, sir. Q. But you can't tell these gentlemen how many cars you handled less after that than you did handle while you were a member of the association, or before you were a member? A. Well, it would run between twelve and fifteen cars a month. * * * Q. And you can't tell the jury the number of cars of coal that you handled in 1898? A. No, sir. Q. All that you can say is that you think it is a little less than it was in the year 1896? A. Yes, sir. Q. But how much less you can't tell? A. No, sir. * * * Q. You haven't got any account, or any paper, or any book, or anything on earth to show how much you took in, or how much your expenses were, or how much you had to pay for your coal? A. I haven't got it here, but I expect I could come pretty near telling you what it was. Q. You haven't even got your cash book, to show how much you took in in any given time, have you? A. No, sir. Q. Or your journal to show how much you paid out? A. No, sir. Q. You haven't got any record to show how much coal you bought, or who you got it from, or when it was received? A. No, sir. * * * Q. Then you can't give any information from your books as to the amount of Cherokee coal you handled? A. No, sir. Q. And the same is true as to all other coal you have handled? A. Yes, sir. Q. So we will just have to take your word for it? A. Yes, sir. Q. Haven't you got a bank book? A. Yes, sir. Q. Where is that? A. It is over in my office. Q. Haven't you got the [weigh bills] for your coal? A. I had them, but I destroyed them. Q. Haven't you got those in 1898, when you thought about commencing this suit? A. I may have; but I didn't look after that part of the business. Q. Then the result of it all is that, so far as the extent of your business is concerned at any time, we can't get any light as to that from any books you kept? A. No, sir; not even from my check books and bank books. I don't keep them."

[102] These excerpts from the testimony demonstrate the fact that the basis of this judgment is nothing but the mere guess of an interested witness. Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way. This plaintiff first estimated that he had lost the sale of from 9 to 13 cars of Salt Fork coal per month during the winter season after he withdrew from the club, and the same number of cars of Cherokee coal,

or in the aggregate from 18 to 26 cars per month. On cross-examination he guessed again, and estimated that his loss was only from 12 to 15 cars a month. When the books of the Salt Fork Coal Company were produced, and showed that his purchases of that coal in the winter of 1896 had averaged less than 2 cars per month, he conceded that this might be correct, and that he might have overestimated his trade in this coal before he withdrew from the association at least 300 per cent.; that he had guessed 9 to 13 cars per month, when it was only 2. Testimony of this character is nothing but conjecture, and it presents no substantial evidence to make certain the profits that were lost, if any. Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts. The plaintiff in this case had his bank account at his command, which would certainly have given him some indication of the volume of his business before and after the interruption of which he complained. He had his ledger, in which he testified that he had entered the charges of the coal which he had sold on credit. The bank account and the ledger account together, if properly kept, would have given at least an approximate statement of the value of the coal which he handled, because one would have shown his cash receipts, the other his charges for coal sold on credit, and the payments he received for that coal, and a careful comparison of the two would have enabled any intelligent bookkeeper to at least approximate the value of his business. These books were not produced. The indispensable facts to warrant a recovery of the expected profits of an established business were not established. There was no evidence of the amount of capital in the business, of its expenses or of its income, either before or after its interruption. There were no data for a rational estimate of the profits at any time during the continuance of the business; nothing from

which the jury could reasonably infer that the business was profitable before, less profitable or profitless after, the plaintiff's withdrawal from the club. Much less were there any facts established which made the amount of the expected profits lost reasonably certain. The interested witness who alone estimated this loss himself testified that he knew no facts from which a rational finding could be made. and his testimony shows that his estimates were nothing but the wildest conjecture. The result is that the verdict is a speculation of the jury, based on the conjectures of an interested witness, unsupported by the proof, or the **[103]** knowledge of any facts from which the plaintiff's loss, or its amount, could lawfully or rationally be inferred, and it cannot be sustained.

The conclusion which has already been reached upon the sufficiency of the evidence of damages to sustain the verdict renders it both unnecessary and unwise to consider or discuss the other questions in this case. The nature of the evidence of damages introduced and withheld by the plaintiff renders it improbable that it will ever be necessary to consider the other issues of law which counsel have discussed.

The judgment below is reversed, and the case is remanded to the court below, with instructions to grant a new trial.

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[156] FOOT *v.* BUCHANAN, UNITED STATES MARSHAL.

(Circuit Court, N. D. Mississippi, W. D. January 14, 1902.)

[113 Fed., 156.]

WITNESSES—EVIDENCE—INCRIMINATING—PROTECTION—CONSTITUTION—STATUTE.—Under the fifth amendment of the constitution of the United States, providing that no person shall be compelled in any criminal case to be a witness against himself, a witness before the grand jury cannot be required to answer as to his participation in, and knowledge of, a combination to regulate and control the price of cotton seed and the product and price of oil throughout certain states, in violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat. 209), notwithstanding Rev. St. § 860, providing that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or

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in any manner used against him in any court in any criminal proceeding, since such section does not exempt the witness from prosecution for the offense which may be disclosed by his testimony.

SAME—INTERSTATE COMMERCE ACT—VIOLATION—WITNESS—EXEMPTION FROM PROSECUTION—UNLAWFUL MONOPOLIES—PROHIBITION—APPLICABILITY OF EXEMPTION.—Act Cong. Feb. 11, 1893 (27 Stat. 443), providing that no person shall be excused from testifying in a proceeding growing out of an alleged violation of an act to regulate interstate commerce, approved February 4, 1887, on the ground that his testimony will tend to incriminate him, and that no person shall be prosecuted, etc., on account of anything concerning which he may testify in such proceeding, applies only to proceedings connected with the act of February 4, 1887, and does not apply to a prosecution for violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat. 209), so as to abrogate in relation thereto Const. U. S. Amend. 5, providing that no person shall be compelled in a criminal case to be a witness against himself.

SAME—QUESTION FOR JUDGE.—Where a witness claims that the answer to a question will tend to incriminate him, it is not for the witness, but for the judge, to decide whether, under all the circumstances, such might be the effect, and the witness entitled to the privilege of silence.

SAME—NATURE OF TESTIMONY.—Where a person has already been indicted for an offense about which he is to be examined as a witness, and the questions asked him tend [157] to connect him with such offense, the testimony sought is within the inhibition of Const. U. S. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself.

SAME—ASSURANCE OF SAFETY—RELINQUISHMENT OF PRIVILEGE.—Where a witness before a grand jury declines to answer certain questions, and is taken before the judge, who assures him that he can safely answer, as his testimony cannot be used against him, he is not compelled by such assurance to relinquish his constitutional privilege, where the answer may tend to criminate him.

SAME—CONTEMPT—COMMITMENT—HABEAS CORPUS—RELIEF.—Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on habeas corpus because some of the questions might be safely answered.[a]

Habeas Corpus.

Lawrence Foot was subpœnaed as a witness before the grand jury for the district court of the United States for the Western division of the Northern district of Mississippi. He was sworn and examined

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in relation to violations of an act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209). This act is intended to suppress conspiracies or trusts in restraint of trade, and it provides that every person who shall violate its provisions shall, on conviction, be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or both, in the discretion of the court. The assistant United States attorney propounded to the witness a number of questions, among which were the following:

"State whether or not you attended any meeting, called either at Memphis or New Orleans or Meridian or elsewhere, in the early part of this fall, or at any time within the past eighteen months, to discuss fixing a price upon cotton seed, or the products of cotton seed?

"Has your mill, or any other, to your knowledge, contributed anything to the selection of a committee whose duty it is to see that the various mills in the states of Mississippi, Louisiana, and Tennessee keep up a uniform rate on cotton seed and its products?

"If your mill should immediately advance the price of cotton seed, or lower the price of products, would you be subject to any sort of forfeiture, censure, or supervision from any source whatever?

"Is there any sort of understanding existing between the mills in Mississippi, Tennessee, or Louisiana, either written or verbal, by which the various mills are to be allowed to press a certain amount of seed; and, in the event any greater amount is pressed by any mill, is there any obligation on the part of such mill to account for the same to any committee whose duty it is to look after such matters?

"Is it not a fact that within the past six months one oil mill will not invade what is known as the 'territory' of another oil mill to purchase seed; and is it not a fact that all the mills in a certain territory have an agreement whereby each day, or every few days, they communicate with each other over the telephone, by letter, or otherwise, and inform each other what they are paying for seed, or what they intend to pay next day or next week, and by virtue of such communications or agreements do not all the mills pay the same price for seed and sell all products within such territory at the same price, and has this not been the practice this fall?

"During the past six months has there existed an agreement between the oil mills of Memphis, or those of Mississippi, Tennessee, and Louisiana, that you will all be governed, in purchasing cotton seed and selling the products thereof, by the Memphis or New Orleans market, and do you strictly adhere to said agreement?"

The witness refused to answer these questions, and gave as the reason for his refusal that "in answering the questions he would criminate himself, and put the government in possession of information as to the details of [158] said alleged combine and agreement, and the names of parties and witnesses, which might supply the means of convicting him of the same offense." For this refusal to answer, on report of the grand jury, the witness was carried before the district court, where he repeated his reasons for declining to answer. The court required the witness to return to the grand jury and answer the questions, and, on his refusal to obey the order of the court and answer the questions, he was committed to jail, "there to remain from day to day and term to term of this court until he shall answer said interrogatories, or be otherwise discharged by due course of law." Being in the custody of the United States marshal for the Northern district of Mississippi under this order of the court, he filed a petition for the writ of habeas corpus. The petition alleges the facts which have been stated, and also, on information and belief, that the petitioner "at the time of his refusal to answer the questions propounded to him by the grand jury aforesaid, and at

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the present time, stands indicted in the district court of the United States at Jackson, Mississippi, for the same identical offense which the grand jury was seeking to investigate in propounding the questions aforesaid to your relator." The writ was issued, and the return of the marshal shows that the petitioner was held under the said order of the court. The United States attorney, who, by order of the judge granting the writ, was notified of the proceedings, filed the following addition to the marshal's return: "We admit that the questions in the petition were asked, but deny that the defendant is entitled to the relief sought, and state the facts to be that the defendant was assured by the court that no information given by him in answer to the questions would or could be used against him in any prosecution in any United States court in this state. And we deny that the defendant knew of any indictment against him at the time the questions were asked, etc., but admit that he was under indictment."

A. K. Foot and *James Stone* (*J. C. Wilson*, on the brief), for petitioner.

M. A. Montgomery, United States Attorney, for respondent.

SHELBY, Circuit Judge (after stating the case as above).

1. It is a rule of the common law that a witness will not be compelled to answer any question, the reply to which would supply evidence by which he could be convicted of a criminal offense. This doctrine was firmly implanted in the common law of Great Britain and of the colonies long before the adoption of the constitution of the United States. The principle is held so sacred in this country that it is embodied in the respective constitutions of all the states, as well as in the federal constitution. The principle, as applied to this case, is found in the fifth amendment to the constitution: "No person shall be compelled in any criminal case to be a witness against himself." The question here is, does this provision protect the petitioner in declining to answer the questions propounded to him? The general power of the court to punish a witness for contempt who refuses to answer is unquestioned. But that power is limited by the language quoted from the constitution. Any exercise of jurisdiction or power violative of this provision is void, and the witness imprisoned by an order made in excess of the court's authority is entitled to be discharged on the writ of habeas corpus. *Ex parte Fisk*, 113 U. S. 713, 5

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Sup. Ct. 724, 28 L. Ed. 1117; Rev. St. § 752. Was the order of the district court requiring the petitioner to answer these questions, and committing him for his refusal to answer, in excess of the court's authority?

In 1890 Charles Counselman was subpœnaed before the United **[159]** States grand jury for the Northern district of Illinois which was engaged in investigating alleged violations of an act to regulate commerce, approved February 4, 1887 (24 Stat. 379). Questions were propounded to him, the answers to which would tend to criminate him. He declined to answer, and was carried before the court. The court held (Judge Gresham presiding) that section 860 of the Revised Statutes of the United States provided that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him, in any court of the United States, in any criminal proceeding, and that he was fully protected by this statute; that therefore he should be required to answer. It was held, in view of this statute (Rev. St. § 860), that the witness could not claim the privilege of silence under the fifth amendment of the constitution. Counselman's petition seeking to be discharged on habeas corpus was dismissed, and he was remanded to the custody of the marshal. *In re Counselman* (C. C.) 44 Fed. 268. Counselman took an appeal to the supreme court. The decision of the lower court was reversed. The supreme court held that the witness could not be required to answer. Referring to section 860, the supreme court said:

"It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which would be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." And again: "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecutions for

the offense to which the question relates." The court concluded: "From a consideration of the language of the constitutional provision, and of all the authorities referred to, we are clearly of opinion that the appellant was entitled to refuse, as he did, to answer." *Counselman* v. *Hitchcock*, 142 U. S. 547, 564–585, 12 Sup. Ct. 195, 198–207, 35 L. Ed. 1110, 1114–1122.

By the unanimous judgment of the supreme court the appellant, Counselman, was discharged from custody.

That case seems conclusive of the case at bar. But the learned district attorney contends that "the case of *Brown* v. *Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, is virtually a repeal of the case of *Counselman* v. *Hitchcock*." Is that contention true? After the opinion in *Counselman* v. *Hitchcock* was rendered, the congress passed an act, approved February 11, 1893, to give immunity to witnesses in certain cases. It provides, in brief, that no person shall be excused from testifying in interstate commerce actions, or from producing books, papers, contracts, etc., before the interstate commerce commission, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress entitled "An act to regulate commerce," ap- **[160]** proved February 4, 1887, on the ground or for the reason that the testimony or evidence required of him would tend to criminate him or subject him to a penalty or forfeiture, and that no person shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he may testify or produce evidence before said commission, or in obedience to its subpœna, or in any such case or proceeding, 27 Stat. 443. The supreme court having decided that section 860 of the Revised Statutes did not confer complete indemnity on witnesses, this act was evidently passed to confer such indemnity in the cases to which it refers. The act has no application to the case at bar. It is confined by its terms to proceedings connected with "An act to regulate commerce," approved February 4, 1887, and amendments thereto. The petitioner in the case at bar was examined before the grand jury in reference to offenses under "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (26 Stat. 209; 1 Supp. Rev. St. p. 762). In the case of *Brown* v. *Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, cited by the district attorney,

the court construed the act of February 11, 1893 (27 Stat. 443). The court held (four of the justices dissenting) that the act affords absolute immunity to the witness in the cases to which the act relates against prosecution, state or federal, for the offense about which the witness is examined, and deprives the witness of his constitutional right to refuse to answer. This act, as we have said, by its terms is confined to a certain class of cases, and has no application to the case at bar. There is no statute applicable to the case at bar which tends to protect the witness, except section 860 of the Revised Statutes, and that has been held by the supreme court not to afford the protection furnished by the constitution. The principle established by the decision in *Counselman* v. *Hitchcock*, so far as it is applicable to the case at bar, is unaffected by the opinion of the court in *Brown* v. *Walker*. The result of the two cases is (1) that since the statute of February 11, 1893 (27 Stat. 443), parties or witnesses in cases or proceedings under the act of February 4, 1887 (24 Stat. 379), to regulate commerce, and amendments thereto, may be required to answer questions that tend to criminate the witness or party; but (2) witnesses or parties in other cases may not be required to answer criminating questions, because section 860 of the Revised Statutes does not afford complete indemnity to the witness or party. The first result is established by a bare majority in *Brown* v. *Walker*. The second proposition is established without dissent in *Counselman* v. *Hitchcock*.

2. It is true that the witness cannot avoid answering questions upon his mere statement that his answers to them will tend to criminate him. It is for the judge to decide whether his answer will reasonably have such tendency, or whether it will furnish an element or link in the chain of evidence necessary to convict him. In determining whether or not the witness is entitled to the privilege of silence, the court may look at all of the circumstances of the case, and determine whether or not there is reasonable ground to appre- **[161]** hend danger to the witness from his being compelled to testify. If the fact that the witness is in danger appears, great latitude should then be allowed to him in judging for himself of the effect of any particular question. A question

which might appear at first a very slight and innocent one might, by establishing a link in a chain of evidence, become the means of convicting the witness. *Ex parte Irvine* (C. C.) 74 Fed. 954. In the case at bar it appears that the defendant was already indicted for the offense about which he was examined, and the questions tended to connect him with the offense for which he is indicted. There can be no doubt that under such circumstances, when the questions are such as seek to connect him with the crime under investigation, the court will not require him to answer them.

3. It is set up in the answer filed by the district attorney that the petitioner, when carried before the court upon his failure to answer questions before the grand jury, was assured by the court that no information given by him in his answers to the questions would or could be used against him in any prosecution in any court of the United States. The petitioner could not be required to waive his constitutional privilege upon such an assurance by the court. He has a right to stand upon his constitutional privilege, notwithstanding such assurance, and to remain silent whenever any question is asked, the answer to which may tend to criminate him. *Temple* v. *Com.*, 75 Va. 892.

4. It is argued by the district attorney that some of the questions asked (we have not stated them all) could have been answered without endangering petitioner, and that, if any one of them did not call for a criminating answer, he is not entitled to relief. We can not accept that view. He was carried before the court, and the court required him to answer all of the questions. He is under commitment for refusal to answer all. It was one examination, relating to one subject, and the questions culminated in an effort to show the witness' connection with the misdemeanor charged. Where there is a series of questions, the examiner cannot "pick out one, and say, if that be put, the answer will not criminate him." If it is one step having a tendency to criminate him, he is not compelled to answer. *People* v. *Mather*, 4 Wend. 230, 254; *Paxton* v. *Douglas*, 16 Ves. 240, 243.

The act to protect trade and commerce against unlawful restraints and monopolies is the law of the land, and should

be enforced. We would make no order that would tend to obstruct its proper enforcement. It confers jurisdiction on the United States courts, and provides a remedy in a civil action "by way of petition setting forth the case, and praying that such violation shall be enjoined or otherwise prohibited." 26 Stat. 209, § 4. This provision does not prevent the criminal prosecution of those guilty of its violation. But the procedure against violators of the act must conform to law. The penalties of fine and imprisonment provided by the act may be imposed by the same procedure sustained by the same kind of evidence, either direct or circumstantial, that is admissible in prosecutions for other misdemeanors, and it ought not to be necessary, and certainly is **[162]** not permissible, to resort to methods in conflict with the constitutional rights of the citizen.

It is ordered that the petitioner, Lawrence Foot, be discharged from custody. Petitioner discharged.

PARDEE and MCCORMICK, Circuit Judges, who were present at the hearing of this case, concur in this opinion.

[1020] METCALF *v.* AMERICAN SCHOOL FURNITURE CO. ET AL.[a]

(Circuit Court of Appeals, Second Circuit. February 4, 1902.)

[113 Fed., 1020.]

Appeal from the Circuit Court of the United States for the Western District of New York

Frederick Seymour for appellant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree affirmed in open court, with instructions to allow plaintiff 30 days to amend, on payment of costs. For opinion below, see 108 Fed. 909.[b]

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[a] Demurrers to bill as originally filed sustained by the Circuit Court (108 Fed., 909). See p. 75. Decree affirmed by the Circuit Court of Appeals, Second Circuit (113 Fed., 1020). Amended bill dismissed (122 Fed., 115). See p. 234.

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[27] W. W. MONTAGUE & CO. ET AL. *v.* LOWRY ET AL.[a]

(Circuit Court of Appeals, Ninth Circuit. February 17, 1902.)

[115 Fed., 27.]

MONOPOLIES—ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.—The Tile, Mantel & Grate Association of California was organized by defendants, who were dealers in tiles and similar articles, for the declared purpose of uniting "all acceptable dealers" in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles), and all American manufacturers of tiles and fireplace fixtures. The articles prescribed that other local dealers who had an established business and carried a stock of a stated value, and who were "acceptable," might, on motion of a member, be permitted to join, and that all manufacturers of tiles in the United States might become members by signing the constitution and paying an entrance fee. The local members were bound by the articles not to buy goods from any manufacturer who was not a member, nor to sell goods to other dealers not members, at less than list price, which was about double the market price, and the manufacturing members were bound not to sell to any dealer within the prescribed territory who was not a member. *Held*, that such association was a combination in restraint of trade among the states, illegal under section 1 of the anti-trust act of July 2, 1890 (26 Stat. 209), and also an attempt to monopolize a part of the trade and commerce among the states, within the prohibition of section 2, by shutting out from such trade all local dealers who were not members, and that defendants were liable in damages, under section 7 of the act, to such a dealer to whom a manufacturer in another state refused to sell tiles, as it had previously done, on the sole ground that such dealer was not a member of the association.[b]

In Error to the Circuit Court of the United States for the Northern District of California.

See 106 Fed. 38.

The writ of error in this case is brought to review the judgment of the circuit court rendered in an action which the defendants in error brought against the plaintiffs in error under the act of congress of July 2, 1890 (26 Stat. 209), commonly known as the "Sherman Anti-Trust Act." The complaint alleged that the plaintiffs therein had been injured in their business by reason of the illegal combination between the defendants therein made under the name of the Tile, Mantel & Grate Association of California. The substantial facts alleged in the complaint and proved on the trial were that for a number of years prior to the year 1898 the defendants in error had been engaged in the business of buying and selling and setting tiles, mantels, [28] and grates in the city of San Francisco, and that the tile which they used in their business was purchased from some of the various tile manufacturers in the states of Ohio, Indiana, Kentucky, New Jersey, and Pennsylvania, who subsequently entered into the association, there being no manufactures of tiles in the state of California; that by industry and attention thereto the defendants in error had established a profitable business; that in the year 1898 the plaintiffs in error formed the association, the object of which, as declared in its articles, was "to unite all acceptable dealers in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of two hundred miles), and all American manufacturers of tiles, and by frequent interchange of ideas advance and promote the mutual welfare of its members." As to membership, it provided that any individual, corporation, or firm engaged in the tile, mantel, and grate business in San Francisco, or within a radius of 200 miles therefrom, having an established business, and carrying not less than $3,000 worth of stock, and having been proposed by a member in good standing and elected, and having signed the constitution and by-laws, and paid an entrance fee of $10, might become a member. It was also provided that all manufacturers of tiles and fireplace fixtures throughout the United States might become nonresident members upon the payment of an entrance fee and signing the constitution and by-laws. Section 7 of the by-laws forbade members of the association to purchase goods from any manufacturer unless the latter were a member of the association, and forbade them to "sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association." It provided, further, that any manufacturer selling goods to others than members of the association should forfeit membership. It was shown that the list price referred to in section 7 was a nominal catalogue price of goods fixed by the manufacturers for convenience, but that in selling to members of the association, and, prior to forming the association, in selling to the trade generally, the manufacturers had allowed large discounts from the list prices amounting to something more than 50 per cent. thereof. The defendants in error alleged in their complaint that it required the unanimous consent of the association to become a member thereof, and that by reason of certain business difficulties there were members of the association who were antagonistic to them, and who would not have permitted them to join if they had applied, and that they were not eligible to join the association for the further reason that they did not carry at all times stock of the value of $3,000. They also alleged that the association constituted a trust and conspiracy in restraint of interstate trade and commerce, and a monopoly of the grate, tile, and mantel trade between the parties engaged therein. The jury found damages for the defendants in error in the sum of $500, and for that amount judgment was rendered in their favor, and for the further sum of $750 for an attorney's fee, which was allowed by the court.

[a] Begun in the Circuit Court for the Northern District of California, and there entitled *Lowry* v. *Tile, Mantel & Grate Ass'n. of Cal.* Demurrer overruled (98 Fed., 817). See vol. 1, p. 995. Charge to jury (106 Fed., 38). See p. 53. Judgment affirmed by the Circuit Court of Appeals, Ninth Circuit (115 Fed., 27), where the title of the case was changed to *Montague & Co.* v. *Lowry*. Affirmed by Supreme Court (193 U. S., 38). See p. 327.

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P. F. Dunn and *Linforth & Whitaker*, for plaintiffs in error.

J. C. Campbell, *W. H. Metson*, and *R. W. Campbell*, for defendants in error.

Before GILBERT and Ross, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Two questions are presented upon the writ of error—First, did the association constitute a combination which was within the prohibition of the act of July 2, 1890? And, second, was the amount of the attorney's fee allowed by the court excessive? In answering the first question, we must first take into the account the declared purpose of the association. It was formed to unite all acceptable dealers engaged in the tile, grate, and mantel business in San Fran- **[29]** cisco, and within a radius of 200 miles therefrom, and all American manufacturers of tiles. In its scope it included upon the one hand every manufacturer of tiles wherever situate in the United States, and upon the other the six firms of local dealers who joined the association at its formation, together with those who might be permitted thereafter to become members. The defendants in error were not invited to enter into the combination. The rules prescribed that others in the same line of business, who had an established business and carried stock of the value of $3,000, and who were "acceptable," might upon the proposition of one who was already a member, and upon the vote of the association, be permitted to join the combination. The evidence shows that the defendants in error after the formation of the association made efforts to purchase tile from manufacturers in Indiana with whom they had before been doing business, and that their orders were declined, and they were notified that they could not purchase goods from the manufacturers unless they became members of the association. They could not obtain tile from the local dealers in San Francisco unless they paid the "list" price, which was more

than double the price which members of the association were required to pay.

We think that, in the light of these facts, the association clearly comes within the prohibition of the act of congress. It has a direct tendency to restrain trade between the different states and to create a monopoly. In principle it would be the same if it were an association between all the manufacturers of the United States in that line of goods and a single dealer in California, whereby all other resident dealers were shut out and all competition between local dealers extinguished. Section 1 of the act of July 2, 1890, provides as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal;" and it proceeds to denounce a penalty against any one who shall make any such contract or engage in any such combination or conspiracy. Interstate commerce "includes the purchase, sale and exchange of commodities" (*Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 828, 29 L. Ed. 158); and every agreement which has the tendency to restrain the purchase, sale, and exchange of commodities is brought within the prohibition of the statute (*Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 238, 20 Sup. Ct. 96, 44 L. Ed. 136). The combination in the case before the court evidently tended to restrain trade. The defendants in error who had been regular purchasers of goods from the manufacturers were shut out from dealing with them from the time when the association was formed. Their orders to the manufacturers for goods were rejected for the express reason and for no other reason than that they were not members of the association.

The tendency of the combination was also to create a monopoly in the hands of the local members thereof. Section 2 of the act includes within its prohibition "every person who shall monopolize or attempt to monopolize or conspire with any other person or persons to monopolize any part of trade or commerce among the several states or with foreign nations." The combination in the case before the court **[30]** was not one such as might lawfully have been made between the residents of a single state for the purpose

of regulating the methods of conducting their business or fixing the prices of goods or for other legitimate purposes, such as was sustained by the court in *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, where it was held that an agreement between manufacturers in a state bore no distinct relation to commerce between the states or with foreign nations, but it is one that brings within its scope not only local dealers, but all the wholesale dealers in the same kind of goods in all the states. Said the court in *U. S.* v. *E. C. Knight Co.*, 156 U. S. 16, 15 Sup. Ct. 255, 39 L. Ed. 325: "It is not essential that the result of the combination be a complete monopoly. It is sufficient if it merely tends to that end and to deprive the public of the advantages which flow from competition." The local members were bound by the articles of the association not to sell goods to nonmembers except at prices which were more than double the prices which the members paid and which all dealers had paid before the association was formed, and the manufacturers were bound not to sell to nonmembers at any price or under any conditions. The testimony indicated that the defendants in error had been in constant competition with the San Francisco firms which entered into the association, and had bid against them on contracts for work. The formation of the association shut off all such competition. The defendants in error were powerless to compete with local firms which possessed such advantages over them. The necessary effect of the combination was to crowd out of business every local dealer who was not a member, and thereby to create a monopoly in the hands of those who were. It is argued that the defendants in error might have joined the association had they chosen to do so, and that thereby they might have availed themselves of the privileges of membership. To this it is sufficient to say that it does not appear that they would have been admitted to membership if they had applied. Under the by-laws they were not eligible, for the reason that they did not at all times carry the requisite amount of stock, and if they had possessed the necessary amount of stock they had no assurance that they were "acceptable" to the members. On the contrary, the fact that they were not invited to enter the combination when

it was formed was a distinct intimation to them that they were not acceptable. But it is immaterial whether they would or would not have been admitted into the combination. To protect their business and secure their legal rights they were not obliged to submit an application for membership in such a combination with the possibility of its rejection, or to submit themselves to the rules and exactions of the association. It is clear, also, that the tendency of the combination was to prevent others from engaging in the business. No one could become a member who had not "an established business," and it is too evident to admit of denial that no one could establish a business in competition with the members of the association who possessed such advantage in dealing with the manufacturers.

It is earnestly contended that the case in its principle comes within the doctrine of *Hopkins* v. *U. S.*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, and *Anderson* v. *Same*, 171 U. S. 604, 19 Sup. Ct. 50, [31] 43 L. Ed. 300; but we think it is clearly distinguishable from those cases. In the Hopkins Case the association, which was claimed to have been formed in violation of the act, was a local voluntary association of men whose business it was to receive at Kansas City consignments of cattle shipped from owners in various states, and to feed, prepare for market, and sell the same, and pay the owners their portion of the proceeds after deducting charges and expenses. The rules of the association forbade members to buy stock from one who was not a member or to transact business with any person who violated its rules and regulations. The court held that the business of the members of the association was not interstate commerce, and that the agreements or contracts relating to their business were not in restraint of interstate trade, for the reason that trade between the states was not affected by the combination, which was a purely local one, comprising only members of the state in which it was formed. The Anderson Case was similar to the Hopkins Case, with the exception that the members of the association were purchasers of certain classes of live stock instead of agents for the sale thereof. There was no association or combination between such purchasers and the vendors of the stock, and

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no monopoly was created or was intended to be thereby created. The association itself transacted no business. The court said:

"Those who are members thereof compete among themselves and with others who are not members for the purchase of the cattle, while the association itself has nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. * * * A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market prices of cattle have been lowered by reason of its existence. There is no feature of monopoly in the whole transaction."

The difference between those cases and the case at bar is apparent. The resident members of the Tile, Mantel & Grate Association, while they may compete with themselves, have no competition with those who are not members, for the latter are practically excluded from doing business within the portion of the state of California which is included in the prescribed area; and instead of being a combination between purchasers only, as was the fact in the Anderson Case, it is a combination between manufacturers and buyers of different states, which brings together on the one hand all the wholesale dealers in the United States in that line of goods, and on the other hand the chosen few who are permitted to obtain goods and supply the local demand.

We find no ground for disturbing the finding of the circuit court concerning the amount of the attorney's fee to be allowed to the defendants in error.

The judgment is affirmed.

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[540] CONNOLLY *v.* UNION SEWER PIPE COMPANY.[a]

ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 46. Argued April 22, 23, 1901.—Decided March 10, 1902.

[184 U. S., 540.]

If a claim is made in the Circuit Court that a state enactment is invalid under the Constitution of the United States, and that claim

[a] Decision in the Circuit Court (99 Fed., 354). See p. 1.

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is sustained or rejected, this court may review the judgment, at the instance of the unsuccessful party.

If the alleged combination in this case was illegal, it would not follow that they could, at common law, refuse to pay for pipes bought for them under special contracts.

The contracts between the plaintiff and the respective defendants were collateral to the agreement between the plaintiff and other corporations, etc., whereby an illegal combination was formed for the sale of sewer pipe.

The first special defence in this case, based alone upon the principles of the common law, was properly overruled.

The special defence, based upon the act of Congress of July 2, 1890, 26 Stat 209, was also properly rejected. That act does not declare illegal or void any sale made by such combination or its agents of property acquired for the purpose of being sold, such property not being at the time in the course of transportation from one State to another, or to a foreign country; and the buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination, which might be restrained or suppressed in the mode prescribed by the act of Congress.[a]

[46 L. ed., 679.] [b]

[The illegality, at common law, of a combination formed by corporations and persons in restraint of trade, does not preclude it from recovering the purchase price of goods sold in the course of business.]

[A violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. L., 209, chap. 647), by the formation of a combination in restraint of trade, by which a penalty is incurred under the statute, does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods.]

[A recovery of the treble damages authorized by the Sherman Anti-Trust Act of July 2, 1890, § 7 (26 Stat. L., 209, chap. 647), in case of injury sustained by violation of the act, can be had only by direct action, and not by way of set-off in an action brought for the price of goods by a company illegally formed in violation of the act—especially when the State practice does not permit the set-off of unliquidated damages.]

[A discrimination in favor of agricultural products or live stock in the hands of the producer or raiser made by the Illinois trust act

[a] The foregoing syllabus copyrighted, 1902, by the Banks Law Publishing Co.

[b] The following paragraphs inclosed in brackets are taken from the syllabus to this case in the United States Supreme Court Reports, Book 46, p. 679. Copyrighted, 1902, by The Lawyers' Co-Operative Publishing Co.

Opinion of the Court.

of June 20, 1893, exempting them from the provisions which prohibit a recovery of the price of articles sold by any trust or combination formed in restraint of trade or competition in violation of that act renders the act repugnant to the provisions of the U. S. Const., 14th Amend., in respect to equal protection of the laws.]

[An elimination of the unconstitutional portion of the Illinois trust act of June 20, 1893, which exempts agriculturists and live-stock dealers from the provisions which prohibit combinations in restraint of trade, can not be made without bringing these classes of persons within the prohibitions of the statute, in contravention of the legislative intent, and therefore the entire act must be held invalid.]

THE case is stated in the opinion of the court.

Mr. Henry D. Coghlan for plaintiffs in error. *Mr. Joseph A. O'Donnell* was on his brief.

[541] *Mr. Herbert Hamlin* and *Mr. Edwin Walker* for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The Union Sewer Pipe Company—a corporation organized under the laws of Ohio and doing business in Illinois—brought its action against Thomas Connolly, a citizen of Illinois, in the Circuit Court of the United States for the Northern District of Illinois, on two negotiable promissory notes both executed at Chicago by the defendant; one, dated December 15, 1894, the other dated January 15, 1895, and each payable to the order of the plaintiff corporation ninety days after date at the First National Bank of Chicago.

These notes were given on account of the purchase by the defendant from the plaintiff of sewer pipe commonly known as standard Akron pipe, at prices agreed upon between the parties.

The Pipe Company also brought an action in the same court against William E. Dee, a citizen of Illinois, upon an open account for $2389.26, the value at agreed prices of certain pipe purchased by him from the plaintiff in June, 1896. The plaintiff supplied the pipe under a written contract executed between it and the defendant in Illinois under date of August, 1895.

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Each of the defendants filed a plea of the general issue, with notice of special defences and of set-off.

The special defences in each case were substantially the same. The notice in the Connolly case was that the defendant on the trial of the action would rely on these special matters:

"First. That the plaintiff is, and at all times since about the first day of January, 1893, has been a trust or combination of the capital, skill and acts of divers persons and corporations carrying on a commercial business in the States of Ohio and Illinois and between said States and elsewhere in the United States of America, and organized for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to wit, in the trade of buying, selling and otherwise dealing in certain articles of merchandise, to wit, sewer and drainage pipes, and also for the express purpose of **[542]** unlawfully and contrary to the common law limiting the production of said articles of merchandise and increasing the market price thereof; and also for the express purpose of unlawfully and contrary to the common law preventing competition in the manufacture, making, transportation, sale or purchase of said articles of commerce; also for the express purpose of unlawfully and contrary to the common law fixing standards or figures whereby the prices of said articles of merchandise intended for sale, use and consumption in this State should be controlled and established; and also for the express purpose of unlawfully and contrary to the common law being a pretended agency whereby the sale of said articles of commerce should and might be covered up and made to appear to be for the original vendors thereof, and so as to enable the original vendors or manufacturers thereof to control the wholesale and retail price of such articles of commerce after the title thereto had passed from such vendors or manufacturers; and for the further express purpose of unlawfully and contrary to the common law making and entering into and carrying out a certain contract or certain contracts by which the several persons or corporations forming the plaintiff, or being the pretended stockholders thereof, to wit, have bound

themselves not to sell, dispose of or transport said article of commerce below certain common standard figures or card or list prices in excess of the true market values thereof, and by which they have agreed to keep the prices of said articles of commerce at certain fixed or graduated figures, and by which they have established certain settled prices of said articles of commerce between themselves and others, so as to preclude a free and unrestricted competition among themselves and others in the sale and transportation of said articles of commerce, and by which they have agreed to pool, combine and unite any interests they may have in connection with the sale and transportation of said articles of commerce so that the prices thereof may effect advantageously to themselves; that all of the claims of the plaintiff against the defendant in this action arise wholly out of and are in respect of sales of said articles of merchandise made between the 1st day of January, A. D. 1893, and the 1st day of March, 1896, to this defendant by **[543]** the plaintiff in the ordinary course of its business as such a trust or combination acting as aforesaid, and that this action is brought to recover the alleged price thereof and for no other purpose.

"Secondly. That the plaintiff is and at all times since the 1st day of January, 1893, was a combination in the form of a trust, in restraint of trade and commerce among the several States, and doing business as such throughout the United States and between the States of Ohio and Illinois, contrary to the provisions of an act of Congress of date of July 2, 1890, and entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' and that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said act.

"Thirdly. That the plaintiff is and at all times since the 1st of January, 1893, was a trust doing business as such in the State of Illinois and elsewhere, contrary to the provisions of an act of the legislature of the State of Illinois entitled 'An act to define trusts and conspiracies against trade, declaring

contracts in violation of this provision void, and making certain acts and violations thereof misdemeanors, and prescribing punishment thereof and matters connected therewith, approved June 20, 1893, in force July 1, 1893;' that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defence to this action and the whole thereof."

The set-offs claimed by Connolly were: Treble the amount of the actual damages sustained and allowed by the act of Congress of July 2, 1890, c. 647, known as the Sherman anti-trust act, $56,970.44; actual damages sustained by reason of the violation by the plaintiff of the provisions of the Illinois statute of July 1, 1893, $17,323.48; and for money had and received by plaintiff of defendant contrary to law, $17,323.48.

The set-offs claimed by Dee were of like character but of larger amounts.

[544] Both cases were, by agreement, submitted to the same jury and were treated as one consolidated case. At the trial the defendants respectively asked leave to amend their notices of special defences, but leave was denied.

The Circuit Court disallowed both the first and second of the above special defences, and in respect of the third its decision was that the Illinois Trust statute of 1893 was in violation of the Constitution of the United States. It consequently directed the jury to find a verdict for the plaintiff in each case; in the Connolly case, for the amount of the two notes sued on; in the Dee case, for the amount of the plaintiff's open account against him. Verdicts having been returned as directed, and a motion for new trial in one case and motions for new trial and in arrest of judgment in the other, having been overruled, judgments were rendered on the verdicts.

1. The defendant in error insists that these cases should have gone to the Circuit Court of Appeals, and has moved on that ground that the writ of error be dismissed. The defence in each case was based in part on the Illinois statute of 1893. The plaintiff insisted at the trial that that statute was in vio-

lation of the Constitution of the United States, and its position was sustained by the Circuit Court. There have been suits in which the Circuit Court upon the claim of the defendant has applied the Constitution of the United States to the case before it and put the plaintiff out of court. Here, the plaintiff claimed that the state enactment upon which defendants relied was unconstitutional, and its position upon that point was sustained. In *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 477, this court said: "The Circuit Court of Appeals Act does not declare that the final judgment of a Circuit Court in a case in which there was a claim of the repugnancy of a state statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the Circuit Court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court **[545]** review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant. It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the Circuit Court in every case in which a claim is made that a state statute is in contravention of the Constitution of the United States." Upon the authority of that case, the motion to dismiss is denied.

2. The defendant Connolly purchased Akron sewer pipe from the plaintiff and for the agreed price thereof gave the two promissory notes upon which he was sued. The defendant Dee also purchased Akron sewer pipe at an agreed price as shown by the account upon which he was sued. Each defendant disputed his liability to the plaintiff upon the ground that prior to the making of the contracts with the defendants respectively for pipe, the plaintiff corporation entered into a combination with certain firms, corporations and companies engaged in Ohio in the manufacture of Akron pipe; which combination, it is alleged, was in illegal restraint of trade and therefore forbidden by the principles of the common law as recognized and enforced both in Ohio and Illinois.

The defence cannot be maintained. Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe.

In *Strait* v. *National Harrow Co.*, 51 Fed. Rep. 819, a suit in which the plaintiffs sought a permanent injunction restraining the defendant from instituting or prosecuting any action against the plaintiffs for the infringement of letters patent owned by the defendant covering certain improvements in spring-tooth har- **[546]** rows, or from instituting or prosecuting any such suits against any person using the spring-tooth harrows manufactured by the plaintiffs, the court said: "In substance, the complaint shows that the defendant has entered into a combination with various other manufacturers of spring-tooth harrows for the purpose of acquiring a monopoly in this country in the manufacture and sale of the same, and, as an incident thereto, has acquired all the rights of the other manufacturers for the exclusive sale and manufacture of such harrows under patents, or interests in patents, owned by them respectively. Such a combination may be an odious and a wicked one, but the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of the patented article, if he believes the patent is being infringed; and the motive

which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights. 'The exercise of the legal right cannot be affected by the motive which controls it.' *Kiff* v. *Youmans*, 86 N. Y. 329."

In *National Distilling Co.* v. *Cream City Importing Co.*, 86 Wisconsin, 352, 355, which was an action to recover the price of goods sold and delivered, one of the defences was that the plaintiff was a member of an illegal trust or combination to interfere with the freedom of trade and commerce. The Supreme Court of Wisconsin said: "The first defence does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful trust or combination, formed to unlawfully interfere with the freedom of trade and com- **[547]** merce and in restraint thereof and to accomplish the ends therein set forth. . . . Conceding, for the purposes of this case, that the trust or combination in question may be illegal and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called 'trust,' or 'combination,' the defendant might voluntarily purchase the goods in question of it at any agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon, or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences."

That case was cited with approval by the Circuit Court of Appeals for the Seventh Circuit in *Dennehy* v. *McNulta*, 86 Fed. Rep. 825, 827, 829. In that case the court said: "The mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal—a status apparently held in *Distilling & Cattle Feeding Co.* v. *People*, 156 Illinois, 448—cannot serve, *ipso facto*, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any **[548]** manner its independent contract obligations." Again: "In the case of an injurious combination of the nature asserted here, the remedy is by well recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination is illegal, or that its prices were unreasonable."

It is undoubtedly the general rule that a contract made in violation of a statute is void, and no recovery can be had upon it; as in *Embrey* v. *Jemison*, 131 U. S. 336, 348. That was an action upon a promissory note given in execution of a contract for the purchase of "future delivery" cotton, neither the purchase or delivery of actual cotton being contemplated by the parties, but the settlement in respect to which was to be on the basis of the "difference" between the contract price and the market price of cotton futures, according to the fluctuations in the market. The contract was held to be a wagering contract, and therefore illegal and void. As there could be no recovery upon the original agreement without disclosing the fact that it was illegal and one that could not, for that reason, be enforced or made the basis of a judgment, it was held, that attention could not be withdrawn from the ille-

gality of the contract by the device of taking notes for the amount claimed under that contract. So, in *Miller* v. *Ammon*, 145 U. S. 421, 427. That was an action to recover the value of 1125 gallons of wines sold in Chicago by one who had not obtained a license to sell liquors at all—an ordinance of that city expressly declaring that no person, firm, or corporation should sell or offer for sale "any spirituous or vinous liquors in quantities of one gallon or more at a time, within the city, without having first obtained a license therefor," under a penalty of not less than $50 or more than $200 for each offence. It was held that the action could not be maintained, because "an act done in disobedience to the law creates no right of action which a court of justice will enforce." In that case the sale from which it was attempted to imply the promise of the buyer to pay for what **[549]** he received, was itself expressly forbidden by law under a penalty. The action there was upon the sale, and there was a direct connection between it and the purchase of the wines. So, again, in *McMullen* v. *Hoffman*, 174 U. S. 639, 654, after an extended review of the cases, American and English, the court said: "The authorities from the earliest time to the present unanimously held that no court will lend its assistance in any way toward carrying out the terms of an illegal contract."

In the present case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms or companies, a different question would be presented.

But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would in itself be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and other corporations, firms or associations whereby an illegal combination was formed for the sale of sewer pipe.

We are of opinion that the first special defence, based alone upon the principles of the common law, was properly overruled.

3. The special defence based upon the act of Congress of July 2, 1890, c. 647, 26 Stat. 209, was also properly rejected.

[550] That act declares illegal "every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations"—every person making any such contract or engaging in any such conspiracy being subject to a fine not exceeding $5000, or to imprisonment not exceeding one year, or to both punishments in the discretion of the court. § 1. So, every person monopolizing or attempting to monopolize, or combining or conspiring with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, is liable by that act to the like penalties in the discretion of the court. § 2. The several Circuit Courts of the United States are invested with jurisdiction to prevent and restrain violations of its provisions. § 4. Any property owned under any contract or by any combination or pursuant to any conspiracy (and being the subject thereof), and being in the course of transportation from one State to another, or to a foreign country, is subject to be forfeited, seized and condemned. § 6. By another section it is declared: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the

damages by him sustained, and the cost of suit, including a reasonable attorney's fee." § 7.

Much of what has just been said in reference to the first special defence, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the **[551]** time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.

In the case of *The Charles E. Wisewall*, 74 Fed. Rep. 802, which was a libel *in rem* by certain tug owners against a steam dredge to recover the value of certain services rendered by the tug in towing the dredges, it was sought to avoid payment for the services thus rendered upon the ground that the tug owners were members of an association which was illegal and void under the Sherman act. The court, assuming that the agreement by which the tugs acted in unison was prohibited by that act, said: "He [the claimant] should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services and having accepted the benefit thereof, he should pay. . . . An agreement by the tug Mayflower to tow the dredge Wisewall, for a reasonable sum, from Albany to Troy, is not void because the Mayflower is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop, he would find it difficult to avoid paying their actual market price because the vendor and other tailors of that city had combined to keep up prices."

Nor can the defendants refuse to pay for what they bought upon the ground that the seventh section of the Sherman act **[552]** gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damages sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that "unliquidated damages arising out of covenants, contracts or torts disconnected with plaintiff's claim cannot be set off under the statute." *Robinson* v. *Hibbs*, 48 Ill. 408, 409, 410; *Hawks* v. *Lands*, 3 Gilm. 227, 232; *Hubbard* v. *Rogers*, 64 Ill. 434, 437; *Evans* v. *Hughey*, 76 Ill. 115. 120; *Clause* v. *Bullock Printing Press Co.*, 118 Ill. 612, 617; *Dushane* v. *Benedict*, 120 U. S. 630, 648. If the act of Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defence of a suit for the price, the illegal character of the combination, that would present an entirely different question. But the act contains no such provision.

4. We come now to the consideration of the defence based upon the Trust statute of Illinois of 1893.

As that statute is alleged to be repugnant to the Constitution of the United States, and that its full scope may be seen, it is here given in full:

"§ 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them for either, any or all of the following purposes: First—to create or carry out restrictions in trade. Second—to limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. **[553]** Fourth—to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established upon any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this State; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity shall have passed from such vendor or manufacturer. Fifth—to make or enter into, or examine or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or card or list price, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with

the sale or transportation of any such article or commodity that its price might in any manner be affected.

"§ 2. That any corporation holding a charter under the laws of this State which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

"§ 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the Attorney General or prosecuting attorney, upon his own motion, to institute suit or *quo warranto* proceedings, at any county in this State in which such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

[554] "§ 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proper proceedings, in any county in which such foreign corporation does business, in the name of the State on his relation.

"§ 5. Any violation of either or all of the provisions of section 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person who may be or may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder, or in pursuance thereof, shall be punished by fine not less than two thousand dollars nor more than five thousand dollars.

"§ 6. In any indictment or information for any offence named in this act, it is sufficient to state the purposes and effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description or how or where it was created.

"§ 7. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in con-

nection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

"§ 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforcible either in law or equity.

"§ 9. The provisions of this act *shall not apply to agricultural products or live stock while in the hands of the producer or raiser.*

"§ 10. Any purchaser of any article or commodity, from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the [555] price or payment of such article or commodity and may plead this act as a defence to any suit for such price or payment." Laws, Ill. 1893, p. 182, act of June 20, 1893; Hurd's Rev. Stat. Ill. (1899), p. 618, title "Criminal Code."

Some reference was made to the act of the legislature of Illinois approved June 10, 1897, amending an act approved June 11, 1891, in force July 1, 1891, relating to the punishment of persons, partnerships or corporations forming pools, trusts and combines, and prescribing the mode of procedure and rules of evidence in such cases. The act of 1897 amended section one of the act of 1891 so as to read: "If any corporation organized under the laws of this or any other State or country for transacting or conducting any kind of business in this State, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of, or party to any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or individual or other association of

persons shall be deemed and adjudicated guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act: provided, however, that in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, it shall not be unlawful for persons, firms or corporations doing business in this State to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages." As this act of 1897 was passed after the date of the transactions here involved, it has nothing to do with the present case. Besides, the special defence was based on the act of 1893. The act of 1897 is referred to only as showing the exemption of another class from the operation of the general law relating to pools, trusts, combinations and confederations organ- [556] ized to regulate prices of articles, commodities and merchandise. Laws, Ill. 1897, c. 38, p. 153; Hurd's Revised Statutes of Illinois, pp. 615, 639.

That the arrangement or combination made between the Union Sewer Pipe Company and other companies, corporations and firms, created such a trust as the Illinois statute forbids is manifest from the evidence in the record. It is equally clear that if the plaintiff was an Illinois corporation, its charter could be forfeited and an end put to its corporate existence by proceedings instituted by the Attorney General of the State. §§ 1, 2 and 3. It is also clear that, if the statute is not altogether invalid the defendants could plead nonliability for the pipe purchased by them upon the ground that the plaintiff was, under the statute of Illinois, an illegal combination and the contracts which it made with the defendants were void. §§ 8, 10. The statute expressly authorizes such a defence. In that particular, the defence based upon the statute of Illinois differs from the other special defences.

The vital question, however, is whether the statute of Illinois of 1893 is not inconsistent with the Constitution of the United States, by reason of the fact that by the ninth section it declares that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of producer or raiser." The Circuit Court held this section to be repugnant to the Fourteenth Amendment of the

Constitution of the United States, and to be so connected and interwoven with other sections that its invalidity affected the entire act.

Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturalists or two or more live stock raisers may, in respect of their products or live stock in hand, combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock; or limiting, increasing or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live stock below a common standard figure [557] or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine or unite any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturalists or live stock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same things, if done by two or more persons, firms, corporations or associations of persons, who shall have combined their capital, skill or acts, in respect of their property, merchandise or commodities held for sale or exchange, is made by the statute a public offence, and every principal, manager, director, agent, servant or employé knowingly carrying out the purposes, stipulations and orders of such combination is punishable by a fine of not less than two thousand nor more than five thousand dollars. Is not this such discrimination against those engaged in business (other than the sale of agricultural products and live stock in the hands of producers and raisers) as is forbidden by that clause of the Fourteenth Amendment which declares that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws?"

By section 26 of a statute of Illinois it is provided: "Foreign corporations, and the officers and agents thereof, doing

business in this State shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon associations of like character organized under the general laws of this State, and shall have no other or greater powers." 1 Starr & Curtis, 619. The contracts upon which these suits are based were made in Illinois. The purpose of the above statute was "to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character and bring them all under the influence of the same law." *Stevens* v. *Pratt*, 101 Ill. 206; *Farmers' Loan and Trust Co.* v. *Lake St. Elevated R. R. Co.*, 173 Ill. 439. These matters are called to our attention as showing—as undoubtedly they do—that the Union Sewer Pipe Company, while doing business in Illinois, was subject to [558] the statute of Illinois concerning trusts or combinations, and which, in terms, applies to both domestic and foreign corporations. But the question remains to be decided whether the statute is repugnant to the Constitution of the United States. If it be, then it is not law and cannot be applied for the purpose of defeating the plaintiff's claims in these actions.

The question of constitutional law to which we have refered cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public

safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 626.

What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the States will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general ques- **[559]** tion we have said that the guarantee of the equal protection of the laws means " that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." *Missouri* v. *Lewis*, 101 U. S. 22, 31. We have also said: " The Fourteenth Amendment, in declaring that no State ' shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts: that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences." *Barbier* v. *Connolly*, 113 U. S. 27,

31. This language was cited with approval in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, in which it was also said that " the equal protection of the laws is a pledge of the protection of equal laws." In *Hayes* v. *Missouri*, 120 U. S. 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, " shall be treated alike, under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed." " Due process of law and the equal protection of the laws," this court has said, " are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the **[560]** powers of government." *Duncan* v. *Missouri*, 152 U. S. 377, 382. Many other cases in this court are to the like effect.

These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.

The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification " must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified

by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere ar- [561] bitrary selection." *Gulf, Colorado and Santa Fé Railway* v. *Ellis*, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws.

Attention has been called to the cases of *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, and *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; and it is supposed that the grounds upon which the decision of the present case is placed are inconsistent with the principles announced in those cases. We do not think so.

In *Magoun* v. *Illinois Trust and Savings Bank* we held that the progressive inheritance tax law of Illinois of June 15, 1895, was not in conflict with the Constitution of the United States by reason of the fact that the amount of the tax was determinable by valuation so that every person and corporation should pay in proportion to the value of his, her or its property inherited. The classification made by the statute was held not to be arbitrary by reason of the fact that inheritances were classified according to amount, and each class taxed at a different rate; for it was based upon principles of equality between the members of each distinct class. Such classification was held not to be inconsistent with the Fourteenth Amendment.

In *American Sugar Refining Co.* v. *Louisiana*, we held that a statute of Louisiana exempting from its operation planters and farmers grinding and refining their own sugar and molasses, but which imposed a license tax upon persons and corporations carrying on the business of refining sugar and molasses, did not deny the equal protection of the laws to such persons and corporations as were thus taxed. It was as if the statute had imposed a tax upon the *business* of refining sugar and molasses, and had declared, as reasonably it might have done, that those who only refined their own sugar and molasses should not be regarded as belonging to that class. We said in that case: [562] "The power of taxation under this provision was fully considered in *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, in which it was said not to have been intended to prevent a State from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only and not securities; may allow or not allow deductions for indebtedness. 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the State in framing their constitution.'" Again: "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

The decision now rendered is not all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens

and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property of all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the [563] United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a State. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are

given or secured by the supreme law of the land. We only need to say in this connection that the constitutional validity of the statute of Illinois now before us is not necessarily to be determined by the same principles that apply to taxing laws.

Other cases have been cited, but they are equally inapplicable in the present discussion, and only serve to show the extent to which the police powers of the States may be exerted without infringing the Federal Constitution.

Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect [564] of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regu-

lations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary.

We therefore hold that the act of 1893 is repugnant to the Constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation.

[565] The principles applicable to such a question are well settled by the adjudications of this court. The different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms *all* persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal

protection of the laws to those within its jurisdiction who are not embraced by the ninth section.

Whether it is also within the prohibition against the deprivation of property without due process of law, is a question which it is unnecessary to consider at this time.

Perceiving no error in the record, the judgment in each case must be affirmed.

Affirmed and it is so ordered.

MR. JUSTICE MCKENNA, dissenting.

The trust statute of Illinois of 1893 is directed against com-**[566]** binations in trade made to affect prices of commodities. The court holds that the statute is repugnant to the Constitution of the United States because of the ninth section, which excludes from the operation of the statute "agricultural products or live stock while in the hands of the producer or raiser." In other words, and to present the discriminations of the statute in its application to persons, it punishes as a criminal conspiracy the acts enumerated in section one, except when they are done by producers and raisers of agricultural products and live stock in respect thereto. The statute also takes away a right of action for the price of the commodities sold. One of the defences of the plaintiffs in error was based on that provision.

The view of the court is that the legislation is purely discriminative and is not justified by any legal principle of classification. To sustain the view the rule expressed in *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150, is quoted. It was there said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." Undoubtedly. Without the observance of that principle, there can be no classification at all in any proper sense. There will be arbitrary grouping—

Mr. Justice McKenna, dissenting.

not association of persons or things on account of common properties or characters or relations. But differences are recognized in classification as well as resemblances, and this court has found it necessary to so state. In *Atchison, Topeka & Santa Fé Railroad* v. *Matthews*, 174 U. S. 96, we said: "Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

It seems like a contradiction to say that a law having inequality of operation may yet give equality of protection. Viewed rightly, however, the contradiction disappears; indeed, need not even be expressed. There are very few exertions of [567] government which can be made applicable to all persons as such. Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and in making it a legislature must be allowed a wide latitude of discretion and judgment. This has been decided many times against contentions based on a variety of facts. I will content myself by citing the later cases and commenting upon them very briefly. The cases are *Magoun* v. *Illinois Trust &c. Bank*, 170 U. S. 283; *Clark* v. *Kansas City*, 176 U. S. 114; *Gundling* v. *Chicago*, 177 U. S. 183; *Petit* v. *Minnesota*, 177 U. S. 164; *Williams* v. *Fears*, 179 U. S. 270; *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89.

In these cases and the cases cited in them classifications were sustained which depended upon differences in the amounts of legacies; on differences between corporations; on differences between land dependent on its use for agriculture and other purposes in regard to the power of a city to annex it; on differences between fire insurance and other insurance; on the right of a legislature to declare as a matter of law that the work of a barber was not a work of necessity, while as to all other kinds of labor the fact was to be determined by a jury; on the difference between hiring persons to labor in the State and hiring persons to labor out of the State; on differences between sugar refiners based entirely and only on the fact of the production or purchase of the sugar refined.

Mr. Justice McKenna, dissenting.

In *American Sugar Refining Co.* v. *Louisiana*, a license tax was imposed on those engaged in carrying on the business of refining sugar and molasses. It was provided, however, that the law should not apply to "planters and farmers grinding and refining their own sugar."

Wherein did the Louisiana statute, which was held constitutional, differ from the Illinois statute, which is held to be unconstitutional? In the former case the distinction (in the opinion in the case it is called "discrimination") was between manufacturers of sugar and growers of it. In the case at bar the distinction is between traders in products and growers of them. Is not a parallel obvious? Can the cases be distinguished because [568] in one a tax was imposed and in the other conduct is regulated or penalized? Indeed, is not the distinction verbal, each being means to an end? Besides, what justification for the distinction is there under the Constitution? None, I submit, can be found in the words of that instrument. Any state legislation which denies the equal protection of the laws is prohibited. The prohibition is independent of form or means. It would be strange, indeed, if the power of a State is limited and confined by the Constitution of the United States, when the State attempts by law to regulate conduct, and is unbounded in its discretion when it imposes taxes; that in one case it may see a difference between manufacturers and planters, and in the other case may not see a difference between traders in commodities acquired for the purposes of sale and such property when held by farmers by whose labor they were produced.

The reasoning of the cases is as strong and demonstrative as their instances. We have declared that we could not investigate or condemn the impolicy of a state law, and that this court is not a refuge from the mere injustice and oppression of state legislation. Many of the exercises of government, it has been pointed out, were addressed to persons, not absolutely or abstractly, but according to their relations, and that classification, based on those relations, need not be constituted by an exact or scientific exclusion or inclusion of persons or things. Therefore, it has been repeatedly declared that classification is justified, if it is not palpably arbitrary.

The cases afford not only affirmative examples but also by

a negative deduction illustrate what is legal classification. Mr. Justice Bradley said in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232: "Clear and hostile demonstrations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition." That is, the prohibition upon the States to deny to any citizen the equal protection of the laws. The thought of Mr. Justice Bradley was developed and illustrated by Mr. Justice Brown, speaking for this court in *American Sugar Refining Co.* v. *Louisiana*, and tests of the unconstitutionality of the discriminations of a state law **[569]** were expressed, which were as ready as they were significant. Speaking of the Louisana act, which discriminated between refiners of sugar, Mr. Justice Brown said: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely *arbitrary, oppressive or capricious* (the italics are mine), and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."

Of course, the enumeration of some tests does not exclude others, but why the enumeration of the special kind? Did not the case require it? What ingenuity can find a difference in the act and process of sugar refining when done by a purchaser of raw sugar and a raiser (planter) of it; what difference in the product after it shall be refined, or in any element, thing or circumstance, which can affect its use or sale. The whole and only distinction in the classes which the statute made was between the grower of sugar and the buyer of it—the exact and only distinction of the Illinois law now held to be void, and yet the Louisiana law was sustained as constitutional.

I have already adverted to the distinction which may be claimed to exist between taxing laws and regulating laws, but a few words more may be justified. The opinion of the court

makes a great deal of the penal provisions of the trust law, and its discriminations are displayed and intensified more by the recitation and effect of those provisions than by the provision upon which the defence of plaintiffs in error was based, that is, the provision (sec. 10) which precludes recovery of the price of "any article or commodity sold" by an offender against the statute.

The penal provisions of the statute are not before us for judgment. If they were, and the unconstitutionality of the statute could be attributed to them, they might be construed as separable and be discarded. But, not insisting on that, and consider- **[570]** ing the comments on those provisions to be more than incidental illustration of the character of the statute, it is very clear to me that they do not in any way affect the power of the State. In other words, the power of the State cannot be impugned or affected by the sanctions which the State may impose to secure obedience to its commands or prohibitions. It may be through a tax or it may be through penalties, and the question will always be, is the thing which is directed or forbidden within the power of the State? And when a statute is assailed as denying the equal protection of the laws its equal operation is only involved.

The principle of classification, therefore, is not different in tax laws than in other laws. That principle, as I have said, necessarily implies discrimination between the persons composing the class and other persons. The equality prescribed by the Constitution is fulfilled if equality be observed between the members of the class. It is violated if such equality be not observed, and the latter was the case in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79. That case, therefore, does not sustain the ruling now made.

Any further remarks may be only repetition, but the application of the cases to the statute now before us should be pointed out.

The equality of operation which the Constitution requires in state legislation cannot be construed, as we have seen, as demanding an absolute universality of operation, having no regard to the different capabilities, conditions and relations of men. Classification, therefore, is necessary, but what are

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its limits? They are not easily defined, but the purview of the legislation should be regarded. A line must not be drawn which includes arbitrarily some persons who do and some persons who do not stand in the same relation to the purpose of the legislation. But a wide latitude of selection must be left to the legislature. It is only a palpable abuse of the power of selection which can be judicially reviewed, and the right of review is so delicate that even in its best exercises it may lead to challenge. At times, indeed, it must be exercised, but should always be exercised in view of the function and necessarily large powers of a legislature.

[571] What was the purpose of the Illinois statute, and what were the relations of its classes to that purpose? The statute was the expression of the purpose of the State to suppress combinations to control the prices of commodities, not, however, in the hands of the producers, but in the hands of traders, persons or corporations. Shall we say that such suppression must be universal or not at all? How can we? What knowledge have we of the condition in Illinois which invoked the legislation, or in what form and extent the evil of combinations to control prices appeared in that State? Indeed, whether such combinations are evils or blessings, or to what extent either, is not a judicial inquiry. If we can assume them to be evil because the statute does so, can we go beyond the statute and determine for ourselves the local conditions and condemn the legislation dependent thereon? But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? Of whom are the classes composed? The excluded class is composed of farmers and stock raisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers, all engaged in commercial transactions. That is, one class is composed of persons who are scattered on farms; the other class is composed of persons congregated in cities and towns, not only of natural persons but of corporate organizations. In the difference of these situations, and in other differences which will occur to any reflection, might not the legislature see difference in opportunities and powers between the classes in regard to the prohibited acts? That

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differences exist cannot be denied. To describe and contrast them might be invidious. To consider their effect would take us from legal problems to economic ones, and this demonstrates to my mind how essentially any judgment or action, based upon those differences, is legislative and cannot be reviewed by the judiciary.

I am, therefore, constrained to dissent from the judgment of the court.

Mr. Justice Gray took no part in the decision of this case.

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[610] CHESAPEAKE & O. FUEL CO. *v.* UNITED STATES.[a]

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

[115 Fed., 610.]

Monopolies—Anti-Trust Act—Contracts in Restraint of Interstate Commerce.—By the anti-trust act of July 2, 1890 (26 Stat. 209), congress has, in the exercise of the power delegated to it by the constitution, declared all contracts and combinations illegal, if in restraint of trade or commerce among the states; and such act does not leave to the courts the consideration of the question whether the restraint is or is not unreasonable, and such as would have rendered the contract invalid at common law. The only question in each case where the validity of a contract or combination under the law is involved is whether or not its necessary effect is to restrain interstate commerce.[b]

Same—Contracts Affecting Interstate Commerce.—A contract by which a corporation agrees to take the entire product of a number of independent persons, firms, and corporations engaged in mining coal and making coke in a certain district, which is intended for "Western shipment" over a leading route of transportation, to sell the same at not less than a minimum price, to be fixed by an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds, above a fixed sum per ton to be retained as "compensation,"—the stated purpose being to "enlarge the Western market,"—and under which the shipments are made into other states, is one affecting interstate commerce, and is subject to the provisions of the anti-trust law.

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[a] Combination dissolved by the Circuit Court (105 Fed., 93). See p. 34.

[b] Syllabus copyrighted, 1902, by West Publishing Co.

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[611] SAME—COMBINATIONS IN RESTRAINT OF TRADE.—By a contract between a fuel company and an association composed of 14 persons, firms, and corporations independently engaged in producing coal and coke in a certain district on a line of a railroad, the company was to handle for a term of years the entire output of the members of the association intended for the Western market, and shipped over such line of railroad, and bound itself not to sell the product of any competing mines. A minimum price at which the coal and coke should be sold was to be fixed by the executive committee of the association from time to time, and the company agreed to pay such price, to obtain as large a profit as possible, and to account to the association for all of the same, above a fixed sum per ton, which it was to retain as compensation. The amount to be furnished by each member of the association was also to be fixed by the executive committee, and each was to receive payment at the same rate, to be based on the average price realized for the particular grade furnished during the current month. It was also provided that any other producer of coal to be shipped on such line of railroad might become a party to the contract by a majority vote of the members of the association. *Held*, that such contract was illegal, under the anti-trust law, as in restraint of interstate commerce, and as tending to create a monopoly.

SAME—REQUISITES OF ILLEGAL COMBINATION—PREVENTING INDIVIDUAL COMPETITION.—It is the declared policy of congress, which accords with the principles of the common law, to promote individual competition in relation to interstate commerce, and to prevent combinations which restrain such competition between their members, or between such members as individuals and outside competitors; and it is no defense to a suit to dissolve such a combination as illegal, under the anti-trust law, that it has not been productive of injury to the public, or even that it has been beneficial, by enabling the combination to compete for business in a wider field.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This case arises from the filing of a bill in the circuit court by the district attorney of the United States for the Southern district of Ohio, by direction of the attorney general, against the defendants, to enjoin them from selling or shipping coal or coke into any state other than the one in which they reside, under or by virtue of a certain agreement set forth and attached to the bill. The complainants ask that the defendants be restrained from further conspiring, agreeing, combining, and acting together in the manner set out in the agreement, which it is prayed be declared null and void, and the unlawful trust and combination thereunder be dissolved by decree of court. The agreement which it is alleged evidences the combination is as follows:

"This agreement, made this 15th day of December, 1897, between the C. & O. Fuel Company, a corporation created, organized, and

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existing under and pursuant to the laws of the state of West Virginia, and hereinafter called the 'Fuel Company,' of the first part, and the St. Clair Company, a corporation of West Virginia; John Carver and Enoch Carver, partners in business under the firm name and style of Carver Brothers; W. R. Johnson, M. T. Davis, doing business as M. T. Davis & Co.; John Carver and Enoch Carver, partners in business under the firm name and style of the Mecca Coal and Coke Company; S. H. Montgomery, doing business under the name of the Montgomery Coal Company; the Chesapeake Mining Company, a corporation of West Virginia; the Belmont Coal Company, a corporation of West Virginia; the Kanawha Splint Coal Company, a corporation of West Virginia; the Robinson Coal Company, a corporation of West Virginia; Harry B. Smith, special receiver of the Lens Creek Coal and Coak Company; Joseph Renshaw, special receiver of the Big Black Band Coal [612] Company; the Charlmore Coal Company, a corporation of West Virginia; and Robert Brabbin, Jr., and L. N. Perry, partners in business under the firm name and style of the Brabbin Coal Company; Jasper McCallister, Samuel Moore, and James Kelsoe, doing business as McCallister & Co.,—and together constituting the C. & O. Coal Association, and hereinafter collectively mentioned as the 'Coal Association,' of the second part. Whereas, the members of the said coal association are all miners and shippers of coal, and part of them makers and shippers of coke, on the line of the Chesapeake & Ohio Railway, in Fayette or Kanawha counties, West Virginia, and have formed and organized said association for the promotion of their common business interests in the mining of Kanawha coals and cokes; and whereas, the said fuel company has been incorporated and organized for the purpose of placing said Kanawha coals and cokes upon the Western market,—its prime object to promote the sale of, and enlarge the Western market for, said coals and cokes: Now, therefore, this agreement witnesseth:

"(1) That the parties of the second part agree, in consideration of the covenants and agreements on the part of the party of the first part herein contained, each firm, individual, or corporation, severally, for themselves, himself, or itself, and not for any other, and each of them doth hereby agree to sell to the said fuel company exclusively the entire coal and coke output of the mine or mines operated by each of them, respectively, on said C. & O. Ry., or branches thereof, for Western shipment, for a period of not less than five years from and after the date of January, 1898, subject to all the provisions, terms, and conditions hereinafter contained, except as to such coal as may be sold by any member of said coal association to the Chesapeake & Ohio Railway Company for the consumption of said railway company, which said coal such member shall have the right to sell to said railway company direct; it being understood that this contract applies only to the coal and coke to be sold west of the respective mines of the members of said coal association, and shall not in any way apply to, or interfere with, the Eastern trade of the members of said association.

"(2) The minimum price f. o. b. mines of all the various grades of coal and coke sold and to be shipped West by the members of said association, and embraced in this contract, shall be fixed by the executive committee of said coal association from time to time, as it shall see proper, after consultation with the executive committee of the fuel company. The said fuel company covenants, agrees, and binds itself that it will make no contract for the sale of any coal or coke of any members of said association at a price lower than such minimum prices to be fixed by such committee, and further that it will at all times endeavor to obtain the maximum price for such coal

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and coke. It is understood and agreed that the minimum prices hereinbefore mentioned are net prices f. o. b. mines, and not including any profit to the said fuel company, which is to get its profit over and above said prices.

"(3) That the said fuel company shall make its sales direct, and shall not make any contract for the sale of coal and coke to a third party in the name of any member of the said coal association, and shall have no right by any contract to bind any member of said association to any third party, except for river business, as hereinafter provided for.

"(4) The executive committee of said fuel company, who shall administer and have charge of its affairs, shall be composed of three (3) persons, one of whom shall at all times be a member of, or officer of a member of, said coal association, and shall from time to time, according to the by-laws or articles of association of said association, be designated as a member of such executive committee, and shall thereupon be appointed such member of such executive committee by said fuel company in the place and stead of the member of, or officer of a member of, said coal association previously occupying such office. The executive committee of said coal association shall consist of three members of, or officers of members of, said coal association, to be selected as such from time to time by the members of said coal association according to their by-laws or articles of association.

[613] "(5) The said fuel company covenants, agrees, and binds itself to sell for shipment by rail via the said Chesapeake & Ohio Railway, and pay for, to the members of said coal association as hereinafter agreed, not less than 600,000 tons per annum of coal, and 75,000 tons per annum of coke; such sales and shipments to be disposed of in as nearly equal monthly quantities as possible. But in case said fuel company is unable for any time to make sales of coal or coke by reason of the failure or inability of the members of said association to make prices sufficiently low to enable said fuel company to meet the prices in the market where said coal or coke is sought to be sold, and to compete with other sellers of coal or coke in such markets, then there shall be an abatement of the minimum amount of coal or coke hereinbefore agreed to be taken annually by said fuel company, bearing the same proportion to such minimum amount of coal or coke as such time during which such inability to meet such market prices shall continue does to one year. The executive committee of said coal association shall, not later than the 20th day of each month, designate the percentage of the total product of each class and grade of coal and coke which they deem best to be shipped by each member of said association by rail as aforesaid during the succeeding month, which apportionment so made shall be furnished the general manager of said fuel company not later than the 20th day of said first-mentioned month, and all orders received to be shipped by rail as aforesaid during such succeeding month shall be distributed between the members of said coal association by said general manager according to such apportionments: provided that, if any member of said coal association shall be unable or shall not desire to ship West the full amount of any kind or grade of coal or coke apportioned to such member for any month, the said fuel company shall distribute the order for the deficiency so caused among the other members of said association who are shippers of such grade of coal or coke in the proportion as between such other members fixed by said committee for such month: provided, further, that only actual inability shall excuse a member of said association from shipping so much of the apportionment for any month as shall be required by the said fuel company for contribution to contracts previously taken by said fuel company.

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"(6) The said fuel company shall make and render to the members of the coal association accurate and complete reports of all coke and coal shipped by rail as aforesaid, as follows: (a) A daily report of all sales, showing the net prices of such sales. (b) A monthly report showing the tonnage of the various kinds of grades of coal and coke shipped by members of said coal association and weighed during the month, or weighed during such month though shipped during a preceding month, together with the average price for each grade or kind of coal or coke so shipped and weighed, which average price shall be computed upon the basis of the actual price, less gross profits, if any, received for all coal or coke sold, and the minimum price, fixed as hereinafter provided, for such month for coal or coke not sold in such month; said report to be made not later than the 10th day of each month for all coal and coke weighed, or weighed during the previous calendar month. The coal and coke shipped and weighed or weighed during such month shall be paid for by said fuel company to the members of said coal association according to the average prices, determined aforesaid, and upon the sale after the end of each month of any coal or coke shipped and weighed, or weighed but not sold during such month, the surplus, if any, arising after deducting from the actual price received the minimum price for such kind and grade of coal or coke for such month, and profit, shall be paid forthwith to the shippers of such grade of coal or coke for such month according to their tonnage of such kind or grade of coal or coke for such month. And the said fuel company agrees and binds itself to pay as aforesaid, in cash, on or before the 20th day of each month, for all coal and coke during the previous calendar month.

"(7) The said fuel company further covenants, agrees, and binds itself to handle only such coal and coke as are produced by the abovementioned members of said coal association, and not to handle, buy, or sell, for itself or on commission, any coal or coke produced by any other operator [614] along said Chesapeake & Ohio Railway, or branches thereof, or any coal or coke, wherever produced, of the same grade as, or competing with, coal or coke produced by any of the members of said association, the prime object of this contract being to enlarge the sale of, and extend the Western market for, Kanawha coal and coke; and this shall not prevent the said fuel company from dealing in anthracite coal or New River coal or coke: provided, that New River coal or coke shall not be dealt in to the prejudice of, or sold as a substitute for, Kanawha coals and cokes; and, provided, further, that in an emergency, and when absolutely necessary, other coals and cokes may be handled by said fuel company to meet such emergency. But no dealing in such anthracite, New River, or other coal or coke shall be done by said fuel company to an extent or in a manner incompatible with the prime object of this agreement, as hereinbefore recited.

"(8) That at any time, by a vote of two-thirds (⅔) of the members of said coal association, said fuel company may be allowed to handle any other coal or coke for such time and upon such terms and conditions as may be prescribed by such vote.

"(9) The said fuel company is to receive a gross profit on all rail coal and coke sold, which shall not exceed ten (10) cents per ton of two (2,000) thousand pounds on any sale, which compensation shall be retained by said fuel company out of the monthly settlements of coal and coke sold; the true intent and meaning of this clause being that the fuel company shall get its profit over and above the net minimum price of said coal and coke f. o. b. mines as hereinbefore fixed, and, if the price at which said coal and coke is sold by said fuel company shall be sufficient to yield a sum exceeding said minimum price and gross profit of ten (10) cents per ton as aforesaid,

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then the difference shall be paid over to the members of said association in the manner and at the time hereinbefore mentioned, as they may be entitled under this agreement, as part of the purchase price to be paid for coal and coke by said fuel company.

"(10) The members of said association shall not be required to mine and ship coal when hindered or prevented by causes beyond their own control, such as strikes, accidents, refusal or inability of the carrier to provide transportation, &c.

"(11) The said coal association shall have the right, once per month, through a committee not exceeding three in number, or a person designated by said committee, to examine the order, sales, and tonnage books of said fuel company.

"(12) The coal or coke of members of said coal association shipped in barges by river shall be handled by the said fuel company, as an agent, on the same terms and under the same conditions as are now established or may be hereafter established and prevail in Cincinnati market for the sale of river coal, but the said fuel company shall not make time sales or extend credit without the consent of the shippers of such coal.

"(13) All settlements for coal or coke shipped by rail as aforesaid shall be made upon the scale of weights of the Chesapeake & Ohio Railway Company, as ascertained at its weighing stations now established, or that may hereafter be established.

"(14) It is distinctly understood that nothing herein contained shall be construed to render the said members of said association liable as partners, in any way, manner, or form, either as between themselves or with the said fuel company; each of said firms, corporations, and individuals contracting herein for themselves, itself, or himself, and not one for the other.

"(15) The said fuel company further covenants, agrees, and binds itself that neither it, nor any of its officers, employés, or servants, will, with its knowledge, directly or indirectly, in any way, manner, or form, engage or become interested in the buying or selling of bituminous coal or coke in competition with the coal or coke of any of the members of said coal association, except under the terms and conditions of this agreement.

"(16) The members of said coal association above named, each for himself, itself, or themselves, and not one for the other, covenant and agree **[615]** that the said members of said association will not sell or consign any coal or coke bound to points west of their respective mines, except under the terms and conditions of this agreement, during the period covered by this agreement, and that there shall be no pretended sale or lease of the property of the members of the said association made to evade this contract; but it is further understood and mutually agreed that this contract shall not be construed to prevent any bona fide sale, assignment, or lease of the respective properties operated by the members of said association, respectively, or the interest therein of any member of said association. And in case of such sale, assignment, or lease, the members of said association are not to be held responsible under this contract for the sale and delivery of any coal from such properties after such sale, assignment, or lease takes place. But in case the vendee, assignee, or lessee of any coal or coke property of any member of the coal association desires, he shall have the right to take the place of such member in this agreement.

"(17) And whereas, some of the members of said association have contracts for the sale of coal or coke, which cannot be completed until after this agreement goes into operation; and whereas, it is to the advantage both of such members and of said fuel company that such contracts be filled through said fuel company: It is further agreed that the members of said association having existing contracts to be completed during the period of this agreement

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shall on or before the 24th day of December, 1897, file with the general manager of said fuel company a memorandum of each of said contracts, and such of said contracts as are uncompleted on the first day of January, 1898, shall be completed through said fuel company; the fuel company to make no charge for its services in connection with such contract, and collecting the proceeds of the same; said fuel company not to guaranty the collection of such proceeds, or be responsible for same unless collected by it. Such coal or coke so shipped on existing contracts shall not be taken into account in any way as a part of the traffic hereinbefore provided for in this contract, nor its prices taken into account in computing the average price for any month, but such as shall be shipped by rail shall be considered part of the minimum tonnage mentioned in the fifth clause of this agreement for the year in which it is shipped.

"(18) The said fuel company shall keep at its own expense one or more inspectors to examine and inspect from time to time, as often as may be necessary, the coal and coke produced, with a view of keeping up a proper standard of excellence. Should said inspector find coal or coke badly or improperly prepared, he shall immediately report all the facts in writing to the fuel company and to the operator preparing such coal or coke, and shipments from mine or mines producing such alleged improperly prepared coal or coke may be suspended after five (5) days' notice in writing to such operator, at the discretion of the executive committee of the fuel company, until such time as such operator may prepare such coal or coke properly. In any case such operator shall have the right to refer the question whether such coal or coke is improperly prepared or not, or, if not so prepared, whether the same be so prepared at reasonable cost, to arbitration, as herein provided, which decision as to the preparation of such coal shall be final and binding on both parties; and in case said arbitration shall find such coal or coke improperly prepared, and shall further find that it is impossible or impracticable for such operator to remedy such faults at reasonable cost, he shall have the right to withdraw from, and have this agreement annulled as to him. If said fuel company shall make default in payment for any coal or coke shipped under this agreement according to the terms hereof, and said default shall continue for the space of fifteen (15) days, unless payment shall be withheld by reason of attachment, suggestion, garnishment, or other legal process against the member of said coal association on whose claim default is so made, such default shall, at the option of such member on whose claim such default is so made, work an annulment of this contract as to such member: provided, such member shall within ten (10) days after the expiration of said fifteen (15) days give notice in writing to said fuel company of the election of such member to exercise such right of annulment; and a failure to exercise this right **[616]** for any such default shall not prevent the exercise of the same for any subsequent default. And a violation or failure to keep, observe, and perform any covenant or covenants herein contained by any party to this agreement shall, at the option of the party or parties thereby aggrieved, work an annulment of this agreement as to such party or parties on thirty (30) days' notice in writing. And no waiver of this right, in case of any violation or failure to keep, observe, and perform any covenant hereof, shall prevent the exercise of the same for any subsequent violation of, or failure to keep, observe, and perform, the same, or any other covenant hereof: provided that, upon any notice for the annulment of this agreement as hereinbefore provided being given by any parties or party, the party or parties to whom it is so given, if desiring to contest the rights of the parties or party giving said notice to annul this agreement, shall have the

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right to submit the question to arbitration, as herein provided, and the decision of such arbitrator shall be final and binding on all parties to such arbitration. But any withdrawal or annulment as to any member or members under this, or clause No. 18 hereof, shall not affect this contract as to the parties remaining, between themselves.

"(19) Any person, firm, or corporation now or hereafter producing coal to be shipped on the Chesapeake & Ohio Railway may become a party to this contract by signing the same, or an exact copy hereof, with the fuel company, or by an indorsement attached hereto may accept the provisions hereof; and, upon becoming such party hereto, such person, firm, or corporation shall be entitled to all the rights and privileges, and be subject to all the duties and liabilities, hereunder, the same as if he, it, or they had been named in said contract as one of the parties of the second part, and had duly signed and executed it with the others named therein: provided, that said association shall agree to such person, firm, or corporation becoming a party hereto by a majority vote of a quorum of its members.

"(20) It is understood and hereby agreed that in any matter or thing connected with this agreement, where any party hereto shall assert, maintain, or set up any claim, right, privilege, liability, or penalty in his, its, or their favor, or against any other party or parties hereto, and thereby a controversy shall arise hereunder, then and in that event either party or parties to such controversy shall have the right to submit the said controversy to arbitration in the manner hereinafter set forth. There is hereby constituted and appointed an arbitration committee, which shall be composed of two persons and such third person as shall be by such two selected from time to time as any controversy may arise. Such two persons shall be selected as follows: Each and every year during the continuance of this contract the said fuel company shall appoint some person to serve upon said arbitration committee, and the parties of the second part shall also appoint one to serve upon said committee, of which appointment the fuel company and the association shall have notice, and the two persons so appointed shall continue to serve until their successors shall be appointed in the same manner. Whenever a controversy shall arise hereunder, the party desiring to submit such controversy shall notify the other party or parties to such controversy of the same, in writing, and shall designate in such notice the time and place when said two arbitrators shall meet to hear the matter in controversy, and he or they shall also notify the said arbitrators to meet at said time and place. And at the time and place so designated said two arbitrators shall meet, and they shall select a third arbitrator, who, with the other two, shall constitute the full arbitration committee to hear and determine the said controversy, and whose award in all matters of law and fact shall be final, and shall be binding upon each and all of the parties to that controversy. Such notice may be served as a legal notice is served, or it may be mailed to the party, to be served at his or their post-office address. And any notice to any one or more of the parties of the second part may be served upon, or sent by mail to, the president and secretary of said association. If at the time and place said two arbitrators are required to meet, either one or both of them should fail or refuse to attend or serve, then the fuel company, by its agent or attorney, on the one side, may fill the vacancy caused by its arbitrator being absent or [617] refusing to serve, and the association, by its officer, agent, or attorney, may fill the vacancy caused by the absence of its arbitrator, or his refusing to serve; and the arbitrator or arbitrators so selected by either or both of said parties as aforesaid shall select the third, which three shall, for that controversy, constitute the arbitration committee, and shall have the same powers, and their award shall be as final, as if the two

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arbitrators herein first provided for had attended and selected a third. If, upon having notice to attend at a time and place to settle a controversy, either party shall fail or refuse to attend, or shall fail or refuse to select an arbitrator when required hereunder so to do, the said association, by its president, other officer, or attorney, may select an arbitrator in the place or stead of the absent one; and, if such association shall fail or refuse to make such appointment, in that event the fuel company, by its agent or attorney, may make such appointment or appointments, and the two, when so appointed in any of said modes, shall select a third, and the three shall constitute the arbitration committee to hear and determine said controversy, whose award shall be final. A notice to arbitrate hereunder shall not fix a time longer than fifteen (15) days, nor less than five (5) days, from the time of giving said notice, unless by mutual consent. The place of such meeting of the arbitrators shall be at Cincinnati, Ohio, or Charleston, W. Va., unless by mutual consent. Said arbitrators shall have the right to adjourn their session from time to time, or to such place or places as they may determine. And they shall make their award in not less than three days from the time the evidence is finally taken before or submitted to them; such award to be valid if signed by two of the arbitrators. Every award shall be executed in duplicate, and a copy thereof furnished to each of the executive committees herein mentioned. The failure of a regular arbitrator to attend at a time and place designated in any notice to him, and the appointment of another in his stead for any controversy, shall not for that reason vacate his general appointment as an arbitrator until his successor is appointed. If the two arbitrators appointed as above provided shall at any time fail or refuse for two days to appoint the third arbitrator, the latter shall be appointed by the judge of the circuit court of Kanawha county, West Virginia.

"Witness the following signatures:

"THE C. & O. FUEL CO.,
"DONALD MCDONALD, *Pt.*
"ROBINSON COAL CO.,
"By NEIL ROBINSON.
"W. R. JOHNSON.
"THE KANAWHA SPLINT COAL COMPANY,
"By F. E. LAIR.
"CARVER BROS.
"ENOCH CARVER.
"JOS RENSHAW,
"*Special Receiver Big Black Band Coal Co.*
"CHARLMORE COAL CO.,
"HERNDON & RENSHAW, *Mgrs.*
"MCCALLISTER & CO.,
"Per JAMES KELSOE.
"MECCA COAL & COKE CO.,
"By JOHN CARVER.
"CHESAPEAKE MINING CO.,
"By J. B. LEWIS.
"COALBURG COLLIERY CO.,
"By J. B. LEWIS.
"MONTGOMERY COAL CO.,
"By S. H. MONTGOMERY.
"BELMONT COAL CO.,
"By T. E. EMBLETON, *Pt.*
"HARRIS B. SMITH,
"*Spl. Receiver Lens Creek Coal & Coke Co.*"

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[618] The defendants answered, admitting the making of the contract, and taking issue upon the other allegations of the bill, and seeking to justify the making of the agreement for lawful purposes, for reasons set forth in the answer, which are noticed in the opinion. The complainant offered no testimony, but certain evidence was introduced by the defendants for the purpose of showing the legality of the transaction, and did tend to establish certain facts,—among others, the following: The 14 parties to the agreement are carrying on trade and business in what is known as the "Kanawha district," in West Virginia. These parties are miners and shippers of coal and manufacturers of coke in that district, and the mines covered by the contract are on the south side of the Kanawha river. They do not own all of the mines on that side of the river. One Donald McDonald had been the agent of the various coal companies in the sale of coal and coke at Cincinnati, Ohio, prior to the formation of the Chesapeake & Ohio Fuel Company, which company is one of the parties to the agreement in controversy, and of which he became the president. His business, before the formation of the fuel company, was largely confined to local points west of the Chesapeake & Ohio Railroad, and to Cincinnati and vicinity. After the making of the contract, coal and coke were sold thereunder in West Virginia, Kentucky, Ohio, Indiana, Illinois, Michigan, Wisconsin, Missouri, Iowa, Nebraska, North Dakota, South Dakota, Arizona, and small quantities in Mississippi. Of the parties to the agreement, which relates only to rail shipments west on the Chesapeake & Ohio Railroad, seven in number have river tipples for shipping coal by the Great Kanawha river. Other miners, not parties to this agreement, also have tipples for shipping coal on this river. The mines embraced in the agreement have a capacity of about 5,000 tons a day, and the mines of the Kanawha district not parties to the agreement have a capacity of about 11,000 tons a day. The coke ovens in this district represented by parties in this agreement are about 226 in number, with a daily capacity of about 450 tons, to about 347 in number, with a daily capacity of 525 tons owned by others than the parties to the agreement. Competition in the Western market is keen with the coal mines shipped along the line of the Chesapeake & Ohio Railroad, in the Kanawha district. This competition comes from the Flat Top coal fields on the line of the Norfolk & Western Railroad, from the coal fields all along the line of the Baltimore & Ohio Railroad, West Virginia & Pittsburg Railroad, and West Virginia Central Railroad; also competition by rail and water from all of the great coal fields of western Pennsylvania, the Hocking, Welston, and Nelson fields of Ohio, the coal fields of Kentucky and Tennessee, northern and southern Illinois, and the fields of Iowa, and some competition from Missouri. The aggregate of all these fields is about 115,000,000 tons annually. The competition in the Western market is severe, with the coke produced in the Kanawha district. The twelfth clause of the agreement, which provides that the Chesapeake & Ohio Fuel Company shall handle the coal shipped in barges, was rescinded by all the parties to the agreement in June, 1898. The business of the operators had not been satisfactory, and it was agreed with McDonald, the former sales agent, that a company should be formed for the sale of the coal, which should use every practicable means to push the sale of the coal, and to enlarge its market. There were large contracts, which no single operator could take. The minimum of 600,000 tons of coal and 75,000 tons of coke per annum, which it is provided shall be taken under the contract, was considerably in excess of the previous year's shipments. In making the contract, the coal was placed at about 60,000 tons in excess of the previous year's production, and the coke at 30,000 tons. It is testified that larger contracts had been obtained for the sale of coal than theretofore, and larger than any of

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the operators could fill. And better preparation of the coal for the market had been secured, together with a more equitable distribution of the cars for the shipment of the coal. Since the fall of 1898 an agent, termed the "equalizer," has been employed to attend to the distribution of the orders sent in by the fuel company. The price to consumers has been reduced, and there has been no intention to control the market or enhance prices. The circuit court made a decree in favor of the complainant (105 Fed. 93), and the defendants appealed.

[619] *Malcolm Johnson* and *A. C. Cassatt*, for appellants.

Wm. E. Bundy and *Sherman T. McPherson*, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge (after stating the facts as above).

This action involves the construction and application of Act Cong. July 2, 1890 (26 Stat. 209). This statute makes illegal "every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations." The act further makes it a misdemeanor to monopolize or attempt to monopolize, or combine or conspire with others to monopolize, any part of the trade or commerce among the several states. This suit was brought under cover of the fourth section, giving to the circuit court jurisdiction of proceedings in equity brought by the United States district attorney, under the direction of the attorney general, to restrain violations of the law.

Is the contract in restraint of trade, within the meaning of the law? As we understand the decisions of the supreme court of the United States, the construction of the statute is no longer an open question. At the common law, contracts were invalid when in unreasonable restraint of trade, and were not enforced by the courts. See opinion of this court, per Taft, Circuit Judge, in *U. S.* v. *Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271–279, 46 L. R. A. 122. By the constitution of the United States, congress is given plenary power to regulate commerce between the states and with foreign nations. In the exercise of this power, congress may prevent interference by the states with the free-

dom of interstate commerce, and may likewise prohibit individuals, by contract or otherwise, from impeding the free and untrammeled flow of such trade. In the exercise of this right, congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce among the states. *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

While this is the general rule to be deduced from the authorities cited, it is to be remembered that the supreme court has also declared:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect commerce." *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259.

The question is, in each case, does the contract or combination have the necessary effect to restrain interstate commerce? A contract or combination which interferes with the freedom of interstate commerce, **[620]** and hinders or prevents its free enjoyment, to the extent that it does so, restrains that commerce, and is illegal. It was the policy of the common law to discourage monopolies, and to refuse to enforce contracts which had the effect to suppress competition. It was believed and declared by those who built up that system of jurisprudence that the public interests were best subserved when commerce and trade were left unfettered by combinations and agreements which had the effect to destroy competition in whole or in part. It was in the same spirit, and with the same end in view, that congress passed the act under consideration, which is aimed to maintain interstate commerce upon the basis of free competition, and contracts which have the necessary tendency

to restrain that freedom are within the condemnation of the law. The courts are not concerned with the policy of such a law. It is not for them to inquire whether it be true, as is often alleged, that this is a mistaken public policy, and combinations, in the reduction of the cost of production, cheapened transportation, and lowered cost to the consumer, have been productive of more good than evil to the public. The constitution has delegated to congress the right to control and regulate commerce between the states. In the exercise of this right, it has declared for that policy which shall keep competition free, and leave interstate commerce open to all, without the right to any to fetter it by contracts or combinations which shall put it under restraint.

Looking, then, to the contract in question, we find 14 of the coal producers of this district, whose aggregate production is 5,000 tons a day, entering into an agreement which, without making a partnership, undertakes to control the entire output of the several mines for shipment west by a leading route. Examining its provisions, we find that these 14 independent operators, who theretofore were competing in the open market for the trade which is the subject of this contract, are now prevented from any independent action in fixing prices, but are obliged to sell at a price fixed by the executive committee, or not to sell at all. One of the witnesses introduced by the defendants said in the course of his testimony:

"I suppose before this contract went into effect the operators were not generally informed as to what each other were receiving, and that each received his own price."

Undoubtedly the market price was generally controlling, but the price was not fixed by arbitrary agreement, and was left to the operation of the natural laws of open competition. Under this agreement no member of the association is permitted to sell coal or coke bound to points west on the railroad except under the terms and conditions of the contract, and the fuel company cannot directly or indirectly become interested in the buying or selling of bituminous coal or coke of any members of the association, or coal or coke in competition with coal or coke of members of the association, except under the terms of the agreement. Monthly reports are to be made, showing the tonnage of the various

kinds of coal and coke shipped by the various members of the association, and weighed during the month, together with an average price of each grade of coal or coke so shipped and weighed, which average price is to be computed upon the basis of the actual **[621]** price, less gross profits, if any, received for all coal and coke sold, and the minimum price as fixed by the contract for coal and coke not sold in such month, and settlement to be made with the members of the association according to the prices fixed. The fuel company is to receive a gross profit of not to exceed 10 cents a ton, and the amount realized each month in excess of said profit, over and above the minimum price, is to be paid to the members of the coal association. The executive committee of the coal association is required, not later than the 20th day of each month, to designate the percentage of the total product of each class and grade of coal and coke which they deem best to be shipped by each member of the association under the terms of the contract.

A consideration of these provisions, assuming that the contract relates to interstate commerce, would seem to make plain the violation of the statute of 1890. Here are 14 dealers who have neither formed a corporation nor a partnership, but have limited to the terms of this agreement their rights for five years in the mining and shipping of coal upon one of their main outlets to the market. They have restricted their right to produce coal for such shipment to the amount designated by the committee. They have restricted sales to this purchaser to a price to be fixed by the committee. They have eliminated competition in the market among themselves. They have restricted the purchaser so that he may not buy from others in competition with themselves. If we correctly interpret the decisions of the supreme court, these provisions clearly restrain the freedom of interstate commerce, which it is the purpose of this statute to maintain unfettered by such contracts and combinations. While it is admitted that some restraint may result upon commerce by these provisions, it is strenuously argued by the learned counsel for the defendants that such restrictions among a portion of the coal dealers of a district are only ancillary to a main lawful purpose, resulting in larger com-

petition, and greater freedom and volume of interstate trade, and do not violate the act. In support of this contention, Judge Taft's opinion in the Addyston Pipe Co. Case, supra, is cited, in which, after summarizing the five instances in which the common law upheld covenants in partial restraint of trade, the learned judge said:

"It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."

And the judge quotes from Chief Justice Tindal in *Horner* v. *Graves*, 7 Bing. 735, to the effect that in such cases it is to be considered whether the restraint imposed by the contract is only fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. If the unreasonable restraint, as at the common law, was the test of the validity of such contracts, we might inquire whether this agreement **[622]** did not contain certain restrictions entirely unnecessary to the protection of the fuel company in acquiring the coal from the association, which restrictions are inimical to the public interest. But it is to be remembered that the test of the common law as to the reasonableness of the restraint of commerce is not the test of the validity of such agreements, within the provision of the statute. This proposition was decided by the supreme court in the Trans-Missouri Case, supra, and affirmed in later cases. Not that every case of incidental restraint makes a contract void, but the question is, is it the effect of the contract to directly restrain interstate commerce? Upon this question the supreme court has said (*Joint Traffic Ass'n Case*, 171 U. S. 567, 568, 19 Sup. Ct. 31, 43 L. Ed. 287):

"Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment, of two or more producers, of the same person to sell their goods on commission, was a matter in any degree in restraint of trade.

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"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.'"

And in the *Addyston Case*, 175 U. S. 245, 20 Sup. Ct. 109, 44 L. Ed. 149, the court says:

"All the facts and circumstances are, however, to be considered in order to determine the fundamental question, whether the necessary effect of the combination is to restrain interstate commerce."

And it is argued that the main purpose of this agreement being to increase the trade of the parties, to enhance competition in a larger field, and improve the character of the product, these objects are beneficial to the public, as well as to the private parties, lawful in their scope and purpose, and justifying the indirect and partial restraint of trade involved in the execution of the agreement. The argument here advanced would be available to nearly every combination of this kind. Wider markets and more trade may be the inducements to such agreements, but they are purposes which the act of congress does not permit to interfere with the freedom of interstate traffic. It would, however, be closing our eyes to the situation and the terms of the contract not to perceive that the limiting of competition was a moving purpose in entering into this agreement. Not only are the 14 operators who signed the agreement limited in prices and trade and production to the governing action of the executive committee, but in the nineteenth paragraph of the contract it is provided that any person, firm, or corporation now or hereafter producing coal to be shipped on the Chesapeake & Ohio Railroad may become a party to the contract by signing the same; such parties to be ad- **[623]** mitted, by a majority vote of the members, to full participation in the benefits and obligations of the contract. The parties may well be concluded to have intended, in what they did, to put an end to competition in the district in shipments to the Western market to be reached by the Chesapeake & Ohio

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Railroad, by getting all the operators into an agreement to sell for a single price, to be fixed by a committee of their number, and to limit competition among themselves in markets near and remote, within the scope of the agreement. It is to be remembered in this connection that it is the effect of the contract upon interstate commerce, not the intention of the parties in entering into it, which determines whether it falls within the prohibition of the statute. The *Trans-Missouri Case*, 166 U. S. 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; the *Addyston Case*, 175 U. S. 234, 20 Sup. Ct. 96, 44 L. Ed. 136. It is, moreover, contended that the effect of this agreement has been the reduction of prices to the consumer. In determining whether a combination restrains interstate commerce, it is not only the effect upon consumers which is to be considered, but, as well, the effect upon others in the business, who, from choice or necessity, are left outside of the organization. As is said in the *Trans-Missouri Case*, 166 U. S. 323, 17 Sup. Ct. 552, 41 L. Ed. 1021:

"In business or trading combinations, they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital."

In the present case, if the scheme of this combination shall prevail, until nearly all of the operators in this district have availed themselves of the opportunity contained in the contract and become parties to it, the effect upon dealers who have not its large facilities, and may be unable to compete for the contracts and meet the prices fixed by the committee, cannot be otherwise than disastrous. And when the small dealer has been driven out, the combination is one step nearer to the power to control the market.

It is further contended that the competition is such in the market for which this coal is intended, and the coal produced by the operators, parties to this agreement, is such a small fraction of the quantity sold, that it cannot affect

prices materially. It is not required, in order to violate this statute, that a monopoly be created. It is sufficient if that be the necessary tendency of the agreement. In *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, Chief Justice Fuller said:

"Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from a free competition." Quoted with approval in the *Addyston Case*, 175 U. S. 237, 20 Sup. Ct. 96, 44 L. Ed. 136.

[624] The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but seeks to reach those which directly restrain or impair the freedom of interstate trade. The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity.

Again, it is argued that the features of the contract which fix the minimum to be taken by the fuel company in excess of the former production of the mines, and permit a proportionate reduction of the minimum quantity to be taken when the price is fixed so high that the fuel company cannot meet the market, are evidences that this is no more than an agreement to make the fuel company the common agent of the parties for the sale of the product of the mines at the market price. The answers to this position are obvious. In the constitution of such an agency the restrictive features of this contract are unnecessary. Should the fuel company be unable in all cases to meet the price fixed, the parties are nevertheless prohibited, during the life of the contract, from dealing with others, or selling at a less price than the committee has fixed, and the purchaser is not at liberty to deal with competitors for a supply of coal for this market. "It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity that is regarded." The *Addyston Case*, 175 U. S. 245, 20 Sup. Ct. 109, 44 L. Ed. 149.

We think this contract, within the meaning of the statute, is in restraint of interstate commerce, and tends to create monopoly.

That the contract under consideration has relation to interstate commerce, within the meaning of the act, we think not doubtful. The coal was contracted for to be sold in the Western market. It is declared to be a main purpose of the contract to extend that market. The coal was in fact shipped to a number of Western states. The payments were to be made for the coal upon the basis of a 10 per cent. profit to the fuel company, and the excess to go to the members of the coal association. These sales were made, as it was intended and stipulated that they should be, in the Western states. Upon this subject, speaking for the court in the *Addyston Case*, 175 U. S. 241, 20 Sup. Ct. 107, 44 L. Ed. 147, Mr. Justice Peckham said:

"If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute. The power to regulate such commerce—that is, the power to prescribe the rules by which it shall be governed—is vested in congress; and, when congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent, and to the same extent intrenches upon the power of the national legislature and violates the statute."

Within this principle, we think the contract and combination under consideration have relation to interstate commerce.

The judgment of the circuit court is affirmed.

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[70] BEMENT *v.* NATIONAL HARROW COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 215. Argued April 9, 10, 1902. Decided May 19, 1902.

[186 U. S., 70.]

Any one sued upon a contract may set up, as a defence, that it is a violation of an act of Congress.

The object of the patent laws is monopoly, and the rule is with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee,

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and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts; and the fact that the conditions in the contracts keep up the monopoly, does not render them illegal. The prohibition was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others, who were engaged in manufacturing and selling other machines under other patents; but it would be unreasonable to so construe the provision, as to prevent the defendant from using any letters patent legally obtained by it and not infringing patents owned by others.

Upon the facts found, there was no error in the judgment of the Court of Appeals, and it is affirmed.[a]

[46 L. ed., 1058.][b]

[The defense that a contract is in violation of the act of Congress of July 2, 1890 (26 Stat. L., 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies, which makes illegal every contract violative of its provisions, may be set up by a private individual when sued theron, and, if proved, constitutes a good defense to the action.]

[Conditions imposed by the patentee in a license of the right to manufacture or sell the patented article, which keep up the monopoly or fix prices, do not violate the act of Congress of July 2, 1890 (26 Stat. L., 209, chap. 647), to protect trade and commerce against unlawful restraints or monopolies.]

[Reasonable and legal conditions imposed by the patentee in a license of the right to manufacture and sell the patented article, restricting the terms upon which the article manufactured under such license may be used, and the price to be demanded therefor, do not constitute such a restraint on commerce as is forbidden by the act of Congress of July 2, 1890 (26 Stat. L., 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies.]

[The agreement of the licensee of a patent for improvements relating to float spring tooth harrows, not to manufacture or sell any other such harrows than those which it had made under its patents before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by such licensor, is not void as an unlawful restraint on trade or commerce forbidden by the act of Congress of July 2, 1890 (26 Stat. L., 209, chap. 647), since the plain purpose of this provision is to prevent the licensee from infringing on the rights of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows.]

[An agreement by the licensor of a patent for improvements relating to harrows, not to license any other person than the licensee to manufacture or sell any harrow of the peculiar style and construction then used or sold by such licensee, does not violate the act of Congress of July 2, 1890 (26 Stat. L., 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies.]

[a] The foregoing syllabus copyrighted, 1902, by The Banks Law Publishing Co.

[b] The following paragraphs inclosed in brackets are taken from the syllabus to this case in the United States Supreme Court Reports, Book 46, p. 1058. Copyrighted, 1902, by The Lawyers' Co-Operative Publishing Co.

Statement of the Case.

THIS was a writ of error to the Supreme Court of the State of New York, to which court the record had been remitted after a decision of the case by the Court of Appeals. The action was brought by the plaintiff below, the defendant in error here, [71] a corporation, to recover the amount of liquidated damages arising out of an alleged violation by the defendant below, the plaintiff in error here, also a corporation, of certain contracts executed between the parties, in relation to the manufacture and sale of what are termed in the contracts "float spring tooth harrows," their frames and attachments applicable thereto, under letters patent owned by the plaintiff. The action was also brought to restrain the future violation of such contracts, and to compel their specific performance by the defendant. The case was tried before a referee pursuant to the statute of New York providing therefor, and he ordered judgment in favor of the plaintiff for over twenty thousand dollars, besides enjoining the defendant from violating its contract with the plaintiff, and directing their specific performance as continuing contracts. This judgment was reversed by the appellate division of the Supreme Court and an order made granting a new trial, but on appeal from such order the Court of Appeals reversed it and affirmed the original judgment. The defendant brings the case here by writ of error.

The particular character of the action appears from the pleadings. The complaint, after alleging the incorporation of both parties to the action, the plaintiff in New Jersey and the defendant in Michigan, averred that about April 1, 1891, the plaintiff's assignor, a New York corporation, entered with the defendant into certain license contracts, called therein Exhibits A and B. The substance of contract A is as follows:

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It stated that the plaintiff was the owner of certain letters patent of the United States, which had been issued to other parties and were then owned by the plaintiff, for improvements relating to float spring tooth harrows, harrow frames and attachments applicable thereto, eighty-five of which patents were enumerated, and that the defendant desired to acquire the right to use in its business of manufacturing at Lansing, (in the State of Michigan,) and to sell throughout the United States, under such patents or some one or more of them, and under all other patented rights owned or thereafter acquired by the plaintiff, which applied to and embraced the peculiar construction employed by the defendant, during the term of such patents or either or any **[72]** thereof, applicable to and embracing such construction. The plaintiff then, in and by such contract, gave and granted to the defendant the license and privilege of using the rights under those patents in its business of manufacturing, marketing and vending to others to be used, float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto; a sample of the harrow frames and attachments the defendant was licensed to manufacture and sell, being (as stated) in the possession of the treasurer of the plaintiff, and marked and numbered as set forth in schedule A, which was made a part of the license. The license was granted upon the terms therein set forth, which were as follows:

(1) The defendant was to pay a royalty of one dollar for each float spring tooth harrow or frame sold by it pursuant to the license, to be paid to the plaintiff at its office in the city of Utica in the State of New York.

(2) The defendant was to make verified reports of its business each month and mail them to the plaintiff, and the defendant agreed that it would not ship these harrows to any person, firm or corporation to be sold on commission, or allow any rebate or reduction from the price or prices fixed in the license, except to settle with an insolvent debtor for harrows previously sold and delivered.

(3) The defendant agreed that it would not during the continuance of the license sell its products manufactured under the license at a less price or on more favorable terms of payment and delivery to the purchasers than was set forth in

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schedule B, which was made a part of the license, except as thereinafter provided.

(4) The plaintiff reserved the right to decrease the selling price and to make the terms of payment and delivery more favorable to the purchasers, and it might reduce the royalty on the harrows manufactured under the license.

(5) The plaintiff agreed to furnish license labels to the defendant, which were to be affixed to each article sold, and the amount of ten cents paid for each of such labels was to be credited and allowed on the royalty paid by the defendant at the time of such payment.

[73] (6) The defendant agreed that it would not, during the continuance of the license, be directly or indirectly engaged in the manufacture or sale of any other float spring tooth harrows, etc., than those which it was licensed to manufacture and make under the terms of the license, except such as it might manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee should be licensed by the plaintiff to manufacture and sell, except such other style and construction as it might be licensed to manufacture and sell by the plaintiff.

(7) The defendant agreed to pay to the plaintiff for each and every of the articles sold contrary to the strict terms and provisions of the license, the sum of five dollars, which sum was thereby agreed upon and fixed as liquidated damages.

(8) The defendant agreed not to directly or indirectly, in any way, contest the validity of any patent applicable to and embracing the construction which the defendant was licensed to manufacture, or which it might manufacture, for another licensee, which such other licensee was itself licensed to manufacture or sell, or the reissues thereof, and no act of either party should invalidate this admission. The defendant also agreed not to alter or change the construction of the float spring tooth harrows, float spring tooth harrow frames, without teeth or attachments applicable thereto, which it was authorized to manufacture and sell under the license, in any part or portions thereof which embody any of the inventions covered by the letters patent, or any of them, or any reissues thereof.

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(9) The plaintiff agreed that after the license was delivered it would not grant licenses or let to any other person the right to manufacture the articles named of the peculiar style and construction or embodying the peculiar features thereof used by the defendant, as illustrated and embodied in the sample harrow then placed in the possession of the treasurer of the plaintiff and referred to in schedule A of the license.

(10) Nothing contained in the license was to authorize the defendant to manufacture or vend, directly or indirectly, any other or different style of harrow than duplicates of such sam- [74] ples as had been deposited by it with the plaintiff, and such as were embraced in the license.

(11) Any departure from the terms of the license might at the option of the plaintiff be treated as a breach of the license, and the licensee might be treated as an infringer, or the plaintiff might restrain the breach thereof in a suit brought for that purpose and obtain an injunction, the licensee waiving any right of trial by jury; such remedy was to be in addition to the liquidated damages already provided for.

(12) The termination of the license by the plaintiff was not to release the defendant from its obligation to pay for articles sold up to the termination of the license.

(13) The plaintiff agreed to defend the defendant in any suit brought for an alleged infringement.

(14) No royalties were to be paid for articles exported for use in a foreign country.

(15) The license was personal to the licensee and not assignable, except to the successors of the defendant in the same place and business, without the written consent of the plaintiff, nor were the royalties or other sums specified to cease to be paid under any circumstances, except under the conditions named in the license during the continuance thereof.

(16) The parties agreed that the license should continue during the term of the patent or patents applicable to the license and during the term of any reissues thereof.

(17) The place of the performance of the agreement was the city of Utica, New York, and the agreement was to be

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construed and the rights of the parties thereunder determined according to the laws of New York.

(18) The consideration of the contract or license was one dollar, paid by each of the parties to the other, and the covenants contained therein to be performed by the other, and it applied to and bound the parties thereto, their successors, heirs and assigns.

Schedule A which followed contained a description of the particular kinds of harrow which the defendant was authorized to make and sell under the license. Schedule B contained a statement of the prices and terms of sale under the license, and it was [75] therein stated that "A maximum discount of forty-two per cent may be allowed on sales of harrows, frames and teeth in the following territory: All of the New England States, also States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia. A maximum discount of forty-five per cent may be allowed on all sales in the territory throughout the United States not mentioned above."

This contract or license was signed by the president of the National Harrow Company for the plaintiff, and A. O. Bement, president of the defendant corporation, for the defendant.

The other license, called Exhibit B, was in substance the same as Exhibit A, excepting that the privilege of sale for the articles manufactured was that portion of the territory embraced within the United States lying south, and west of Virginia, West Virginia and Pennsylvania, and there was some difference in the machines which the defendant was authorized to manufacture and sell under this license, and in regard to the prices to be charged for those machines not covered by the former contract or license.

These two agreements were, as stated, made parts of the plaintiff's complaint, and the plaintiff then set forth various alleged violations of the two agreements on the part of the defendant, and claimed a recovery of a large amount of damages under the provisions of the contracts, and prayed for an injunction restraining future violations and for a specific performance of the contracts.

The plaintiff also alleged that the plaintiff's assignor, the

New York corporation, duly assigned to the plaintiff all its rights and interests in regard to the subject-matter of the two contracts, and that the plaintiff, at the time of the commencement of the action, was the lawful owner of all such interests and rights, and was entitled to bring the action in its own name.

To this complaint the defendant made answer, denying many of its allegations and setting up certain other agreements which it alleged had been made by the plaintiff and other parties, including defendant, and which, as averred, amounted to a combination of all the manufacturers and dealers in patent harrows, to regulate their manufacture and to provide for their sale and **[76]** the prices thereof throughout the United States. It was also in the answer averred that such contracts had been pronounced to be void by the Supreme Court of New York, and the contracts now before the court were, as contended by defendant, but a continuation and a part of the other contracts already declared void, and that these contracts between the parties to this action were also void. It also alleged that all of the various contracts were in violation of the act of Congress, approved July 2, 1890, being chapter 647 of the first session of the Fifty-first Congress, (26 Stat. 209,) entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

The case was referred to a referee to hear and decide, who, after hearing the testimony, reported in favor of the plaintiff. The material portions of his report are as follows:

"That for some time prior to the month of September, 1890, the spring tooth harrow business was conducted by the following-named parties: D. C. & H. C. Reed & Company, of Kalamazoo, Mich.; G. B. Olin & Company, Perry and Canandaigua, N. Y.; Chase, Taylor & Company, W. S. Lawrence, doing business under the name of Lawrence & Chapin, both of Kalamazoo, Mich.; J. M. Childs & Company, of Utica, N. Y.; and A. W. Stevens & Son, of Auburn, N. Y., who began the harrow business in substantially the order named above.

"The first two above-named firms conducted their business in separate portions or territory of the United States, under the same United States letters patent, and the other figms began their business in hostility to the same letters patent. The first two firms began a number of patent lawsuits against the other firms and their customers for infringement of patents. These suits were vglorously prosecuted and the court finally decided the patents valid, and ordered an accounting of profits against the firm of Chase, Taylor & Company, and W. S. Lawrence.

"Prior to September, 1890, the last four of the above-named firms settled their disputes over patents with the first two firms, and took

licenses under their letters patent. Considerable sums of money were paid in settlement of these disputes and rights; and prior to said date, September, 1890, there was no other relation between the first two firms named, and the other parties **[77]** than that of licensor and licensee under United States letters patent.

"In the year 1890, and just prior thereto, other persons, firms and corporations began the spring tooth harrow business and other patent lawsuits followed: Suits were begun against the defendants herein, and against their customers purchasing their spring tooth harrows; and one case had gone to final decree, in which the defendant was ordered to account for profits and damages; and an injunction had been granted in other suits. Proceedings were pending upon an application for rehearing in these cases.

"In September, 1890, the six firms first above named decided to organize a corporation known as the National Harrow Company of New York, with a view to transferring various United States letters patent owned by the six firms respectively to said corporation, and for the purpose of conducting the manufacture of some part or portion of the material which entered into their spring tooth harrow business.

"In the conduct of the spring tooth harrow business, the harrows came to be known in the market as 'float spring tooth harrows;' that name having been adopted to differentiate the harrows from those known in the market as 'wheel harrows,' which had frame bars and curved spring teeth supported from an axle above, which axle had wheels at either end of the diameter above thirty inches. The two classes of harrows were differentiated, one being called a 'float' and the other a 'wheel' spring tooth harrow. The litigations had been wholly over the 'float' spring tooth harrows.

"The members composing the first six firms, above named, in the harrow business in September, 1890, organized under the laws of the State of New York the 'National Harrow Company.' That corporation was duly legally incorporated, and after its incorporation it received from the said six firms the transfer of their separate United States letters patent, license contracts and privileges under patents. The defendant's president, Arthur O. Bement, became and continued a director of this corporation until its dissolution, which followed in a little over a year.

[78] "This corporation entered into some contracts with spring tooth harrow manufacturers, which were decided by the Supreme Court of the State of New York to be illegal as against public policy, on account of restraints contained in the contracts, which extended beyond the lifetime of the patents. That case is reported in the New York Supplement, vol. 18, page 224. *Strait et al.* v. *National Harrow Company et al.*

"Immediately following this decision, all of the contracts then in existence which were affected thereby were immediately cancelled by the parties to such contracts.

"The defendant, E. Bement & Sons, in the fall of 1890, entered into a contract with the National Harrow Company, looking to the selling of its patents and rights under patents relating to the spring tooth harrow business; but this contract was abandoned, the conditions upon which it was executed not having been complied with, the contract became and was wholly void.

"The defendant had no contract with the National Harrow Company until about June 16 or 17, 1891, at which time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several United States

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letters patent and license rights and privileges under United States letters patent, all of which related to the defendant's float spring tooth harrow business. Such contracts constituted an absolute sale of the property and privileges thereby transferred, and the defendant agreed to accept in payment thereof the paid-up capital stock of the National Harrow Company of New York, and the value of the rights transferred were by agreement between the parties fixed and determined by arbitration, under which arbitration the defendant was awarded and the value was fixed at upwards of $29,000. The defendant was dissatisfied with the amount of the award, and such dissatisfaction and difference was afterwards adjusted by an agreement to issue to the defendant and the defendant to accept an additional amount of $16,000 of said capital stock. That by agreement, in the place of the said capital stock of the New York company, the defendant accepted [79] and agreed to take the stock of the plaintiff in this action, and there has been issued to the defendant and the defendant has received the capital stock of this plaintiff in an amount upwards of $45,000 in payment for the property and rights sold and transferred by the defendant to the National Harrow Company of New York. That said upwards of $45,000 of stock was issued to the president of the defendant for defendant's benefit, and on said stock defendant has received several cash dividends.

"The transaction between the National Harrow Company of New York and this defendant had, in June, 1891, was intended by the parties to be an absolute sale by the defendant to the National Harrow Company of New York of the United States letters patent and licenses under United States letters patent relating to the float spring tooth harrow business conducted by the defendant, and it was found on a good, valuable and adequate consideration moving between the parties.

"That, as a part of such transaction, the National Harrow Company of New York granted, issued and delivered to the defendant the license contracts A and B, which are attached to the complaint in this action and made a part thereof. Upon the consummation of the transaction in June, 1891, the controversy over patents and infringements existing between the first six firms named above, and the defendant and its customers, was settled. The papers which were executed in June, 1891, were all dated as of April 1, 1891, and were to take effect as of that date. At the date of the execution and delivery of the license contracts A and B, the National Harrow Company of New York was the owner by assignment and purchase of a large number of United States letters patent, which it is claimed fully monopolized and covered the defendant's float spring tooth harrow business.

"The sale by the defendant of its letters patent, and license rights and privileges to the National Harrow Company of New York, and the signing and delivering of license contracts A and B, were intended to and did, settle existing controversies with reference to the rights of the National Harrow Company of New York and the defendant.

[80] "I decide that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant were and are good and valid contracts, founded on adequate considerations and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept.

"In July, 1891, a corporation was organized under the laws of the State of New Jersey, known and designated as the National Harrow Company, which corporation is the plaintiff in this action. None of the parties organizing this corporation were in the spring tooth harrow business. The New Jersey corporation was duly and legally organized in conformity with the laws of that State, and was by those laws and its charter authorized to purchase United States letters patent and to grant licenses under United States letters patent and to conduct the manufacturing business, and had a variey of other rights and privileges under its charter and said statutes. That this corporation, the plaintiff, still is a legal and valid corporation, entitled to hold and enjoy such of its property as it now or may hereafter own or acquire, and that it was not organized in hostility to any rule of public policy.

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"That the National Harrow Company of New Jersey, this plaintiff, through its duly constituted officers purchased from the National Harrow Company of New York all of its various United States letters patent, and all contracts, licenses and privileges which the National Harrow Company of New York then owned and possessed, and also purchased a part of its other property, rights and privileges.

"That on the 9th of September, 1891, a formal transfer in writing was made from the National Harrow Company of New York to the National Harrow Company of New Jersey of the property and rights sold as aforesaid by the former company to the latter, which transfer was founded on a good, valuable and edequate consideration moving between the parties, and which transfer was sanctioned by the directors and stockholders of the New York corporation, and by the officers and [81] directors of the National Harrow Company of New Jersey, this plaintiff, and separate assignments in writing were made of the various United States letters patent from the New York corporation to the New Jersey corporation.

"I decide that this transfer was in all respects legal and valid, being founded on a good and valuable consideration, and that it vested in the plaintiff in this action all the rights, privileges and benefits accruing to the New York corporation under its contracts with the defendant, including contracts A and B, which contracts have been slightly modified by the parties as to price and terms of sale.

"The defendant's president, Arthur O. Bement, became a director and an active manager of the plaintiff, and continued as such down to September, 1893.

"The defendant made monthly verified reports to this plaintiff down to and including the 8th of September, 1893, of the harrows embraced in contracts A and B, by such reports stating the total harrows sold to be 13,900, on which defendant paid to the plaintiff a royalty of $13,900.

"The National Harrow Company of New York and this plaintiff have performed all of the stipulations and provisions in the contracts entered into between the National Harrow Company of New York and this defendant, including all the provisions of contracts A and B, and the plaintiff is now ready, willing and able to perform all of the stipulations and agreements to be performed on its part, as assignee of the National Harrow Company of New York.

"That the defendant, after having received and retained large pecuniary benefits under the contracts, has failed, neglected and refused, and still fails, neglects and refuses to keep and perform its contracts entered into, including the stipulations and provisions contained in contracts A and B, and since September, 1893, it has wholly repudiated contracts A and B, and refused to perform any of the stipulations contained therein which it agreed to do and perform, and it has broken and violated all of the stipulations and agreements contained in contracts A and B which it agreed to do and perform."

The referee then states with some detail the various viola- [82] tions of the license agreements by the defendant, and finds the defendant indebted to the plaintiff in the sum of

over twenty thousand dollars. He then continues as follows:

"I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction, and that all of the contracts in evidence were and are legal, valid and binding contracts, such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints, and are not repugnant to any rule of public policy as in restraint of trade, or tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including contracts A and B, are and were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted."

The referee then held the plaintiff entitled to a judgment against the defendant, declaring the validity of the plaintiff corporation and its title to the contracts and their validity, and decreeing specific performance thereof and restraining future violations of the contracts by the defendant. Judgment in accordance with the report was entered, from which the defendant appealed to the appellate division of the Supreme Court.

Some difficulties regarding the form in which the case was presented to that court arose upon the argument, and it was therefore suspended and the case sent back to the referee for a resettlement, which was subsequently agreed upon by counsel for the respective parties, who entered into a stipulation in regard to what was to be reviewed by the courts above, and, among other things, it was agreed between counsel: "That the foregoing record, as amended and corrected in this stipulation, contains all of the evidence given and proceedings had before the referee material to the questions to be raised on this appeal by the appellant, which questions to be raised by the appellant on this appeal are to be only as follows." Those questions are eight in number, the fourth of which is: "Whether or not the contracts A and B are valid under the act of Congress approved July 2, 1890, chapter 647 of the first [83] session of the Fifty-first Congress." This is the only Federal question raised and appearing in the record.

The case was thereupon argued before the appellate division, which reversed the judgment, and ordered a new trial, but it did not state in its order of reversal that the judgment was reversed on questions of fact as well as of law. The

plaintiff then appealed to the Court of Appeals from the order granting a new trial, and after argument it was held by that court that it had no jurisdiction to review the facts, and that upon the findings of the referee there had been no error of law committed, and consequently the Supreme Court was wrong in reversing the judgment. The court therefore reversed the judgment of the Supreme Court, and affirmed the judgment entered upon the report of the referee.

Mr. Clark C. Wood, *Mr. Edward Cahill* and *Mr. Henry J. Cookingham* for plaintiff in error.

Mr. Edwin H. Risley for defendant in error.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court.

In this court we are concluded by the findings of fact made in a state court in a suit in equity, as well as in an action at law. *Dower* v. *Richards*, 151 U. S. 658, 666; *Israel* v. *Arthur*, 152 U. S. 355; *Egan* v. *Hart*, 165 U. S. 188; *Hedrick* v. *Atchison, Topeka & Santa Fé Railroad Company*, 167 U. S. 673, 677.

The only Federal question raised in the record is as to the validity of contracts A and B, with regard to the act of Congress on the subject of trusts. Act of July 2, 1890, c. 647, 26 Stat. 209. That is a question of law, plainly raised in the record, and we are not precluded from its consideration by any action of the state courts. If, however, facts not found by the referee are necessary for the purpose of connecting those contracts with others not found in such report, we cannot supply the omission to find those facts. The contention of the defendant is that [84] the two contracts A and B are in truth a part and continuation of the agreements set forth in the defendant's answer, and that taken together they prove a purpose and combination on the part of all the dealers in patented harrows to control their manufacture, sale and price in all portions of the United States, and defendant avers that such a contract or combination was and is void, not only as against public policy, but also because it is a violation of the Federal statute upon the subject of trusts and illegal combinations. Those former al-

leged contracts are not mentioned in the report of the referee excepting, as he stated, they had been declared void as against public policy, and as being in restraint of trade because they extended beyond the life of the patents therein mentioned, and the referee found that following this decision all of the contracts then in existence, which were affected thereby, were immediately cancelled by the parties thereto.

The referee made no finding of any fact connecting the contracts A and B with prior contracts of a like nature including other parties, as alleged in the answer of the defendant. The referee did find, however, that the defendant had no contract with the National Harrow Company until June 16 or 17, 1891, at which time several contracts were entered into between the plaintiff and the National Harrow Company of New York, and among other contracts the plaintiff executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which relate to the defendant's float spring tooth harrow business. He also found that such contracts constituted an absolute sale of the property and privileges thereby transferred, and that the defendant agreed to and did accept in payment thereof paid up capital stock of the plaintiff. He further found that the transaction between the assignor of the plaintiff and the defendant in June, 1891, was intended by the parties to be an absolute sale by the defendant to such assignor of the United States letters patent and licenses under such patents relating to the float spring tooth harrow business conducted by the defendant, and that it was founded upon a good, valuable and adequate consideration between the parties; that as a part of such consider- **[85]** ation the assignor of the plaintiff granted and delivered to the defendant the license contracts A and B, heretofore spoken of, and that upon the consummation of the transaction the controversy over patents and infringements existing between the first six firms named in the referee's report and the defendant and its customers was settled. The report also decided " that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant were and are

good and valid contracts, founded on adequate considerations and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept."

The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The contracts A and B are to be judged by their own contents alone and construed accordingly.

The referee also decided that the plaintiff was a legal and valid corporation, authorized to enforce its rights in courts having jurisdiction, and that all the contracts in evidence might reasonably be made under the circumstances, and were founded upon a good, valuable and adequate consideration, and were reasonable in their provisions, and that they were and are legal, valid and binding contracts, and such as embodied no illegal restraints, and were not repugnant to any rule of public policy as in restraint of trade, and were not intended to create a monopoly, trust or illegal combination, and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts A and B, are, and were, intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted.

When he speaks of all the contracts in evidence, the referee **[86]** plainly means all the contracts in evidence between the parties to this action, for it was of such contracts only that he had been speaking. There were, in fact, other contracts than those designated A and B between these parties, and such other contracts had been put in evidence, and previously referred to by the referee. He, therefore, must have included what is termed the escrow agreement in his finding,

that all the agreements made by defendant with the plaintiffs were valid. That agreement is set forth in the margin.[a]

[87] There is no finding by the referee that this agreement was ever signed by any one other than the parties to this action, or that any other person received the licenses from and made contracts with the plaintiff similar to the ones entered into between these parties. All that the referee finds is, that all the contracts in evidence were legal, by which was meant, as already stated, all the contracts in evidence between the parties to the action, which were in existence and uncancelled. In the absence of any finding as to the escrow agreement having been signed by others, it must be regarded as unimportant, and we are brought back to the question

[a] "*Escrow Agreement.*

"This memoranda of agreement, made and entered into this 1st day of April, A. D. 1891, by and between the National Harrow Company, a corporation of Utica, in the State of New York, and Edward Norris of the same place; and E. Bement & Sons of Lansing, in the State of Michigan.

"Whereas, the said National Harrow Company is the owner of a large number of latters patent relating to float spring tooth harrows, and is desirous of granting licenses thereunder to the following-named persons, firms and corporations, to wit: Chas. H. Childs & Company, D. B. Smith & Company, A. W. Stevens & Son, Childs & Jones, Syracuse Chilled Plow Company, Geo. W. Sweet & Company, Walker Manufacturing Company, Taylor & Henry, the Herndeen Manufacturing Company, D. C. & H. C. Reed & Company, L. C. Lull & Company, Williams Manufacturing Company, W. S. Lawrence, McSherry Manufacturing Company, D. O. Everst & Company, E. Bement & Sons, Hench & Dromgold, Farmers' Friend Manufacturing Company, Eureka Mower Company.

"And whereas, the said National Harrow Company has placed in the hands of said E. Norris in escrow, duly executed by it in duplicate, a certain contract and license for each of said persons, firms and corporations hereinbefore named, to be by the said E. Norris immediately presented to each of the above and foregoing named respective persons, firms and corporations, to be signed and executed by said respective persons, firms and corporations—

"Now, therefore, it is hereby understood and agreed by and between the parties hereto, that as the said licenses and contracts are signed and executed by the said respective persons, firms and corporations, they shall be held by said Norris, in escrow, for both parties until such time as all of said above-named persons, firms and corporations shall have signed, executed and delivered the same to said Norris, whereupon they shall become operative, and immediately thereafter the said Norris shall deliver one of the duplicates of each of said contracts and licenses to the said National Harrow Company and the other duplicate thereof to the respective licensees who have signed the same, in person or by mail.

"But in case any of the above-named persons, firms and corporations shall neglect or refuse to sign, execute and deliver said respective contracts and licenses on or before the 1st day of June next, then and in such case said E. Norris shall, provided he shall be so directed, by a resolution duly adopted by the board of trustees of said National Harrow Company, make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative, and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of said contracts and licenses, and they shall be null and void.

"Witness the signatures of the parties.

"THE NATIONAL HARROW CO.,
By CHAS. H. CHILDS, *Pres't.*
"EDWARD NORRIS.
"E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

"Received of E. Bement & Sons a license and contract executed between the National Harrow Company and said E. Bement & Sons, which I agree to hold and deliver in accordance with an agreement between the said National Harrow Company and said E. Bement & Sons and myself, and hereto attached.

"Dated this 1st day of April, 1891. EDWARD NORRIS."

whether these contracts or licenses, A and B, irrespective of any contracts not found by the referee as in any way connected with, or forming a part thereof, are void as a violation of the act of Congress.

The plaintiff contends in the first place that only the Attorney General of the United States can bring an action under the statute, excepting that by section 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any Circuit Court of the United States, in the district in [88] which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that any one sued upon a contract may set up as

a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action.

The first section of the act provides that "every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defence of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence, and we think when proved it is a valid defence to any claim made under a contract thus denounced as illegal.

This brings us to a consideration of the terms of the license contracts for the purpose of determining whether they violate the act of Congress. The first important and most material fact in considering this question is that the agreements concern articles protected by letters patent of the Government of the United States. The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was, therefore, the owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize [89] others to sell it. As stated by Mr. Justice Nelson, in *Wilson* v. *Rousseau*, 4 How. 646, 674, in speaking of a patent:

"The law has thus impressed upon it all the qualities and characteristics of property for the specified period; and has enabled him to hold and deal with it the same as in the case of any other description of property belonging to him, and on his death it passes, with his personal estate, to his legal representatives, and becomes part of the assets."

Again, as stated by Mr. Chief Justice Marshall, in *Grant* v. *Raymond*, 6 Pet. 218, 241:

"To promote the progress of useful arts, is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress. This subject was among the first which followed the organization of our Government. It was taken up by the first Congress at its second session, and an act was passed authorizing a patent to be issued to the inventor of any useful art, etc., on his petition, 'granting to such petitioner, his heirs, administrators or assigns, for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, using and vending to others to be used, the said invention or discovery.' The law further declares that the patent 'shall be good and available to the grantee or grantees by force of this act, to all and every intent and purpose herein contained.' The amendatory act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right to their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received: [90] if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield: it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged."

In *Heaton-Peninsular Company* v. *Eureka Specialty Company*, 47 U. S. App. 146, 160, it is stated regarding a patentee:

"If he sees fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The *dictum* found in *Hoe* v. *Knap*, 17 Fed. Rep. 204, is not supported by reason or authority."

It is true that in certain circumstances the sale of articles manufactured under letters patent may be prevented when the use of such article may be subject, within the several States, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation. Thus an improvement for burning oil, protected by letters patent of the United States, was condemned by the state inspector of Kentucky as unsafe for illuminating purposes under the statute requiring an inspection and imposing a penalty for **[91]** the violation of the statute, and it was held that the enforcement of the statute was within the proper police powers of the State, and that it interfered with no right conferred by the letters patent. *Patterson* v. *Kentucky*, 97 U. S. 501.

There are decisions also in regard to telephone companies operating under licenses from patentees giving them the right to use their patents for the purpose of operating public telephone lines, but prohibiting companies from serving within such district any telephone company, and it has been held in the lower Federal courts that such a prohibition was of no force; that it was inconsistent with the grant, because a telephone company, being in the nature of a common carrier, was bound to render an equal service to all who applied and tendered the compensation fixed by law for the service; that while the patentees were under no obligation to license the use of their inventions by any public telephone company, yet, having done so, they were not at liberty to place restraints upon such a public corporation which would disable it to discharge all the duties imposed upon companies engaged in the discharge of duties subject to regulation by law. It could not be a public telephone company and could not exercise the franchise of a common carrier of messages with such exceptions to the grant. See *Missouri ex rel. &c.* v. *Bell Telephone Company*, 23 Fed. Rep. 539; *State ex rel. &c.* v. *Delaware &c. Company*, 47 Fed. Rep. 683; and *Delaware & Atlantic &c. Company* v. *Delaware ex rel. &c.* 3 U. S. App. 30.

These cases are cited in the opinion of the court in the case of *Heaton-Peninsular Company* v. *Eureka Specialty Company*, *supra*. Notwithstanding these exceptions, the general

rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

[92] The contention that they do not affect interstate commerce, is not correct. We think the licenses do by their terms and by their plain meaning refer to, include and provide for interstate as well as other commerce. The contract called Exhibit B provides for the manufacture at Lansing, Michigan, and for the sale of the articles there made in territory lying south and west of Virginia and West Virginia and Pennsylvania, and the referee finds that a number of harrows have been sold under that contract. The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the State of Michigan. As these contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addystone Pipe &c. Company* v. *United States*, 175 U. S. 211. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers.

United States v. *E. C. Knight Company*, 156 U. S. 1, does not bear upon the facts herein. That case related to a purchase of stock in manufacturing companies, by reason of

which the purchaser secured control of a large majority of the manufactories of refined sugar in the United States. It was held by this court that the Federal act relating to trusts and combinations affecting interstate commerce could not reach and suppress the creation of a monopoly in regard to the refining of sugar, and that the manufacturing of a commodity bore no direct relation to commerce between the States or with foreign nations. It was said by Mr. Chief Justice Fuller, for the court, while **[93]** speaking of such manufacture: "Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

In these contracts provision is expressly made, not alone for manufacture, but for the sale of the manufactured product throughout the United States, and at prices which are particularly stated, and which the seller is not at liberty to decrease without the assent of the licensor. *Addystone Pipe & Steel Company* v. *United States*, 175 U. S. 211, 238. These contracts directly affected, not as a mere incident of manufacture, the sale of the implements all over the country, and the question arising is whether the contracts which thus affect such sales are void under the act of Congress.

On looking through these licenses we have been unable to find any conditions contained therein rendering the agreement void because of a violation of that act. There had been, as the referee finds, a large amount of litigation between the many parties claiming to own various patents covering these implements. Suits for infringements and for injunction had been frequent, and it was desirable to prevent them in the future. This execution of these contracts did in fact settle a large amount of litigation regarding the validity of many patents as found by the referee. This was a legitimate and desirable result in itself. The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recog-

nizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

It is also objected that the agreement of the defendant not **[94]** to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture and make, under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is void under the act of Congress.

The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning.

There is nothing which violates the act in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual who is the licensee, and is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article. In brief, after a careful examination of these contracts, we are unable to find any provision in them, either taken separately or in connection with all the others

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therein contained, which would render the contracts between these parties void as in violation of the act of Congress.

It must, however, be conceded that the escrow agreement above set forth looks to the signing, by the parties mentioned therein, of contracts similar to those between the parties to this suit, designated A and B, and containing like conditions relating to the patents respectively, owned by such parties. But there is no finding by the referee that such contracts were in fact entered into by those other parties nor that they con- [95] stituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an opinion upon a state of facts not found. Upon the facts found there is no error in the judgment of the Court of Appeals, and it must, therefore, be

Affirmed.

MR. JUSTICE HARLAN, MR. JUSTICE GRAY and MR. JUSTICE WHITE did not hear the argument and took no part in the decision of this case.

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[925] FIELD *v.* BARBER ASPHALT PAV. CO.[a]

(Circuit Court, W. D. Missouri. July 15, 1902.)

[117 Fed., 925.]

CLOUD ON TITLE—REMOVAL—ACTION IN EQUITY—POSSESSION OF PLAINTIFF.—A suit in equity may be maintained for the removal of a cloud on title under the Missouri statutes, though plaintiff is not in possession.[b]

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[a] See 194 U. S. 618 (p. 555).

[b] Syllabus copyrighted, 1902, by West Publishing Co.

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UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.—Where complainant sued to set aside special tax bills assessed against certain lots in a city, of which he owned the fee, and he was the equitable owner of other lots assessed, and the tax bills on all the lots amounted to over $2,000, the federal court had jurisdiction.

MUNICIPAL CORPORATIONS—SPECIAL TAXES—TAX BILLS—REGISTRATION BY CITY CLERK.—The failure of a city clerk of a city to register tax bills for special assessments, as required by the Missouri statutes, is not a sufficient defense against the bills, the statute being directory merely.

[926] SAME—STREET GRADING—ASSESSMENT.—Where the evidence, in the action to restrain a special city assessment, showed that the grading, for which the city was not entitled to charge the abutting property, was not included, at least to any great extent, in the cost of paving, and no extra charge or expense for the grading was made, the fact that some grading was done was immaterial.

SAME—CITY IMPROVEMENTS—PROTEST—STATUTES—CONSTITUTIONALITY—REVIEW.—Where a nonresident property owner did not appear after notice and attempt to protest against a city street improvement, he cannot, in an action to restrain enforcement of tax bills against his property, obtain a review of the constitutionality of Laws Mo. 1895, § 95, limiting the right to protest to resident owners.

CONTRACT FOR IMPROVEMENT—ACTS OF ALDERMEN—REVIEW.—The board of aldermen of a city, in procuring the improvement of streets and letting the contract therefor, do not act in a legislative capacity, but act in an administrative or business capacity, and hence their acts are reviewable on the ground of fraud or corruption.

VALIDITY OF CONTRACT—LIMITATION AS TO MATERIAL—[ANTI-TRUST LAWS].—Where the contract for the paving of a street with asphalt limited the kind of asphalt to be used to Trinidad asphalt, such fact, and the further fact that such asphalt was controlled by a single corporation, [was not violative of the commerce clause of the constitution or of the Federal anti-trust statutes, and] did not affect the validity of the contract. [See p. 194.]

SAME—EVIDENCE.—Evidence in an action to vacate special tax bills for municipal improvements reviewed, and *held* not sufficient to show corruption on the part of the city council.

SAME—NECESSITY OF IMPROVEMENT—REVIEW.—Where one of the streets of a city, located in an extreme and thinly populated portion, had been well paved with macadam in 1892, and at the time the street was ordered paved with aphalt by the city council, in 1897, the macadam was not badly worn, and the street was in good condition, the subsequent improvement was unnecessary, and special assessments therefor void.

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[The only part of the opinion which has any bearing whatever upon the federal anti-trust law is as follows:]

[929] "The evidence shows that the contracts called for 'Lake Trinidad asphalt.' There is evidence tending to show that good asphalt, and quite as good as Trinidad, can be obtained from Bermuda, Mexico, and from places in the United States. On such facts it is contended that the city had no right to limit the contract to Trinidad, and that in so doing the commerce clause of the constitution was violated, and that the federal anti-trust statutes were likewise violated. And this argument is emphasized by complainant's counsel, because, as he contends, the defendant has a monoply of Trinidad asphalt. The evidence does not show this to be so. But, if it does have the monoply, I do not believe the point is well taken. An individual certainly has the right, in the erection of an improvement, to get that which he believes the best, and that which he prefers, regardless of the reason; and he should not defeat a recovery by showing that in fact something else was as good or better, or that the vendor had a monoply."

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[120] GIBBS *v.* McNEELEY ET AL.[a]

(Circuit Court of Appeals, Ninth Circuit. October 13, 1902.)

[118 Fed., 120.]

ANTI-TRUST LAW—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—To render a combination unlawful under the anti-trust act of 1890 [U. S. Comp. St. 1901, p. 3200], it need not be one which by its terms refers to interstate commerce, but it is sufficient if its purpose and effect are necessarily to restrain interstate trade.[b]

SAME.—An association of manufacturers of and dealers in red cedar shingles in the state of Washington, formed for the purpose of controlling the production and the price of such shingles, which are made only in that state, but are principally sold and used in other states, and which, by its action in closing the mills of its members,

[a] Demurrer overruled by Circuit Court as to fourth cause of action (102 Fed., 594). See p. 25. Verdict for defendants in error directed (107 Fed., 210). See p. 71. Reversed by Circuit Court of Appeals (118 Fed., 120).

[b] Syllabus and statement copyrighted, 1903, by West Publishing Co.

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has reduced the production, and has also arbitrarily increased the prices at which the product is sold, is a combination in restraint of interstate commerce, and unlawful under the anti-trust law of July 2 1890 [U. S. Comp. St. 1901, p. 3200].[a]

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

The plaintiff in error brought an action to recover damages against the defendants in error under the act of congress known as the "Sherman Anti-Trust Act," of July 2, 1890 [U. S. Comp. St. 1901, p. 3200], and alleged in his complaint, as his first cause of action: That for more than 10 years he had [121] been a dealer in Washington red-cedar shingles at the city of Tacoma in the state of Washington, conducting a general business in such shingles, purchasing them of the various manufacturers thereof within the state of Washington, and selling them to purchasers in other states of the United States and in certain foreign countries; That his business was valuable; and that he was solely dependent upon it for his livelihood, and that he had acquired a wide clientage, and had transacted a business amounting to $100,000 a year, and had derived an annual profit therefrom of $3,000; that the said Washington red-cedar shingle is solely manufactured in the state of Washington, and has become an article of prime necessity and indispensable use to the people in the various states and countries named; and alleged that, during the first 10 months of the year 1899, 4,000,000,000 shingles were manufactured, of which 3,300,500,000 were manufactured for the purpose of selling and delivering to purchasers outside the state of Washington, and were so sold and delivered. That the defendant the Washington Red-Cedar Shingle Manufacturers' Association was a voluntary association of the various manufacturers and dealers in said shingles in the state of Washington, comprising a total of 108; that the association has a constitution and by-laws; that membership is secured by paying a certain initiation fee graded according to the number and character of shingle machines in use by the applicant for membership; that its officers are president, vice president, secretary, treasurer, and a central committee; that the defendants specifically named in the complaint are respectively such officers; that the powers of the committee were to hold meetings "and issue, from time to time, a minimum price below which all members agree not to sell shingles to dealers or wholesalers," "to establish a system of prices at which shingles must be sold to retail dealers," etc., "to order the closing down of all mills, and to take other necessary steps to curtail the output of Washington red-cedar shingles, when in their judgment the supply should exceed the demand." For a second cause of action, the plaintiff in error alleged, in addition to the facts above set forth, that on or about August 15, 1899, the central committee adopted a schedule of prices for shingles, whereby the members of said association were required to and bound themselves to sell at the price so fixed, to wit: Extra A, $1.35 per 1,000, Clears, $1.50 per 1,000, which price the plaintiff alleged was above the market price; the market price then being Extra A, $1.20 per 1,000, and Clears, $1.35 per 1,000. That by reason of the said increase in prices the plaintiff was unable to carry on his business and supply the natural and ordinary demand for such shingles, or to purchase shingles at any other than the price so fixed, and he was injured thereby in his business in the

[a] See Monopolies, vol. 35, Cent. Dig. §§ 11, 13.

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sum of $1,200. For a third cause of action, the plaintiff, in addition to the facts above alleged, set forth that on November 11, 1899, for the purpose of further increasing the price of said shingles, the association ordered its mills to close down for the period of 60 days, which order was obeyed, whereby the trade in shingles was interrupted, and he was unable to purchase shingles with which to fill his orders, to his damage in the sum of $1,000. For a fourth cause of action, in addition to the facts already set forth, the plaintiff alleged that the president, vice president, treasurer, and secretary, together with the central committee, for the purpose of destroying the plaintiff's business, published resolutions adopted at a meeting of the central committee, charging the plaintiff with endeavoring to injure the market for Washington red-cedar shingles, and with having no money invested in his business, and as being without credit and irresponsible, and not an honorable and legitimate dealer in such shingles, and that for the purpose of inducing all wholesale and retail dealers in shingles in the states and foreign countries aforesaid to refuse to buy shingles of the plaintiff, and to induce the manufacturers of shingles to refuse to sell him shingles, they printed and circulated through the mails the said resolutions, and published them in newspapers. And the plaintiff in error set forth in the complaint the names of 253 persons to whom such circulars were sent. He alleged that the result of the conspiracy was to destroy his business, to his damage in the sum of $15,000. On February 2, 1900, the defendants in the action, by their attorneys, filed a general appearance with the clerk on behalf of all the defendants named in the complaint. The defendants McNeeley and Beckman subsequently appeared separately, and **[122]** demurred to each cause of action in the complaint for want of jurisdiction of the persons of the defendants, want of jurisdiction of the subject-matter, defect of parties defendant, and the insufficiency of the facts pleaded to constitute causes of action. Upon the last of these grounds of demurrer, the cause was presented in the circuit court before Hanford, District Judge, and the demurrer was sustained as to all except the fourth cause of action. 102 Fed. 594. Upon that cause the case afterward went to trial before Bellinger, District Judge, who directed the jury to return a verdict for the defendants in error upon the ground that the proofs did not sustain the causes of action, and that the combination described in the complaint is not one in restraint of interstate commerce, so as to give a right of action, under the provisions of the act of July 2, 1890 [U. S. Comp. St. 1901, p. 3200], to one who has been injured by a resolution, passed and circulated, denouncing him for cutting prices, and also upon the ground that in the opinion of the court the allegations in the fourth cause of action were insufficient to constitute a cause of action. 107 Fed. 210.

T. O. Abbott and *T. L. Stiles*, for plaintiff in error.

Charles O. Bates, *Charles A. Murray*, and *John A. McDaniels*, for defendants in error.

Before GILBERT and Ross, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The case having gone to trial before a jury on the fourth cause of action, and having been determined adversely to the

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plaintiff in error on the facts, and it being conceded that the demurrer to the first cause of action was properly sustained, the question which is here presented is whether the facts alleged in either the second or the third cause of action in the complaint constitute a cause of action under the act of July 2, 1890, commonly known as the "Sherman Anti-Trust Act" [U. S. Comp. St. 1901, p. 3200]. The combination which is described in the complaint consists of a combination of manufacturers and wholesale dealers in Washington red-cedar shingles, who reside and carry on their business within the state of Washington, and sell and deliver goods to residents of other states. It is not charged that the defendants in error, or any of them, have entered into any combination or contract with residents of other states. The alleged right of the plaintiff in error to recover is based substantially upon the fact that the combination comprises all the manufacturers and wholesale dealers within the state of Washington, and that they have combined and conspired together to fix an arbitrary price to wholesale and retail dealers for an article of merchandise used in interstate commerce, below which no one is permitted to buy or to sell, and that the price so fixed marks a distinct increase of the market price as it had stood theretofore, and that the association has assumed and exercised, and will continue to exercise, the power to shut down all mills within the state at will, and for so long a time as it may deem necessary. Is this a combination in restraint of interstate commerce, such as is denounced by the statute? There can be no doubt that at common law it is an unlawful combination in restraint of trade. It has the effect to diminish production, abolish competition, and enhance prices. Its illegality is not relieved by the fact that **[123]** it was induced by the keen competition and the unprofitable condition of the shingle manufacturing business which existed before it was entered into, or by the fact that the prices fixed by the combination may have been reasonable. *Manufacturing Co.* v. *Klotz* (C. C.) 44 Fed. 721; *Richardson* v. *Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *State* v. *Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *People* v. *Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep.

609; *Harrow Co.* v. *Hench*, 27 C. C. A. 349, 83 Fed. 36, 39 L. Ed. 299: *Cravens* v. *Carter-Crume Co.*, 34 C. C. A. 479, 92 Fed. 479.

The anti-trust act goes as far, if not farther, than the common law, and declares unlawful all combinations in restraint of interstate trade. In order, therefore, to bring the combination which is under consideration within the interdiction of the act, it must appear that it is more than a mere combination in restraint of trade; it must involve the restraint of interstate or international commerce. It is urged by the defendants in error that merchandise is not subject to the power of congress to regulate commerce until it is in actual transit from one state to another, and that matters occurring prior to the commencement of this final movement are not matters of interstate commerce, but are within the authority of the state, and are wholly unaffected by other authority. *Coe* v. *Town of Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; *Kidd* v. *Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; and other cases are cited in support of that view. But in *Robbins* v. *Taxing Dist.*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. Ed. 694, it was said: "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce;" and the case of *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, is authority for the proposition that the power of congress to regulate commerce is not confined to goods that have begun their movement out of the state in which they are manufactured, but that it extends to negotiations and contracts made preliminary to the manufacture, sale, and shipment of goods in interstate commerce. The court in that case had under consideration a combination between manufacturers located in different states. The combination comprised six corporations, and it was entered into for the purpose of raising prices of steel pipe in certain designated states. Their method of business required the delivery of pipe by the seller at the place where it was to be used by the buyer, and included in the price the cost of delivery. By the terms of the combination, contracts were to be made, after public letting, at the home and in the state of the buyer.

Requests for bids were to be submitted to a central committee, which was to fix a price, and the contract was to be awarded to that member of the combination who would agree to pay, for the benefit of the other members, the largest bonus. This was the method of business except in certain designated reserved states, in which the successful bidder was to be designated, and the price and bonus were to be fixed by the association. The agreement of the association restrained every defendant, except the one selected to receive the contract, from making a contract for pipe with the intended purchaser. **[124]** With respect to the sales in the states in which the mills of the defendant were situated, the effect of the agreement was to bind at least three, if not more, of the defendants to make no contract at all in those states for the sale and delivery of pipe in another state. In short, the agreement had the effect to restrain at least three, sometimes four, sometimes five, and sometimes all, of the defendants in interstate trade, which otherwise they would have been permitted to engage in, in selling in one state pipe to be delivered from another state at prices to be determined upon from competition and at market rates. There were other restrictions in the combination, not necessary here to be further specified. The court held that the association was a contract, combination, or conspiracy in restraint of trade, as the terms are understood in the act, and that the subject-matter of the restraint was not articles of merchandise or their manufacture, but contracts for the sale of such articles, to be delivered across state lines, and the negotiations and bids preliminary to the making of such contracts; all of which are interstate commerce. The court said:

"If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute."

The defendants in error rely upon the case of *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. That case arose upon a bill in equity filed by the United States under the anti-trust act to enjoin the defendants from continuing a combination which comprised substantially all the sugar refineries of the country for refining raw sugar. The bill alleged that the American Sugar-Refining Company

had purchased the stock of four other sugar-refining companies with shares of its own, and that thereby it acquired almost the complete control of the manufacture of refined sugar in the United States. It was the object of the suit to cancel the agreements of purchase, to cause the redelivery of the stock to the former owners thereof, and to enjoin the further performance of the agreement. The court denied the relief which was prayed for, and held that the combination was not within the prohibition of the statute for the reason that the agreement related only to the manufacture of refined sugar, and not to its sale. The chief justice, in delivering the opinion of the court, said:

"Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly wherever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. * * * The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state, and belongs to commerce."

The chief justice proceeded to say, further:

"What the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations, but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refin- [125] ing in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. * * * There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected, was not enough to entitle complainants to a decree."

The purport of this language of the court is to mark a distinction between a restraint upon manufacturing and a restraint upon interstate commerce in a manufactured article, and to hold that the power of congress to regulate commerce extends only to the latter. If the defendants in that case had combined for the purpose of not only regulating the manufacture of refined sugar, but the price at which it should be furnished to purchasers in other states, a different case might have been presented. There was nothing in the case as it was presented to show that the combination contemplated a regulation of prices of merchandise which was to enter into interstate commerce, or a restraint of the trade in merchandise in such commerce. There was before the court only a combination to manufacture, which might or might not result in an increase of prices, and the court held, therefore, that commerce was only indirectly affected. Mr. Justice Peckham, in delivering the opinion of the court in the Addyston Pipe & Steel Co. Case, said:

"It is the sale and delivery of a certain kind and quality of pipe, and not the manufacture, which is the material portion of the contract, and a sale for delivery beyond the state makes the transaction a part of interstate commerce,"

—And, distinguishing that case from the E. C. Knight Co. Case, said, of the combination in the latter case, that its direct purpose was the control of the manufacture of sugar; and added:

"There was no combination or agreement in terms regarding the future disposition of the manufactured article, nothing looking to a transaction in the nature of interstate commerce."

In these words the court marked the limit of the doctrine of the E. C. Knight Co. Case. The plain intimation from the language of the court is that, if there had been in that case a combination or agreement in terms regarding the future disposition of the manufactured article across state lines, there would have been added the essential element to make it a combination affecting interstate commerce.

The ground upon which the court held that the combination of manufacturers in the Addyston Pipe & Steel Co. Case restrained interstate commerce was the fact that it was made in contemplation of the transaction of future business between citizens of different states and the negotiation of sales, to be made in one state, of goods to be delivered therein from another. While there was in that case no particular contract for furnishing pipe or fixing its price in the contemplation of the parties to the combination at the time when it was made, the court referred to the fact that it was the purpose of the combination to abolish all competition, and said:

"The direct and immediate result of the combination was, therefore, necessarily a restraint upon interstate commerce in respect of articles manufac- [126] tured by any of the parties to it, to be transported beyond the state in which they were made."

Opinion of the Court.

The present case differs in important aspects from both the E. C. Knight Co. Case and the Addyston Pipe & Steel Co. Case. It occupies a ground intermediate between. The combination which it presents is more than a mere combination to manufacture, such as was before the court in the E. C. Knight Co. Case, and it lacks some of the features of the Addyston Pipe & Steel Co. Case, in that it contains no express provision for the transaction of business across state lines; it does not by its terms refer to the sale or delivery of shingles elsewhere than in the state of Washington. But can it be said that such sales and delivery were not within its contemplation, and are not directly affected by it? The defendants in error were engaged in manufacturing a product of which, as they well knew, more than 80 per cent. was to be sold, delivered, and used in states other than that of its manufacture. They were in the business of selling and delivering shingles to purchasers in other states. In fixing a list of prices they fixed it not alone for domestic trade, but for external commerce as well. The inevitable result of the combination is to enhance the price and restrain the trade of shingles in all the states. In the E. C. Knight Co. Case it was held that a monopoly to manufacture did not necessarily affect interstate commerce. The reason for so holding is apparent. From the creation of a monopoly to manufacture, it does not necessarily follow that interstate commerce in the monopolized article will in any degree be interfered with. The total production of the manufactured article and its price may, notwithstanding the monopoly, remain unaffected. In that case it was said, "There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce." But this cannot be said of a combination of manufacturers in one state who agree to arbitrarily increase the price and diminish the total output of a manufactured product which is made only in that state, but which is principally bought and used in other states. The intention to put a restraint upon interstate commerce in such a case is evident, and the restraint is not indirect, but direct, and it is the necessary and inevitable result of the combination.

Opinion of the Court.

We do not think that the act contemplates that the combination therein made unlawful must be one which shall by its terms refer to interstate commerce. It is enough if its purpose and effect are necessarily to restrain interstate trade. If it were otherwise, all combinations in restraint of interstate trade might be so expressed in words as to avoid the statute. The true test would seem to be, not what the agreement professes, but what it accomplishes. This combination must be dealt with in view of the known facts which surrounded it when it was formed, and which still attend it. It is impossible that the parties to it had in view only domestic trade. They must have had in contemplation the market which they had theretofore had, and which they would continue to have, and which, as they well knew, was principally without the limits of their own state. It is immaterial that all the parties to the agreement were residents of the same state. It is not the place where the parties reside that dis- **[127]** tinguishes the combination, and lends to it the features of a combination in restraint of interstate trade. A case in point is *Chesapeake & O. Fuel Co.* v. *U. S.*, 115 Fed. 610, recently decided by the circuit court of appeals for the Sixth circuit, in which the court held illegal under the anti-trust law, both as in restraint of interstate commerce and as tending to create a monopoly, a combination between a fuel company, a corporation of the state of West Virginia, and 14 corporations, persons, and firms of that state, who were independently engaged in producing coal and coke in a district on the line of a railroad. The combination stipulated that the company was to handle for a term of years the entire output of the members of the association, which was to be shipped to the western market over said road, and that it should sell the product of no competing mines, and it provided that a minimum price for the sale of the coal and coke should be fixed from time to time by a committee of the association, which price the fuel company agreed to pay, and in addition thereto agreed to obtain as large a profit as possible, and to account to the association for all thereof above a fixed sum per ton, which it was to retain as its compensation. We have not over-

looked certain expressions of the court in the E. C. Knight Co. Case, where it was said that congress did not attempt, by the act of July 2, 1890, "to limit and restrict the rights of corporations created by the states, or the citizens of the states, in the acquisition, control, or disposition of property, or to regulate or prescribe the price or prices at which such property or the products thereof should be sold"; and where it was further said that contracts "to raise or lower prices or wages might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy." We think the court, in using this language, had in view combinations to raise prices which might be made without special reference to interstate trade, and which would only indirectly affect it. The combination in the case before the court is more than a combination to regulate prices; it is a combination to control the production of a manufactured article more than four-fifths of which is made for interstate trade, and to diminish competition in its production, as well as to advance its price. These features, we think, determine its object, and bring it under the condemnation of the law. The plaintiff in error is in the business of buying the manufactured article in the state where it is manufactured, and selling it to purchasers in other states. The acts charged against the defendants in error interfere with his "contracts to buy, sell, or exchange goods to be transported among the several states,"—contracts which are made and negotiated between the plaintiff in error and his customers in various states,—and the acts of the defendants are in restraint of the interstate commerce in which he is engaged. We think the complaint states a cause of action. We find no error in the ruling of the circuit court in denying the motion of the plaintiff in error for an order granting the default of all the defendants in error except E. J. McNeeley and Victor H. Beckman, **[128]** and granting Bates & Murray leave to withdraw their general appearance entered on behalf of all of the defendants in error, and to so amend

the same as to make said appearance for and on behalf of McNeeley and Beckman only.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings not inconsistent with the foregoing views.

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[922] GENERAL ELECTRIC CO. *v.* WISE.

(Circuit Court, N. D. New York. January 17, 1903.)

[119 Fed., 922.]

PATENTS—INJUNCTION AGAINST INFRINGEMENT—DEFENSES.—That a defendant is able to respond in damages is no defense to an application for an injunction against infringement of a patent. If the patent is valid, the owner has the absolute right to be protected in the exclusive use of the invention which the law secures to him during the term of the patent.[a] [b]

SAME—VIOLATION OF ANTI-TRUST LAW.—That a complainant is a member of a combination in violation of the anti-trust law of July 2, 1890 [U. S. Comp. St. 1901, p. 3200], does not give third persons the right to infringe a patent of which complainant is owner, nor preclude complainant from maintaining a suit in equity to enjoin such infringement.

SAME—ANTICIPATION—PRIOR UNSUCCESSFUL DEVICES.—A patent for an invention which successfully accomplishes a useful result is not void, for anticipation or prior use, because of a prior device, however similar in combination or close in resemblance to that of the patent, where such prior device was not operative, and failed to produce the result sought, and which is produced by the device of the patent.

SAME—INFRINGEMENT—INCANDESCENT LAMP SOCKET.—The device of the Tournier patent, No. 559232, for an incandescent lamp socket, was not anticipated by either the Weston socket or the Westinghouse push button socket, both of which failed to accomplish the result sought, and attained by the device of the patent. Claims 1, 2, 3, and 4 construed, and *held* valid and infringed, on a motion for a preliminary injunction.

In Equity. This is a motion in the above-entitled cause for a preliminary injunction restraining the defendant, his agents and servants, from manufacturing and selling certain

[a] See Patents, vol. 38, Cent. Dig. § 495.

[b] Syllabus copyrighted, 1903, by West Publishing Co.

electrical apparatus (sockets for incandescent lamps) alleged to be an infringement of the Tournier patent (letters patent No. 559232), particularly claims 1, 2, 3, and 4 thereof,—a structure or invention alleged to be indispensable in the art of electric lighting.

Samuel Owen Edmonds, for complainant.

Alfred Wilkinson (*William Kernan*, of counsel), for defendant.

RAY, District Judge.

The complainant's claim is: That prior to April 28, 1896, Julius C. Tournier, a citizen of the state of New York, residing at Schenectady, was the original, first, and sole inventor of certain new and useful improvements in sockets for incandescent lamps, fully described in the letters patent, No. 559232, and which had not been used by others in this country before his invention or discovery thereof, and which had not been abandoned or patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his application for said letters patent, and which were not, prior to his said application, in public use or on sale in this or any other country for more than two years. That all lawful conditions having been complied with, on the 28th day of April, 1896, letters patent, in due form, were duly issued therefor to the said Tournier; **[923]** complainant, General Electric Company, being the assignee of said Tournier. That by virtue of such patent and assignment the complainant became and is vested with and possessed of the full and entire right, title, and interest in and to said letters patent, and all rights thereunder, and was in the full possession and enjoyment of same up to February, 1899. That the complainant is a large manufacturing company, engaged in manufacturing and putting sockets for incandescent lamps, employing and containing such invention, on the market and in the trade, and that same are being generally used, and that such sockets so made, sold, and delivered have been duly marked "Patented," and that complainant has invested large capital in the business, and been to great expense and

trouble in establishing the business, and that such sockets are in great demand, and complainant will reap great benefits if the alleged infringement by the defendant is enjoined, and suffer great loss if an injunction is not granted. That in the spring of 1899, the Anchor Electric Company undertook to and did infringe said letters patent. That this complainant brought suit against said company for said infringement in the United States circuit court for the Southern district of New York, and that an answer was filed alleging the invalidity of said patent by reason of anticipation in the prior art, and that the production of such structure did not involve the exercise of invention, and also denying that the sockets made and sold by said Anchor Electric Company constituted an infringement. That proofs were taken, the action tried and duly submitted, and a decree duly made and entered fully establishing the validity of such patent. The final decree was made January 24, 1902. Another suit and decree of similar or the same import against New England Electric Company are also alleged. It is then alleged that the defendant, well knowing all such facts, without license or allowance and against the will of the complainant, has made and sold, and is making and selling, or causing to be made, used, and sold, sockets for incandescent lamps, employing and containing the said invention, and particularly those set forth in claims 1, 2, 3, and 4 of said letters patent, and is threatening to continue such infringement; that said defendant has been notified of such infringement; and that his continuance of such acts encourage others to infringe likewise.

The defendant claims that this invention was old,—prior invention,—and relies on the Weston socket and the Westinghouse push button socket, and says he has not infringed, and that his block differs more from Tournier's than Tournier's does from Weston's. The defendant then alleges that the complainant does not come into court with "clean hands"; that it and all other important socket manufacturers in the country organized an illegal association three or more years ago, by the terms of which they bound themselves to raise the price of sockets, and not to sell at a lower price than agreed, in direct opposition to the anti-trust law of July

2, 1890 (26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). By implication, rather than directly, it charges collusion between the complainant and Anchor Electric Company in the action referred to, and finally says no injunction should be granted, because the defendant is a leading manufacturer of Watertown, N. Y., amply able to respond in damages, and that the com- **[924]** plainant should resort to that remedy even if this court finds an infringement.

No time will be used in answering this suggestion, except to say that, if the complainant's letters patent are valid, it is entitled to protection by injunction against all the world. No other person or company can use its property of this description without its consent, and relegate it to an action for damages. If this patent is valid, the complainant has the absolute right, under the laws of our country, to the use of the patent, and to designate the parties upon whom it will confer the right to use it. Again, in such a case, an action for damages does not afford an ample or a full and complete remedy. Such a remedy is inadequate. In a sense, the granting of a patent confers a monopoly on the inventor or owner of such patent, but such a monopoly is granted in the interest of the public as well as of the grantee of the patent, and is an encouragement to the development of inventive skill and genius. The patent laws of the United States, while sometimes abused or perverted, have had much to do with the growth and prosperity of our country, and have added much to our material and intellectual development. Ultimately, these inventions are surrendered to the public, and it is only just that for a time the inventor reap the rewards of study and industry. *Grant* v. *Raymond*, 6 Pet. 218, 241, 8 L. Ed. 376; *Bement* v. *Harrow Co.*, 186 U. S. 88, 89, 22 Sup. Ct. 747, 46 L. Ed. 1058. The cry of monopoly, therefore, has no place in the discussion of the question of infringement or priority of invention. It is difficult to understand how or why a violation of the Sherman antitrust law by this complainant, if there has been such a violation, confers any right on the defendant to infringe this patent. That act points out the penalties for its violation, and it is not understood that such law denies the grantees of patents the protection of the law because they may be violating

some statute. However that may be the evidence falls far short of establishing such a violation by this complainant. The testimony on that subject is squarely contradicted. An individual cannot confiscate the property or property right of a corporation on the ground it has violated that act. *Soda Fountain Co.* v. *Green* (C. C.) 69 Fed. 333; *Columbia Wire Co.* v. *Freeman Wire Co.* (C. C.) 71 Fed. 302; *Bement* v. *Harrow Co.*, 186 U. S. 70, 88–91, 22 Sup. Ct. 747, 46 L. Ed. 1058. *Harrow Co.* v. *Quick* (C. C.) 67 Fed. 131, cannot be accepted as authority on this question.

We come then to the consideration of the questions whether this Tournier patent, No. 559,232, issued April 28, 1896, is a new and valid invention, and whether the defendant has infringed and is infringing same.

Claims 1, 2, 3, and 4 of the said patent, now particularly in question, are as follows:

"(1) In an incandescent lamp socket, an insulating block, circuit terminals, and a circuit-controlling key, with a metallic tip and operating spring mounted thereon, in combination with a metallic socket mounted on the insulating block; the metallic tip of the controlling key being adapted to make contact with the shell and close the circuit.

"(2) In an incandescent lamp socket, as a new article of manufacture, an insulating block, formed with passages in its edges for the circuit wires, a **[925]** transverse passageway for the insertion of a controlling circuit key shaft, its bearings, and a controlling spring, a cavity at one end for the location of a rotary metallic tip of the key shaft, and a cavity at the other end for the location of one of the binding screws and brackets, a cavity at one side of the block for the location of the other binding screw and bracket, and a contact arm as herein set forth.

"(3) In an incandescent lamp socket, an insulating block, formed with a transverse cavity, a rotary circuit-controlling key, and a spring and contact tip located in this cavity, binding screws located in cavities in the insulating block, one connected with the key shaft and the other with a metallic contact arm projecting over the top of the block, and a shell or socket mounted on the top of a block, and adapted to complete the circuit with a lamp by contact of the contact tip therewith.

"(4) In a socket for incandescent lamps, the combination with the insulating base thereof and a key having a contact tip of a lamp-socket cylindrical shell mounted on one end of said base, and so arranged in relation to the key tip that the latter contacts with the lamp-socket cylindrical shell to close the circuit, as set forth."

In *General Electric Co.* v. *Anchor Electric Co.* (and Henry G. Issertel as agent and manager of said company), reported (C. C.) 106 Fed. 503, the validity of this patent,—particularly of claims 1, 2, 3, and 4, above quoted, and also

claim 9, was directly in issue; and it was held by Shipman, Circuit Judge, after full and careful consideration:

"The Tournier patent, No. 559232, for a socket for incandescent lamps, the base of which consists of a substantial block of porcelain or other insulating material, in which the contact key and circuit terminals are incased, covers a device which, as a complete structure, was not anticipated, and, in view of its immediate general adoption and commercial success, cannot be denied patentable invention. Claims 1, 2, 3, and 4 construed, and held infringed. Claim 9, which is limited to an insulating ring, used between the outer shell and the socket, held void for lack of invention, in view of the prior art."

In that decision, as far as it covers the precise questions now presented, this court fully concurs. It is not necessary to travel over the same ground, and present the same facts and reasoning in different language. But the respondent here, James B. Wise, as he alleges, raises new questions, and presents new evidence, upon which this court is asked to find and hold that this invention, covered by the claims quoted, was anticipated and not patentable, and, failing here, claims the defendant's socket is as much or more a new invention as the complainant's, and that same is so widely different as not to constitute an infringement. The defendant says:

"We oppose this motion on new evidence of the highest importance, and offer entirely new defenses: First. On the Weston socket, having a cylindrical block of insulation, identical in every essential with Tournier's, for it has the transverse passageway, the outside cavities, and the wire grooves or passages in its edges. Second. On the Westinghouse push button socket, in public use and on sale in 1893 and before, which shows a porcelain block of similar construction, having a transverse passageway to receive and to protect the switch mechanism."

It is not discovered from the record that Judge Shipman had these two sockets, or a description of them, before him when he passed on the question of anticipation or prior invention and use. This alleged new evidence will be considered on the theory that it was not presented to the court on the trial of the Anchor Electric Co. Case, and might have changed the result there, and may change the result here from [926] what it necessarily would be, should this court follow the decision of Judge Shipman.

Two or more persons may use the same material, existing in precisely or substantially the same form, experimenting and making combinations, and having in mind the construc-

tion of a new and a useful invention that will produce a given result. The one or ones who fail invent nothing, but the one who succeeds may have invented a patentable thing; and, if a patent is granted, he is entitled to its protection and benefits. Those who failed, or others, cannot, by taking the same materials and making substantially the same combinations, varying the form or arrangement, or both, in nonessentials, but aiming at and producing the same results, claim either priority of invention, prior use, or new invention. Such facts will not defend the charge of infringement. And even if in such experimentation certain imperfect results were obtained, that fact does not establish priority of invention. "If the patented invention is not operative, it cannot be infringed by one that is." *Royer* v. *Coupe* (C. C.) 29 Fed. 358, 39 O. G. 239. It would seem to follow that however close the resemblance between some prior alleged invention, even when put in actual use, and the patented invention, if such alleged prior invention was not operative, and failed to produce the beneficial results sought and produced by the patent, it could not constitute prior invention. In such case the patented invention cannot be regarded as old.

In *General Electric Co.* v. *Anchor Electric Co.*, supra, Judge Shipman says:

"The insulating block of the patent, as constructed and arranged to become the receptacle of the various metallic parts, was a novelty, and in its peculiar characteristics it had no predecessor."

It is now insisted that the Weston socket and the Westinghouse push button socket are each substantially identical with the Tournier socket, and that therefore the Tournier insulating block had not one, but two, predecessors. A careful examination of both, and a comparison of the Tournier block with the Weston block, not only fail to disclose identity, but even similarity, when we consider the purposes for which devised, and the ends to be accomplished. Both are, in general form, cylindrical. Each has a transverse passageway, but these are neither identical, nor, mechanically speaking, similar. The differences in the two are marked and well defined, and absolutely essential differences. They are so marked that it does not occur to the observer that the designer of the Tournier block had the Weston block before

him, or in mind, when planning his. In the Tournier block the transverse passageway gives neither ingress on the one side, nor egress on the other, to its full depth. At one side this passageway is so widened as to form a chamber on either side of the main passageway, while at the other side a part of the block is entirely cut away for about one-third the diameter of the block, and to a depth within one-eighth or one-fourth of an inch from the bottom of the transverse passageway. Upon one side a recess is cut, which reaches to within about one-eighth of an inch of the passage referred to. There are other peculiarities, not necessary to describe, but all these peculiarities have their necessary uses in the assembled socket. In the Weston [927] block, which was of wood, the transverse passageway extends from circumference to circumference unbroken, is much wider, is of uniform width from circumference to circumference and of uniform depth, giving ingress and egress to its full depth, and on one side is cut through to the bottom. Upon the outside of the cylinder we find no less than eight grooves and recesses vertical and diagonal for the arrangement and application of the electrical appliances, none of which are found in the Tournier block. When we come to consider the mode of using these blocks, the ideas of means of application and use, and the results, we find that the functions are not the same, the modes of operation are radically unlike, the results not the same, and the ideas of means for the accomplishment of satisfactory results are radically different, or at least radically defective, in the assembled Weston socket. The Weston socket was not satisfactory or even safe. The Tournier device was carefully and skillfully wrought out by a change in the character of the insulating base, as well as by the modes of working the same, and also in many minor details and appliances, all brought into harmony and harmonious action, and producing satisfactory results, at which many had aimed, but which all had failed to accomplish. It is impossible to find that the Weston socket was, in a legal sense, as applied in these cases, the predecessor of the Tournier socket.

Coming to the consideration of the Westinghouse push

button socket, we find far less resemblance and similarity. It is not necessary to go into detail. In both the Star and Weston sockets, the metallic switch mechanism, which is in the circuit where the current of electricity is being fed to the lamp, is arranged in a cavity or a passageway on the underside of the block, and consequently there is no solid insulation between these electrified parts and the metallic supporting cap of the socket. The result of this, or one result, is the tendency to short-circuiting and burning out, and the resulting fire hazard. In the Tournier socket, the metallic switch mechanism is arranged in a passageway on the upper side of the block, and we have a solid wall of insulation interposed between these electrified parts and the supporting cap of the socket. Short-circuits and burning out are thus precluded between such parts and the cap. In the Tournier socket, we find the contact key and circuit terminals encased within the base, and accidental contact with the exterior metallic shell is thus prevented. In the Weston socket, one of the terminals—one of the parallel contact strips on the block (and this corresponds to the screw shell element)—is always in the circuit and electrified, whether the lamp is in place and the current turned on or not. Here is found, again, the evil of short-circuiting, with outside metallic bodies, and also a liability to accidental shock when handling the socket and when replacing or removing the lamp. With the Tournier socket, all this is remedied, as the situation is the reverse. Again, in the Tournier structure we find the threaded shell disconnected from the circuit except when the lamp is in place or the key closed. To bring about these results, necessary to the success of the art, required inventive skill. The Tournier structure accomplished what all others had failed to bring about, by new ideas of means, by the use of new means, or, to some [928] extent, old appliances improved, applied, and combined in a new and an effective and beneficial way.

We come, then, to consider the alleged infringement. Each and every essential element of the Tournier patent, as described or mentioned in the claims quoted, or its exact equivalent, is used by the defendant in what we will term the "Wise

Opinion of the Court.

Socket." Placing the various appliances, making up the assembled sockets, side by side, and then taking the assembled sockets as a whole, we find that there is no substantial difference, except in the mere form of two or three of the parts. In short, the Wise socket is a copy of the Tournier. The compared sockets perform the same functions by the same modes of operation. The effects are the same; the modes of operation are the same, substantially; and the same is true of the means employed. In some respects we find variations in size, shape, and arrangement, but these are evidently studied, not for the sake of improvement, but to avoid the charge of infringement. The socket of the Anchor Electric Co. held to be an infringement, and therefore enjoined (106 Fed. 503), differs but slightly from the Wise socket, here in question. The defendant here, in some respects, has varied from the Anchor Electric and New England infringements, but in so doing has made the similarity of his socket to the Tournier patent the more apparent. In some respects he has varied the form of the insulating block by changing the location, size, and shape of certain cavities and grooves; but all these changes are immaterial, as they do not change the principles of operation, the means, or the results, and the claims of the Tournier patent (referred to and here in question) do not confine the complainant to any precise form or size. The combinations in the assembled socket do not present any substantially different combination. As stated, the combinations are substantially identical. So far as there has been a substitution of elements, they were well-known equivalents. The defendant has produced this Wise socket extensively and secretly. He claims the right to continue its manufacture and sale. Unless enjoined, he will do this, and most seriously injure the complainant. This injury cannot be measured satisfactorily by any judgment for damages, even if the defendant shall be found responsible at the end of the protracted litigations sure to follow a denial of this application.

The conclusion is that, until the trial and determination of this action, the defendant should be enjoined as prayed. It is so ordered.

Syllabus.

[721] UNITED STATES *v.* NORTHERN SECURITIES CO. ET AL.[a]

(Circuit Court, D. Minnesota, Third Division. April 9, 1903.)

[120 Fed., 721.]

MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—CONSTRUCTION OF ANTI-TRUST LAW.—The generality of the language used in the anti-trust act of 1890 (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), declaring illegal "every contract, combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations," indicates the purpose of Congress to include in the prohibition every combination which directly and substantially restricts interstate commerce, whatever its form.[b]

SAME—APPLICATION OF ACT TO INTERSTATE CARRIERS.—The anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]) applies to interstate carriers of freight and passengers, and any contract or combination which directly and substantially restricts the right of such a carrier to fix its own rates, independently of its natural competitors, places a direct restraint upon interstate commerce, in that it tends to prevent competition, and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable.

SAME—CORPORATION TO ACQUIRE STOCK OF COMPETING RAILROADS—LEGALITY.—The real control of a corporation is in its stockholders, who have the power to determine all important corporate acts and policies, and any contract or combination by which a majority of the stock of two railroad companies owning and operating parallel and competing interstate lines of road is transferred to a corporation organized for the purpose of holding and voting the same, and receiving the dividends thereon, to be divided pro rata among the stockholders of the two companies so transferring their stock, directly and substantially restricts interstate trade and commerce, and is in violation of the anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), since it destroys any motive for competition between the two roads; and it is immaterial that each company has its own board of directors, which nominally directs its operations and fixes its rates.

CORPORATIONS—POWERS—NEW JERSEY STATUTES.—The language of the New Jersey enabling act (Laws 1899, p. 473), authorizing the organization of corporations "for any lawful purpose," imposes a limitation upon the powers of any corporation organized thereunder, however broad may be the terms of its articles of incorporation.

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[a] Affirmed by Supreme Court (193 U. S., 197). See p. 338.

[b] Syllabus copyrighted, 1903, by West Publishing Co.

Statement of the Case.

SAME—INTERSTATE COMMERCE.—A state cannot invest a corporation organized under its laws with the power to do acts in the corporate name which would operate to restrain interstate commerce.

CONSTITUTIONAL LAW—RIGHT OF PRIVATE CONTRACT—LIMITATION BY INTERSTATE COMMERCE CLAUSE.—The constitutional guaranty of liberty to the individual to enter into private contracts is limited to some extent by the commerce clause of the Constitution, and Congress may, in the exercise of the power conferred by such clause, prohibit private contracts which operate to directly and substantially restrain interstate commerce.

MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—SUIT TO ENJOIN.—The fact that the purpose of an illegal combination between stockholders of two railroad companies operating parallel and competing interstate lines, to secure unity of interest and control of such companies, and to prevent competition, has been accomplished by the formation of a corporation which has acquired the ownership of a majority of the stock of each of the companies, cannot be urged to defeat a suit by the United States to restrain the exercise of the power so illegally acquired **[722]** by the corporation through such combination, as imposing a restraint upon interstate commerce in violation of the anti-trust law (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).

SAME—DEFENSES—QUESTIONS OF PUBLIC POLICY.—Where the effect of a combination is to directly prevent competition between two parallel and naturally competing lines of railroad engaged in interstate business, it is in restraint of interstate commerce, and a violation of the anti-trust act (Act July 2, 1890, 26 Stat. 209, see 647 [U. S. Comp. St. 1901, p. 3200]), and the court, in a suit to enjoin it as such, cannot consider the question whether the combination may not be of greater benefit to the public than competition would be; that being a question of public policy, to be determined by Congress.

In Equity.

Philander C. Knox, Attorney General, *D. T. Watson*, Special Counsel, *James M. Beck* and *W. A. Day*, Assistant Attorneys General, and *John M. Freeman*, for the United States.

George B. Young and *John W. Griggs*, for the Northern Securities Company.

George B. Young, for James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, and George F. Baker.

M. D. Grover, for the Great Northern Railway Company.

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C. W. Bunn, for the Northern Pacific Railway Company.

Francis Lynde Stetson and *David Willcox*, for defendants Morgan, Bacon, and Lamont.

Before CALDWELL, SANBORN, THAYER, and VANDEVANTER, Circuit Judges.

THAYER, Circuit Judge.

This is a bill, exhibited by the United States, to restrain the violation of an act of Congress approved July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which is commonly termed the "Sherman Anti-Trust Act." The case was heard before a Circuit Court composed of the four Circuit Judges of the Eighth Circuit, pursuant to the provisions of a recent act of Congress, approved February 11, 1903, which requires such cases to be heard "before not less than three of the Circuit Judges" of the Circuit where the suit is brought, when the Attorney General files with the clerk of the court wherein the case is pending, a certificate that it is one of "general public importance." Such a certificate has been filed, and in accordance with the mandate of the statute the case "has been given precedence over others and in every way expedited."

From admissions made by the pleadings, as well as from much oral testimony, we reach the following conclusions as respects matters of fact:

Two of the defendants, namely, the Northern Pacific Railway Company and the Great Northern Railway Company, are the owners, respectively, of lines of railroad which extend from the cities of Duluth, St. Paul, and Minneapolis, in the state of Minnesota; thence across the continent to Puget Sound. These roads are, and in public estimation have ever been regarded as, parallel and competing lines. For some years, at least, after they were built, they competed with each other actively for transcontinental and interstate traffic.

[723] In the spring of the year 1901 they united in purchasing about 98 per cent. of the entire capital stock of the Chicago, Burlington & Quincy Railway Company, and be-

came joint sureties for the payment of bonds of the last-named company, whereby the purchase was accomplished, which were to run 20 years, and bear 4 per cent. interest per annum. The amount of stock so acquired was of the par value of about $107,000,000, and, as it was purchased at the rate of $200 per share, the bonded indebtedness of the two companies was thus increased to the extent of $200,000,000.

Subsequent to the acquisition of the stock of the Burlington Company, and in the summer of the year 1901, certain large and influential stockholders of the Northern Pacific and Great Northern Companies, who had practical control of the two roads, and who have been made parties defendant to the present bill, acting in concert with each other, conceived the design of placing a very large majority of the stock of both of the last-named companies in the hands of a single owner. To this end these stockholders arranged and agreed with each other to procure and cause the formation of a corporation under the laws of the state of New Jersey, which latter company, when organized, should buy all or at least the greater part of the stock of the Northern Pacific and Great Northern Companies. The individuals who conceived and promoted this plan agreed with each other to exchange their respective holdings of stock in the last-named railroad companies for the stock of the New Jersey company, when the same should be fully organized, and to use their influence to induce other stockholders in their respective companies to do likewise, to the end that the New Jersey company might become the sole owner of the whole, or at least a major portion, of the stock of both railroad companies.

In accordance with this plan the defendant the Northern Securities Company (hereafter termed the "Securities Company") was organized under the laws of the state of New Jersey on November 13, 1901, with a capital stock of $400,000,000, that sum being the exact amount required to purchase the total stock of the two railroad companies at the price agreed to be paid therefor. When the Securities Company was organized, it assented to and became a party to the scheme that had been devised by its promoters before it became a legal entity.

Very shortly after its organization the Securities Company acquired a large majority of all the stock of the Northern Pacific Company at the rate of $115 per share, paying therefor in its own stock at par. At the same time it acquired about 300,000 shares of the stock of the Great Northern Company from those stockholders of that company who had been instrumental in organizing the Securities Company, paying therefor at the rate of $180 per share, and using its own stock at par to make the purchase.

The Securities Company subsequently made further purchases of stock of the Great Northern Company at the same rate, and in about three months had acquired stock of the latter company, amounting at par to about $95,000,000, using for that purpose its own stock to the amount of about $171,000,000. The Securities Company was enabled to make the subsequent purchase of stock from stockholders [724] of the Great Northern Company not immediately concerned in the organization of the Securities Company by the advice, procurement, and persuasion of those stockholders of the Great Northern Company who had been instrumental in organizing the Securities Company, and had exchanged their own stock for stock in that company shortly after its organization. At the present time the Securities Company is the owner of about 96 per cent. of all the stock of the Northern Pacific Company, and the owner of about 76 per cent. of all the stock of the Great Northern Company.

The scheme which was thus devised and consummated led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies; and, according to the familiar rule that every one is presumed to intend what is the necessary consequence of his own acts when done willfully and deliberately, we must conclude that those who conceived and executed the plan aforesaid intended, among other things, to accomplish these objects.

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The general question of law arising upon this state of facts is whether such a combination of interests as that above described falls within the inhibition of the anti-trust act or is beyond its reach. The act brands as illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations." Learned counsel on both sides have commented on the general language of the act, doing so, of course, for a different purpose, and the generality of the language employed is, in our judgment, of great significance. It indicates, we think, that Congress, being unable to foresee and describe all the plans that might be formed and all the expedients that might be resorted to to place restraints on interstate trade or commerce, deliberately employed words of such general import as, in its opinion, would comprehend every scheme that might be devised to accomplish that end.

What is commonly termed a "trust" was a species of combination organized by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles and commodities, which was well known and fully understood when the anti-trust act was approved. Combinations in that form were accordingly prohibited; but Congress, evidently anticipating that a combination might be otherwise formed, was careful to declare that a combination in any other form, if in restraint of interstate trade or commerce—that is, if it directly occasioned or effected such restraint—should likewise be deemed illegal.

Moreover, in cases arising under the act, it has been held by the highest judicial authority in the nation, and its opinion has been reiterated in no uncertain tone, that the act applies to interstate carriers of freight and passengers as well as to all other persons, natural or artificial; that the words "in restraint of trade or commerce" do not [725] mean in unreasonable or partial restraint of trade or commerce, but any direct restraint thereof; that an agreement between competing railroads, which requires them to act in concert in fixing the rate for the carriage of passengers or freight over their respective lines from one state to another, and which, by that means, restricts temporarily the right of

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any one of such carriers to name such rates for the carriage of such freight or passengers over its road as it pleases, is a contract in direct restraint of commerce within the meaning of the act, in that it tends to prevent competition; that it matters not whether, while acting under such a contract, the rate fixed is reasonable or unreasonable, the vice of such a contract or combination being that it confers the power to establish unreasonable rates, and directly restrains commerce by placing obstacles in the way of free and unrestricted competition between carriers who are natural rivals for patronage; and, finally, that Congress has the power, under the grant of authority contained in the federal Constitution, to regulate commerce, to say that no contract or combination shall be legal which shall restrain interstate trade or commerce by shutting off the operation of the general law of competition. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

Taking the foregoing propositions for granted, because they have been decided by a court whose authority is controlling, it is almost too plain for argument that the defendants would have violated the anti-trust act if they had done, through the agency of natural persons, what they have accomplished through an artificial person of their own creation. That is to say, if the same individuals who promoted the Securities Company, in pursuance of a previous understanding or agreement so to do, had transferred their stock in the two railroad companies to a third party or parties, and had agreed to induce other shareholders to do likewise, until a majority of the stock of both companies had been vested in a single individual or association of individuals, and had empowered the holder or holders to vote the stock as their own, receive all the dividends thereon, and prorate or divide them among all the shareholders of the two companies who had transferred their stock—the result would have been a combination in direct restraint of interstate commerce, because it would have placed in the hands of a small coterie of men the power to suppress competition between two com-

peting interstate carriers, whose lines are practically parallel.

It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. It was the method pursued by the Northern Pacific and Great Northern Companies to obtain control of the Chicago, Burlington & Quincy Railroad; and, so **[726]** long as directors are chosen by stockholders, the latter will necessarily dominate the former, and in a real sense determine all important corporate acts.

The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 671, 16 Sup. Ct. 705, 710, 40 L. Ed. 838. The same fact has been recognized and declared by other courts. *Pennsylvania R. Co.* v. *Commonwealth* (Pa.) 7 Atl. 368, 371; *Farmers' Loan & Trust Co.* v. *New York & Northern Railway Co.*, 150 N. Y. 410, 425, 44 N. E. 1043, 34 L. R. A. 76; *People ex rel.* v. *Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 802, 8 L. R. A. 497, 17 Am. St. Rep. 319. In opposition to this view counsel cite *Pullman Car Co.* v. *Missouri Pacific Co.*, 115 U. S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499, but in that case the meaning of the word "controlled," as used in a private contract, was the point under consideration, and what was said on the subject cannot be held applicable to cases arising under the anti-trust act, when the point involved is whether the ownership of all of the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does. Indeed, we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership.

What has been done through the organization of the Securities Company accomplishes the object which Congress has denounced as illegal more effectually, perhaps, than such a combination as is last supposed. That is to say, by what has been done the power has been acquired (and provision made for maintaining it) to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. Competition, we think, would not be more effectually restrained than it now is under and by force of the existing arrangement if the two railroad companies were consolidated under a single charter.

It is manifest, therefore, that the New Jersey charter is about the only shield which the defendants can interpose between themselves and the law. The reasoning which led to the acquisition of that charter would seem to have been that while, as individuals, the promoters could not, by agreement between themselves, place the majority of the stock of the two competing and parallel railroads in the hands of a single person or a few persons, giving him or them the power to operate the roads in harmony, and stifle competition, yet that the same persons might create a purely fictitious person termed a corporation, which could neither think nor act except as they directed, and, by placing the same stock in the name of such artificial being, accomplish the same purpose. The manifest unreasonableness of such a proposition, and the grave consequences sure to follow from its approval, compel us to assume that it must be unsound, especially when we reflect that the law, as administered by courts of equity, looks always at the substance of things—at the object accomplished, whether it be lawful or unlawful—rather than upon the particular devices or means by which it has been accomplished.

[727] So far as the New Jersey charter is concerned, the question, broadly stated, which the court has to determine, is whether a charter granted by a state can be used to defeat the will of the national legislature as expressed in a law relating to interstate trade and commerce over which Congress has absolute control. Presumptively, at least, no charter granted by a state is intended by the state to have that effect or to be used for such a purpose; and in the pres-

ent instance it is clear that the state of New Jersey did not intend to grant a charter under cover of which an object denounced by Congress as unlawful, namely, a combination conferring the power to restrain interstate commerce might be formed and maintained because the enabling act under which the Securities Company was organized expressly declares that three or more persons may avail themselves of the provisions of the act and "become a corporation for any lawful purpose." Laws N. J. 1899, p. 473. This language is not merely perfunctory. It means, obviously, that, whatever powers the incorporators saw fit to assume, they must hold and exercise for the accomplishment of lawful objects. The words in question operate, therefore, as a limitation upon all the powers enumerated in the articles of association which were filed by the promoters of the Securities Company, so that, however extensive and comprehensive these powers may seem to be, the state of New Jersey has said, "You shall not exercise them so as to set at defiance any statute lawfully enacted by the Congress of the United States, or any statute lawfully enacted by any state wherein you see fit to exercise your powers."

But aside from this view of the subject, if the state of New Jersey had undertaken to invest the incorporators of the Securities Company with the power to do acts in the corporate name which would operate to restrain interstate commerce, and for that reason could not be done by them acting as an association of individuals, then we have no doubt that such a grant would have been void under the provisions of the anti-trust act, or at least that the charter could not be permitted to stand in the way of the enforcement of that act.

The power of Congress over interstate commerce is supreme, far-reaching, and acknowledges no limitations other than such as are prescribed in the Constitution itself. *Gibbons* v. *Ogden*, 9 Wheat. 1, 197, 6 L. Ed. 23; *County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697, 26 L. Ed. 238; *Champion* v. *Ames* (decided Feb. 23, 1903) 23 Sup. Ct. 321, 47 L. Ed. —. No legislation on the part of a state can curtail or interfere with its exercise; and, in view of repeated decisions, no one can deny that it is a legitimate

exercise of the power in question for Congress to say that neither natural nor artificial persons shall combine or conspire in any form whatever to place restraints on interstate trade or commerce. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

It is urged, however, that such a combination of adverse interests as was formed, and has been heretofore described, was lawful, and not prohibited by the anti-trust act, because such restraint upon interstate trade or commerce, if any, as it imposes, is indirect, collateral, **[728]** and remote, and hence that the combination is not one of that character which the Congress of the United States can lawfully forbid. The following cases are relied upon to sustain the contention: *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Hopkins* v. *United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson* v. *United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300.

It is pertinent, therefore, to inquire in what way the existing combination that has been formed does affect interstate commerce. It affects it, we think, by giving to a single corporate entity, or, more accurately, to a few men acting in concert and in its name and under cover of its charter, the power to control all the means of transportation that are owned by two competing and parallel railroads engaged in interstate commerce; in other words, the power to dictate every important act which the two companies may do, to compel them to act in harmony in establishing interstate rates for the carriage of freight and passengers, and generally to prescribe the policy which they shall pursue. It matters not, we think, through how many hands the orders come by which these aims are accomplished, or through what channels. The power was not only acquired by the combination, but it is effectually exercised, and it operates directly on interstate commerce, notwithstanding the man-

ner of its exercise, by controlling the means of transportation, to wit, the cars, engines, and railroads by which persons and commodities are carried, as well as by fixing the price to be charged for such carriage.

The cases cited above, and on which reliance is placed to sustain the view that the restraint imposed is merely indirect, remote, incidental, or collateral, are not relevant, for, as was fully explained in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 238, 240, 243, 20 Sup. Ct. 96, 44 L. Ed. 136, one of these cases (*United States* v. *E. C. Knight Company*) dealt only with a combination within a state to obtain a practical monopoly of the manufacture of sugar, and it was held that the combination only related to manufacture, and not to commerce among the states or with foreign nations; that the fact that an article was manufactured for export to another state did not make it an article of interstate commerce before transportation had been begun, or necessarily subject it to federal control; and that the effect of the combination then under consideration on interstate commerce was at most only incidental and collateral. But while commenting on its previous decision in *United States* v. *E. C. Knight Co.*, the court took occasion to say, in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 246, 20 Sup. Ct. 96, 44 L. Ed. 136, that, when a contract is made for the sale and delivery of an article in another state, the transaction is one of interstate commerce, although the vendor has also agreed to manufacture the article so sold, and that combinations to control and monopolize such transactions would be in restraint of interstate commerce.

In the other cases (*Hopkins* v. *United States* and *Anderson* v. *United States*) it was held that the business of the members of the Kansas City Live Stock Exchange, which was under consideration by the court, was not interstate commerce and that the act did not affect them, and that, even if they were so affected, the particular agree- [729] ment which was involved did not operate as a restraint of interstate commerce.

We fail to find in either of these cases any suggestion that

a combination such as the one in hand, the object and necessary effect of which is to give to a single person or to a coterie of persons full control of all the means of transportation owned by two competing and parallel lines of road engaged in interstate commerce, as well as the power to fix the rate for the transportation of persons and property, does not directly and immediately affect interstate commerce. No combination, as it would seem, could more immediately affect it.

Again, it is urged tentatively that, if the existing combination which the government seeks to have dissolved is held to be one in violation of the anti-trust act and unlawful, then the act unduly restricts the right of the individual to make contracts, buy and sell property, and is invalid for that reason. With reference to this contention it might be suggested (as it has been by the government) that, as the situs of the stock which the Securities Company has bought is in the states of Wisconsin and Minnesota, which respectively chartered the Northern Pacific and Great Northern Companies, and as the stock owes its being to the laws of those states, and as each state has forbidden the consolidation of competing and parallel lines of railroad therein, and has likewise prohibited any consolidation of the "stock and franchises" of such roads, the contention last mentioned is entitled to little consideration in the case at bar.

But waiving and ignoring this suggestion, the argument advanced in behalf of the defendants is met and answered, so far as this court is concerned, by the decision in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 228, 229, 20 Sup. Ct. 96, 102, 44 L. Ed. 136, where it is said, inter alia:

"Under this grant of power to Congress (the power to regulate commerce between the several states and with foreign nations), that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate, to any substantial extent, interstate commerce. * * * We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts, limits the power of Congress and prevents it from legislating on the subject of contracts of the class mentioned. * * * It has been held that the word 'liberty,' as used in the Constitution, was not to be confined to the

mere liberty of persons, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. * * * But it has never been, and in our opinion ought not to be held, that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature, and wholly irrespective, among other things, of the fact that they would, if performed, result in the regulation of interstate commerce, and in violation of an act of Congress upon that subject. The provision of the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is to some extent limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the righ to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate [730] to a greater or less degree commerce among the states. We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes, or that it was intended to include, a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts."

These observations, as a matter of course, preclude further controversy over the power of Congress to limit to some extent the right to make contracts when enacting laws for the regulation of commerce between the states.

Learned counsel for the defendants further contend as follows: That the anti-trust act was not intended to include or prohibit combinations looking to the virtual consolidation of parallel and competing lines of railroad, although such a combination operates to stifle competition; that no relief can be granted to the government in this instance, because the combination or conspiracy of which it complains has accomplished its purpose, to wit, the organization of the Securities Company and the lodgment of the majority of the stock of the two railroads in its hands before the bill was filed; and, finally, that the combination proven was one "formed in aid of commerce and not to restrain it;" in other words, that it was one formed to enlarge the volume of interstate traffic and thus benefit the public.

The court cannot assent to either of these propositions.

The first, we think, is clearly untenable for the reasons already stated and fully disclosed in the decisions heretofore cited.

Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce, that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it.

Relative to the third contention, which has been pressed with great zeal and ability, this may be said: It may be that such a virtual consolidation of parallel and competing lines of railroad as has been effected, taking a broad view of the situation, is beneficial to the public rather than harmful. It may be that the motives which inspired the combination by which this end was accomplished were wholly laudable and unselfish; that the combination was formed by the individual defendants to protect great interests which had been committed to their charge; or it may be that the combination was the initial [731] and a necessary step in the accomplishment of great designs, which, if carried out as they were conceived, would prove to be of inestimable value to the communities which these roads serve and to the country at large.

We shall neither affirm nor deny either of these propositions, because they present issues which we are not called upon to determine, and some of them are issues which no

court is empowered to hear or decide, involving, as they do, questions of public policy which Congress must determine. It is our duty to ascertain whether the proof discloses a combination in direct restraint of interstate commerce; that is to say, a combination whereby the power has been acquired to suppress competition between two or more competing and parallel lines of railroad engaged in interstate commerce. If it does disclose such a combination—and we have little hesitation in answering this question in the affirmative—then the anti-trust act, as it has been heretofore interpreted by the court of last resort, has been violated, and the government is entitled to a decree.

A decree in favor of the United States will accordingly be entered to the following effect: Adjudging that the stock of the Northern Pacific and Great Northern Companies, now held by the Securities Company, was acquired in virtue of a combination among the defendants in restraint of trade and commerce among the several states, such as the anti-trust act denounces as illegal; enjoining the Securities Company from acquiring or attempting to acquire further stock of either of said companies; also enjoining it from voting such stock at any meeting of the stockholders of either of said railroad companies, or exercising or attempting to exercise any control, direction, supervision, or influence over the acts of said companies or either of them by virtue of its holding such stock; enjoining the Northern Pacific and Great Northern Companies, respectively, their officers, directors, and agents, from permitting such stock to be voted by the Northern Securities Company, or any of its agents or attorneys on its behalf, at any corporate election for directors or officers of either of said companies; and likewise enjoining them from paying any dividends to the Securities Company on account of said stock, or permitting or suffering the Securities Company to exercise any control whatsoever over the corporate acts of said companies, or to direct the policy of either; and, finally, permitting the Securities Company to return and transfer to the stockholders of the Northern Pacific and Great Northern Companies any and all shares of stock of those companies which it may have received from

such stockholders in exchange for its own stock, or to make such transfer and assignment to such person or persons as are now the holders and owners of its own stock originally issued in exchange for the stock of said companies.

THE DECREE.

It was ordered, adjudged, and decreed as follows, to wit:

That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several states, such as an act of Congress, approved July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monop-
[732] olies," denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company now claimed to be held and owned by the defendant the Northern Securities Company was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several states; that the Northern Securities Company, its officers, agents, servants, and employés, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and

agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

It is further ordered and adjudged that the United States recover of and from the defendants its costs herein expended, the same to be taxed by the clerk of this court, and have execution therefor.

HENRY C. CALDWELL,
Presiding Judge.
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

[608] BOARD OF TRADE OF CITY OF CHICAGO *v.* CHRISTIE GRAIN & STOCK CO. ET AL.[a]

(Circuit Court, W. D. Missouri. March 19, 1903.)

[121 Fed., 608.]

EXCHANGES—CONTRACT FOR DISTRIBUTION OF QUOTATIONS—LEGALITY OF RESTRICTIONS.—A contract between a board of trade, having a property right in the quotations made on its exchange, and a telegraph company, relating to the transmission and distribution of such quotations by the latter, is not in violation of the anti-trust act of 1890 (Act July 2, 1890, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), as in restraint of trade and commerce, because of a provision that the quotations shall only be furnished to persons who sign an agreement to the effect that they shall not be used in the conduct of a bucket shop.[b]

In Equity. On final hearing.

For former opinion, see 116 Fed. 944.

HOOK, District Judge.

The only question of consequence presented at the final hearing which was not fully argued at the preliminary hearing is whether the arrangement between the board of trade and the telegraph companies is violative of the provisions of the Sherman act (Act July 2, 1890, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). This proposition may be roughly stated as follows: The board of trade, having a property right in its quotations, contracted with the telegraph companies for their transmission and distribution by the latter; such transmission and distribution to be confined to persons who would sign an application embodying an agreement to the effect that the quotations should not be used in the conduct of an unlawful business, to wit, a bucket shop. Is such an arrangement

[a] An injunction was granted by the Circuit Court July 5, 1902 (116 Fed., 944), but it was not based in any way upon the anti-trust law, and therefore the decision is not reprinted. On final hearing, March 19, 1903, the court considered the matter from the standpoint of the anti-trust law and adhered to its original conclusions (121 Fed., 608). See above. The decree was reversed by the Circuit Court of Appeals, Eighth Circuit (125 Fed., 161), but not upon any ground related to the anti-trust law. Decision not reprinted. The action of the Circuit Court of Appeals was reversed by the Supreme Court, and the injunction allowed (198 U. S., 236). See p. 717.

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an unlawful combination in restraint of trade and commerce, within the meaning of the act of July 2, 1890, popularly known as the "Sherman Anti-Trust Act"? I am of the opinion that it is not.

Let a final decree be prepared in conformity with the above, and the conclusions heretofore announced in this case.

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[115] METCALF *v.* AMERICAN SCHOOL FURNITURE CO. ET AL.[a]

(Circuit Court, W. D. New York. March 7, 1903.)

[122 Fed., 115.]

EQUITY—PLEA—SETTING DOWN FOR HEARING.—Where a plea has been set down for argument by complainant, the facts stated therein must be taken as true.[b]

CORPORATIONS—ACTION BY STOCKHOLDER.—Where the action of a corporation in making a transfer of all of its property was illegal, and it is under the control of the directors who made such transfer, a stockholder may maintain a suit on behalf of the corporation to set aside the transfer.

SAME—POWERS—SALE OF ALL ITS PROPERTY.—A corporation organized under the laws of West Virginia has power, under Code W. Va. 1899, c. 53, § 56, to sell and transfer all of its property and discontinue its business by the action of the holders of a majority of the stock, taken at a general stockholders' meeting.

SAME—RATIFICATION OF UNAUTHORIZED SALE.—Where a corporation has power to transfer all of its property by a vote of a majority of its stock, such a transfer, made by its directors without actual fraud, may be validated by a subsequent ratification by the stockholders.

SAME—RIGHTS OF MINORITY STOCKHOLDERS—EFFECT OF STATUTE.—Where the charter and by-laws of a corporation and the statutes of the state under which it is organized, vest in a majority of the stockholders the right to sell the property of the corporation and to discontinue its corporate existence, every stockholder takes his stock subject to such right; and a minority stockholder must submit to the action of the majority in exercising such power, in the absence of fraud.

SAME—VALIDITY OF SALE—COMBINATION IN RESTRAINT OF TRADE.—The sale and transfer by a corporation of its property and good will to another corporation, where such sale was within its powers, cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business, and in pursuance of an illegal combination in restraint of trade.[a]

[116] SAME—SECRET PROFIT OBTAINED BY DIRECTORS.—The fact that directors of a corporation, on making a sale of its property by a secret agreement with the purchaser, obtained for themselves a portion of the consideration paid for the property, does not afford ground for a rescission of the sale at suit of the corporation or a stockholder; the remedy being by suit against the directors for an accounting.

SAME—RESCISSION—EXECUTED CONTRACT.—A contract by a corporation for the sale of its property cannot be rescinded by the corporation, or at suit of a stockholder suing in its right, on the ground that it was ultra vires, where it has been fully executed by a transfer of the property and the receipt of the price.

SAME—PAYMENT FOR PROPERTY SOLD—ACCEPTANCE OF STOCK IN ANOTHER CORPORATION.—Where a corporation is given by its charter the right to dispose of its property and to discontinue its corporate existence, it has the power to accept stock in another corporation in payment of the purchase price of its property, provided the transaction is bona fide.

SAME—CONSTRUCTION OF STATUTE.—The provisions of Code W. Va. 1899, c. 52, §§ 3, 4, which prohibit the purchase of stocks, bonds, or securities by a corporation, except when taken in payment of a debt, or as security therefor, apply only while the corporation is a going concern, engaged in carrying on the business for which it was created.

[SAME—INJUNCTIVE RELIEF—ANTI-TRUST LAW.—The only party entitled to maintain a bill in equity for injunctive relief for violating the provisions of the anti-trust act is the United States attorney, at the instance of the Attorney-General.]

In Equity. On demurrers and pleas.

Seymour, Seymour & Harmon, for complainant.

Davies, Stone & Auerbach (*Brainard Tolles*, of counsel), for defendants American School Furniture Co., Oakman, and Turnbull.

Cox, Kernan & Kimball (*Maulsby Kimball*, of counsel), for defendants Buffalo School Furniture Co. et al.

HAZEL, District Judge.

This cause was heretofore considered by this court (108 Fed. 909), and the demurrers then interposed were sustained

[a] Demurrer to bill as originally filed sustained by Circuit Court (108 Fed., 909). See p. 75. Decree affirmed by Circuit Court of Appeals, Second Circuit (113 Fed., 1020), memorandum decision (see p. 111), and plaintiff allowed 30 days in which to amend. Amended bill dismissed (122 Fed., 115).

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[a] Validity of monopolistic contracts as affected by public policy, see note to *Cravens* v. *Carter-Crume Co.*, 34 C. C. A. 486.

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on the ground of multifariousness. In the former bill of complaint, relief was sought in equity by complainant as a minority stockholder, suing for herself and in behalf of other stockholders of defendant Buffalo School Furniture Company, and to recover treble damages, under the anti-trust act of July 2, 1890 (26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). It was held that such damages were only recoverable in an action at law by the complainant, and inured to her sole benefit, while the equitable relief sought by the bill was for the benefit of the corporation in whose behalf the suit was brought, and therefore inconsistent remedies were averred in the bill. The order sustaining the demurrers to the original bill recites that they are sustained solely and only upon the ground of multifariousness, although the precise questions here involved were also then considered. The opinion of the court, however, merely indicated an impression that the bill, with the inferences deduced therefrom, sufficiently averred a conspiracy in restraint of trade and commerce to enable the complainant to give evidence upon the trial in support of the charge. Subsequently the parties appeared before the court in settlement of the terms of the order, with the result that the restrictive order sustaining the demurrer because of multifariousness, only, was entered. On appeal the Circuit Court of Appeals affirmed the de- **[117]** cree of the Circuit Court, with leave to amend the bill. 113 Fed. 1020. The precise questions now considered not having been determined on the former hearing, as appears by the order sustaining the demurrer because of multifariousness, the contention of the complainant that the defendants' demurrers were overruled upon every other ground therein stated cannot be maintained. The amended bill which is now before me has eliminated the demand for treble damages, but in all other respects the relief demanded is practically similar to that of the original bill. All the defendants, except Oakman and Turnbull, have demurred to part, answered to part, and all the defendants have filed pleas in bar to part of the bill now considered.

The grounds of demurrers may be subdivided and briefly summarized into four general grounds, as follows: (1) Want of equity; (2) complainant has no legal capacity to sue; (3)

that the cause assigned for equitable relief does not entitle complainant to the character of the relief prayed for; (4) defect of parties plaintiff or defendant, in that there are interested stockholders, without whose presence relief ought not to be granted.[a]

* * * * *

[126] I do not understand that it is claimed by complainant that this court has the power to take cognizance of the alleged illegal combination because of the provisions of the anti-trust act of 1890 (26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). It has been many times decided, and no longer admits of any question or doubt, that the only party entitled to maintain a bill in equity for injunctive relief for violating the provisions of the anti-trust act is the United States attorney, at the instance of the Attorney General. *Pidcock* v. *Harrington* (C. C.) 64 Fed. 821; *Southern Indiana Express Co.* v. *U. S. Co.* (C. C.) 88 Fed. 659; *Connolly* v. *Union Sewer Pipe Co.*, supra.

* * * * *

It follows from the foregoing that the bill must be dismissed, with costs, and the pleas of the various defendants allowed. The complainant, however, is entitled to take issue, if she shall see fit, upon the facts stated in the plea, by filing replication within thirty days from the entry of an order in accordance with this opinion.

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[529] UNITED STATES v. SWIFT & CO. ET AL.[b]

(Circuit Court, N. D. Illinois, N. D. April 18, 1903.)

[122 Fed., 529.]

INTERSTATE COMMERCE ACT—COMMERCE.—Commerce is the sale or exchange of commodities, but that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the initiatory and inter-

[a] It is not deemed advisable to reprint the entire opinion, as very little of it relates to the anti-trust law. This may be seen by consulting the syllabus, which is printed in full.

[b] Decree modified and affirmed by Supreme Court (196 U. S., 375). See p. 641.

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vening acts, instrumentalities, and dealings—that directly bring about the sale or exchange.

SAME—RESTRAINT OF TRADE.—Restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination averred, nor is it to be tested by the prices that result from the combination. The statute has no concern with prices, but looks solely to competition and to the giving of competition full play by making illegal any effort at restriction upon competition.

SAME.—The agreement of the defendants to refrain from bidding against each other in the purchase of cattle is combination in restraint of trade; so also their agreement to bid up prices to stimulate shipments, intending to cease from bidding when the shipments have arrived, and the same result follows from the combination of defendants to fix prices upon and restrict the quantities of meat shipped to their agents or their customers. Being restriction upon competition, such agreements are combination in restraint of trade.[a]

The defendants are seven corporations, one copartnership, and twenty-three other persons, and the petition is fairly summarized as follows:

1st. "That at the time of its filing they had been and then were engaged in the business of buying live stock at divers points throughout the United States where stockyards existed, and slaughtering the same at such places in different states and converting the same into fresh meats for human consumption.

2nd. "That they had been and then were engaged in the business of selling such fresh meats at the places where prepared, to dealers and consumers in divers other states and territories of the United States and in foreign countries, and shipping the same when so sold, from said places of preparation to such dealers and consumers, pursuant to such sales, and were thus engaged in trade and commerce among the several states and territories and with foreign nations.

3rd. "That they had been and then were engaged in the business of shipping such fresh meats from said points where so prepared, by common carriers to the respective agents of the defendants located at and near the principal markets of such meats in other states and territories and in foreign countries for sale by those agents in those markets to dealers and consumers, which they there sold through their agents and were thus engaged in trade and commerce among the several states and territories and with foreign nations.

4th. "That of the total volume of trade and commerce among the said states and territories in fresh meats the said defendants together controlled about sixty per cent.

5th. "That as to such trade and commerce among the several states and territories and foreign nations in fresh meats, the said defendants should, and but for the acts hereinafter complained of would be and remain in competition with each other.

6th. "That said defendants, in violation of the act of congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] and

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in order to restrain competition among themselves as to the purchase of livestock necessary to the production of the meats produced by them, have engaged in, [530] and intended to continue an unlawful combination and conspiracy between themselves for directing and requiring their respective purchasing agents at the said several stockyards and markets where they customarily purchase such livestock, which livestock is produced and owned principally in other states and territories of the United States, and shipped by the owners thereof to such stockyards for competitive sale, to refrain from bidding against each other when making purchases of such livestock, and by these means inducing and compelling the owners of such livestock to sell the same at less prices than they would receive if such bidding were competitive; which combination and conspiracy is in restraint of trade and commerce among the several states, etc.

7th. "That said defendants, in further violation of said act, and in order to further restrain competition among themselves, which would otherwise exist, as to the purchase of livestock necessary to the production of the meats produced by them, have engaged in and intend to continue an unlawful combination and conspiracy among themselves for bidding up through their agents the prices of livestock for a few days at said stockyards, thereby inducing shippers from other states and territories to make large shipments of such livestock to such stockyards, and then refrain from bidding up such livestock, and thereby obtaining such livestock at prices much less than it would bring in the regular way of trade.

8th. "That said defendants, in further violation of said act, and in order to restrain and destroy competition among themselves as to such trade and commerce and to monopolize the same, have engaged in and intend to continue an unlawful combination and conspiracy to arbitrarily, from time to time, lower and fix prices, and maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout said states and territories and foreign countries. That the arbitrary raising, lowering, fixing, and maintaining of said prices is effected through the action of divers of their agents in secretly holding periodical meetings, and there agreeing upon the prices to be adopted by said defendants respectively in such trade and commerce, which said prices are notified by letters and telegrams, and are adhered to in their sales, which are made directly, and among other ways; and by collusively restricting and curtailing the quantities of such meats shipped by them in pursuance of such combination, and imposing against each other divers penalties for any deviations from such prices, and establishing a uniform rule for the giving of credit to dealers throughout the said states and territories and foreign countries, and for the conduct of the business of such dealers, with penalties for violations thereof, by notifying each other of the delinquencies of said dealers, and keeping what is commonly known as a 'black list' of such delinquents, and refusing to sell meats to any of such delinquent dealers.

9th. "And the said defendants, in violation of the provisions of the said act, have engaged in and intend to continue an unlawful combination and conspiracy, to direct and require their respective agents at and near many of the markets for such fresh meats throughout the United States and territories to arbitrarily make and impose uniform charges for cartage for delivery, upon making such sales to dealers and consumers in those markets of the meats shipped to them through said agents by the said defendants respectively from their several points of preparation, thereby increasing the charges for such meats to said dealers and consumers.

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10th. "That notwithstanding the common carriers by railroad subject to the provisions of the laws of the United States for the regulation of commerce, have established and published their schedule of rates, fares and charges for the transportation of livestock, and for the transportation of meats, which are the only lawful rates for such transportation, the said defendants, intending thereby to monopolize the commerce aforesaid, and prevent competition therein, have made and are making agreements and arrangements with divers officers and agents of such common carriers whereby the said defendants were to receive, and will continue to receive, by means of rebates and other devices, unlawful rates for such transportation, less than the lawful rates, which rebates they divide, among themselves [531] and will continue to do so unless restrained by the injunction of this court, which is a scheme to monopolize, and also a combination and conspiracy in restraint of trade and commerce among the several states and territories and with foreign nations.

11th. "That the said defendants now are, and for years past have been in combination and conspiracy with each other and with the railroad companies and others to complainant unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States and its territories and foreign countries, to that end the defendants do and will artificially restrain such commerce and put in force abnormal, unreasonable and arbitrary regulations for the conduct of their own and each other's business, effecting the same from the shipment of the livestock from the plains to the final distribution of the meats to the consumer. All to the injury of the people and in defiance of law."

To this petition five of the defendant corporations have filed joint and several demurrers, the grounds of which are as follows:

"The bill of complaint does not allege any contract, combination or conspiracy in restraint of interstate or foreign trade or commerce within the meaning of said act of congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

"The bill of complaint does not allege any acts of defendants monopolizing, or attempting to monopolize, or combining or conspiring to monopolize any part of such trade or commerce within the meaning of said act.

"If the act of congress in question should be given a construction which would sustain this bill of complaint, such act would violate the provisions of the Constitution of the United States.

"Said bill is multifarious.

"There is a misjoinder of causes of action and of persons in said bill, as alleged in said demurrers.

"The said bill of complaint and the allegations and charges therein are not sufficiently definite or specific, but are too general and indefinite."

The hearing is on these demurrers and on motion for an injunction.

John K. Richards, *S. H. Bethea*, and *W. A. Day*, for the United States.

John S. Miller, and *Merritt Starr*, for defendants.

Opinion of the Court.

After the foregoing statement of facts, GROSSCUP, Circuit Judge, delivered the opinion:

Commerce, briefly stated, is the sale or exchange of commodities. But that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the initiatory and intervening acts, instrumentalities and dealings—that directly bring about the sale or exchange. Thus, though sale or exchange is a commercial act, so also is the solicitation of the drummer, whose occupation it is to bring about the sale or exchange. *Brennan* v. *Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. The whole transaction from initiation to culmination is commerce.

When commerce, thus broadly defined, is between parties dealing from different states—to be effected so far as the immediate act of exchange goes by transportation from state to state—it is commerce between the states," within the meaning of the constitution, and the statute known as the Sherman Act. But it is not the transportation that constitutes the transaction interstate commerce. That is an adjunct only, essential to commerce, but not the sole test. [532] The underlying test is that the transaction, as an entirety, including each part calculated to bring about the result, reaches into two or more states; and that the parties dealing with reference thereto deal from different states.

An interstate commercial transaction is, in this sense, an affair rising from different states, and centering in the act of exchange, each essential part of the affair being as much commerce as is the center. With this definition in mind, let us see what the transaction made out in the petition is.

For the purpose of clear exposition, the facts set forth in the petition should be separated into two groups—those that are intended to bring the transaction within the body of interstate commerce; and those that are intended to fix upon such transaction the character of unlawful combination and conspiracy. Shorn of verbiage, and of immaterial accessories, the first group may be stated as follows: The defendants controlling sixty per cent. of the trade and commerce in fresh meats in the United States, buy, in the course of

their business, livestock shipped from points throughout the United States; which, having been converted into fresh meats, is sold again by them at the places where prepared, to dealers and consumers in other states; or is sold through their agents, located in other states, to dealers and consumers in the states where the agents are located. The shipment in the first class of sales is made directly from the places where the meat is prepared to the dealers and consumers in other states, and in the latter class to the agents in the other states who, upon sale, deliver directly to the dealer and consumer.

What may be called the body of these transactions is twofold. It reaches backward to the purchase of cattle that come to defendants from states other than those in which defendants manufacture; and it reaches forward to the sale of the meats, after conversion, to parties dealing with respect thereto from states other than the state of the defendants; followed by shipments into the other states. Each of these transactions constitute, in my judgment, interstate commerce. The purchase of cattle shipped habitually from other states to the markets where defendants purchase, in the expectation that the purchase will be made by the slaughter companies, is an act of interstate commerce. *Hopkins' Case*, 171 U. S. 590, 19 Sup. Ct. 40, 43 L. Ed. 290.

It is none the less interstate commerce merely because the local incidents or facilities for such purchase are to be regarded as outside the interstate character of the transaction. Thus the local commission broker, or the men who drive the cattle from the pens to the slaughter house, need not, in any survey of the transaction, be held to be within the interstate status of the transaction. With them, it is essentially the same whether the cattle come from the state in which the purchase is made, or from other states. They are aids or facilities only, and as such are merely local incidents. But the purchase of livestock thus brought habitually from other states, relates, in its larger bearings, to a transaction that had its beginning in other states. The original shipments are influenced, and to a large extent brought about, by the character of the purchase.

[533] The purchase, the shipments, and the transportation, are commercially interdependent; and in any survey of the transaction, as an entirety, none could be omitted. They each go to make the transaction, and covering different states, they stamp the transaction—not all its incidents, but its essential body—as a transaction in interstate commerce.

Coming, now, to the other branch of the transaction—the sales by the defendants—a like result follows. Unquestionably it is interstate commerce when purchasers from other states buy directly from the defendants, and have the meats shipped to them by the vendors. The situs of such a transaction, both as to initiatory intercourse, and as to transportation in furtherance of the exchange, includes a state other than the one from which defendants deal.

I think the same is true of meat sent to agents, and sold from their stores. The transaction in such case, in reality, is between the purchaser and the agents' principal. The agents represent the principal at the place where the exchange takes place; but the transaction, as a commercial entity, includes the principal, and includes him as dealing from his place of business. Indeed such privity exists between the principal and the transaction, that he could, at the instant, as a citizen of another state, sue upon the transaction in the federal courts; nor have I any question that if the conditions of this case were reversed, so that defendants were invoking the shelter, instead of seeking to escape, the obligations of the commerce clause, federal law would be found equal to the protection asked.

I need not dwell on the contention of defendants that the fresh meats in the hands of the agents are subject to ordinary state taxation, or upon the cases cited in this connection. It is enough to say that because a thing can be taxed by the state, it does not follow that it lies outside the body of interstate commerce; for commerce, interstate as well as domestic, is subject to the police and taxing power of the state, so long as the exercise of such power does not interfere with the national government's exclusive right of regulation. *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Austin* v. *Tennessee*, 179 U. S. 349, 21 Sup. Ct. 132, 45 L. Ed. 224; Prentice and Egan

on the Commerce Clause of the Constitution, p. 27. Nor shall I differentiate the *Knight Case*, 155 U. S. 685, 15 Sup. Ct. 248, 39 L. Ed. 310; the Hopkins Case, and other cases urged upon me as applicable to the case under consideration. A study of these cases will show that they are not in conflict with the views already expressed.

The next inquiry is this: Do the facts set forth in the second grouping, fix upon the transaction, even though the transactions be within the body of interstate commerce, the character of unlawful combination. The averments of the petition in this respect may be summarized as follows: That the defendants are engaged in an unlawful combination and conspiracy under the Sherman act in (a) directing and requiring their purchasing agents at the markets where the livestock was customarily purchased, to refrain from bidding against each other when making such purchases; (b) in bidding up through their agents, the prices of livestock for a few days at a time, to induce [534] large shipments, and then ceasing from bids, to obtain livestock thus shipped at prices much less than it would bring in the regular way; (c) in agreeing at meetings between them upon prices to be adopted by all, and restriction upon the quantities of meat shipped; (d) in directing and requiring their agents throughout the United States to impose uniform charges for cartage for delivery, thereby increasing to dealers and consumers the charges for such meats; and (e) in making agreements with the transportation companies for rebates and other discriminative rates.

No one can doubt that these averments state a case of combination. Whether the combination be unlawful or not, depends on whether it is in restraint of trade. The general meaning of that term is no longer open to inquiry. It has been passed upon carefully by the Supreme Court in the *Freight Association Case*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and in the *Traffic Case*, 171 U. S. 558, 19 Sup. Ct. 25, 43 L. Ed. 259, where the whole subject was a year later elaborately re-argued. I will not extend into this opinion even a summary of these cases. It is clear from them that restraint of trade is not dependent upon any consideration of

reasonableness or unreasonableness in the combination averred; nor is it to be tested by the prices that result from the combination. Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases, even as against the consumer, be restraint of trade; and combination that leads directly to higher prices, may, as against the producer be restraint of trade. The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition. Whatever combination has the direct and necessary effect of restricting competition, is, within the meaning of the Sherman act as now interpreted, restraint of trade.

Thus defined, there can be no doubt that the agreement of the defendants to refrain from bidding against each other in the purchase of cattle, is combination in restraint of trade; so also their agreement to bid up prices to stimulate shipments, intending to cease from bidding when the shipments have arrived. The same result follows when we turn to the combination of defendants to fix prices upon, and restrict the quantities of meat shipped to their agents or their customers. Such agreements can be nothing less than restriction upon competition, and, therefore, combination in restraint of trade; and thus viewed, the petition, as an entirety, makes out a case under the Sherman act.

The demurrer challenges the petition for multifariousness and misjoinder of parties; and challenges each paragraph of the petition, standing separately, as insufficient to constitute a case under the Sherman act. But the paragraphs can not properly be looked upon as separate causes of action. They relate clearly to each other, thus constituting a whole that is the sum of the parts; and thus regarded, are free from the objections indicated.

It may be true that the way of enforcing any decree under this petition is beset with difficulties, and that a literal enforcement may result in vexatious interference with defendant's affairs. But in the inquiry [535] before me, I am not at liberty to stop before such considerations. The Sherman act, as interpreted by the Supreme Court, is the law of

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the land, and to the law as it stands both court and people must yield obedience.

The demurrer is overruled, and the motion for preliminary injunction granted.

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[692] STATE OF MINNESOTA *v.* NORTHERN SECURITIES CO. ET AL.[a]

(Circuit Court, D. Minnesota, Third Division. August 1, 1903.)

[123 Fed., 692.]

MONOPOLIES—COMBINATIONS IN RESTRAINT OF TRADE AND COMMERCE—MINNESOTA STATUTE.—The anti-trust law of Minnesota (Laws 1899, p. 487, c. 359), making unlawful any contract or combination in restraint of trade or commerce within the state, is in substantially the same language as the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and must receive a similar construction. Following the decisions of the United States Supreme Court construing the latter act, the Minnesota law applies to railroads, and any contract or arrangement between railroad companies for the purpose and having the effect of preventing competition by fixing rates to be maintained by the parties is in violation of its provisions; but contracts or combinations which do not directly and necessarily affect transportation, or rates therefor, are not in restraint of trade or commerce, nor within the statute, even though they may remotely and indirectly appear to have some probable effect in that direction.[b]

SAME—RAILROADS—STOCK-HOLDING CORPORATION.—A holding corporation organized by individual stockholders of two railroad companies, owning and operating substantially parallel and competing lines of railroad within the state of Minnesota, for the sole purpose of acquiring, by the exchange of its own stock therefor, stock of the two companies, and holding and voting the same, but having no power or franchise to operate a railroad, is not in violation of the Minnesota anti-trust law (Laws 1899, p. 487, c. 359), which provides that "any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust or otherwise * * * which is in restraint of trade or commerce within this state, * * * is hereby prohibited and declared to be unlawful," where the purpose of its promoters was thereby to acquire and retain in the same hands a majority of the stock of one or both companies, to insure

[a] Reversed by Supreme Court, with direction that the case be remanded to the State court (194 U. S., 48). See p. 533.

[b] Syllabus copyrighted, 1903, by West Publishing Co.

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uniformity of policy and stability of management, although it in fact acquired the controlling interest in both, in the absence of any evidence that it ever exercised its power to prevent competition between the two roads, or to interfere in any manner with the fixing of rates by either company.

SAME—ENFORCEMENT OF STATUTE—JURISDICTION OF EQUITY.—The anti-trust law of Minnesota (Laws 1899, p. 487, c. 359) imposes severe penalties for its violation, but contains no provision for restraining or enjoining violations, and without such statutory authority a court of equity has no jurisdiction to enjoin an act which constitutes a criminal offense.

RAILROADS—MINNESOTA STATUTE AGAINST CONSOLIDATION—STOCK-HOLDING CORPORATION.—The Minnesota statute prohibiting the consolidation of parallel and competing lines of railroad (Laws 1874, p. 154, c. 29, and subsequent enactments of the same tenor), which provides that "no railroad corporation or the lessees, purchasers or managers of any railroad corporation shall consolidate the stock, property or franchise of such corporation [693] with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line," does not apply to a corporation organized by individual stockholders of two companies, owning parallel and competing lines of railroad, for the sole purpose of acquiring, holding, and voting stock of the two companies, in the formation of which neither company had any part, and which has no powers or franchise as a railroad company. Such a corporation is merely an investing stockholder, and not a railroad corporation, nor a lessee, purchaser, or manager of a railroad corporation, within the terms of the statute; and, although it may acquire and own a majority of the stock of both companies, it does not thereby effect a consolidation, where the companies still maintain their separate organizations, with separate boards of directors and managing officers.

In Equity. On final hearing.

W. B. Douglas, *M. D. Munn*, and *Geo. P. Wilson*, for complainant.

Young & Lightner, for Northern Securities Co. and J. J. Hill.

C. W. Bunn, for Northern Pacific Ry. Co.

M. D. Grover, for Great Northern Ry. Co.

LOCHREN, District Judge.

This cause came on for final hearing at St. Paul June 5, 1903, upon the bill, answers, and testimony taken and on file.

That the cause is one of equitable cognizance, and that this court has rightful jurisdiction of the same, was conceded by counsel. The cause was fully argued, and upon full consideration the following facts appear and are established:

First. The defendant the Great Northern Railway Company is a Minnesota corporation, which has, as stated in the bill, acquired the property rights and franchises, and the management and control, of various specified railway corporations. The defendant the Northern Pacific Railway Company is a Wisconsin corporation, which filed its articles of incorporation in Minnesota, and in 1896 purchased and acquired all the railroad properties, railway lines, right of way, rolling stock, and franchises of the earlier Northern Pacific Railroad Company, and has also, as stated in the bill, acquired the property rights and franchises and the management and control of other specified railway corporations. The said Great Northern and Northern Pacific Companies now, and for many years, severally own, operate, and maintain a main line of railway extending from the cities of Duluth, St. Paul, and Minneapolis westward, across the states of Minnesota, North Dakota, Montana, Idaho, and Washington, to Puget Sound, with many branches along the route of each, and that said two systems of railroad are, as to each other, parallel and competing lines of railway, at least between cities and towns reached or traversed by the lines of both of said two railways, among which are Duluth, St. Paul, Minneapolis, Anoka, St. Cloud, Moorehead, East Grand Forks, and several other towns in the state of Minnesota, and that a reasonable degree of competition for the traffic between places so situated on both said lines of railway has existed in the past years.

Second. The state of Minnesota has heretofore made large grants of its swamp lands in aid of the construction of portions of the railways of each of said companies, and, in the support of its various state institutions—educational, eleemosynary, and otherwise—transports an- **[694]** nually large quantities of goods, stores, and supplies upon said two railroads; and large quantities of wheat and other products owned and produced by citizens and inhabitants of Minnesota are annually carried over said railroads from competitive places in the western part of the state to Duluth, St. Paul, and Minneapolis.

Third. In 1874 the Legislature of the state of Minnesota enacted a statute known as chapter 29, p. 154, of the General Laws of 1874, as follows:

"SECTION 1. No railroad corporation, or the lessees, purchaser or manager of any railroad corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way contol any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil cases."

In 1881 the Legislature of Minnesota enacted a statute (Laws 1881, p. 109, c. 94) authorizing and empowering any railroad corporation, domestic or foreign, to consolidate its stock and franchises with, or lease or purchase or in any way become owner of or control the stock of any other railroad corporation when their respective railroads can be connected and operated together so as to constitute a continuous main line, with or without branches. But the same statute reiterated the prohibition against the consolidation of railroads having parallel and competing lines, and by a subsequent amendment of this statute (Laws 1899, p. 253, c. 229) the same prohibition was again enacted almost in the language of the act of 1874, above quoted. In 1899 the Legislature of Minnesota also enacted a statute known as the "Anti-trust law" (Laws 1899, p. 487, c. 359), which provided:

"SECTION 1. Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust or otherwise, hereafter entered into which is in restraint of trade or commerce within this state, or in restraint of trade or commerce between any of the people of this state and any of the people of any other state or country, * * * is hereby prohibited and declared to be unlawful."

Severe penalties are denounced against all who shall violate the act, including the forfeiture of the charter of any offending corporation. And it is made the duty of the Attorney General to institute, in the name of the state, proceedings in any court of competent jurisdiction to recover the penalties imposed, and also, in the case of offending corporations, to enforce the forfeiture of their charters.

Fourth. The railroads both of the Great Northern and

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Northern Pacific Companies between the Missouri river and Puget Sound pass through long stretches of mountainous and unsettled or sparcely settled country, which supplies comparatively little traffic or business to these railroads. But the forests near Puget Sound produce a great supply of lumber, readily marketable east of the Missouri river, and in Iowa, Illinois, Nebraska, and Missouri. To transport it over these railroads (which in the direction of the principal markets for the lumber ended at St. Paul) at rates which would make the business practicable, it was necessary that west-bound freight should be se- **[695]** cured for the cars which would bring the lumber eastward. The Great Northern Company and Northern Pacific Company were alike interested in this business, and, acting in harmony, in the spring of 1901, purchased substantially all the shares of the Chicago, Burlington & Quincy Railway Company (each company buying and owning one-half), at $200 per share, amounting to $108,000,000, par value, the cost being about $216,000,000; paying for the same in the joint 4 per cent. bonds of the two purchasing companies. As the Burlington system so purchased has a railway extending from Minneapolis and St. Paul to Chicago, and railways covering large portions of the states of Illinois, Iowa, Missouri, and Nebraska, and connecting again with the Northern Pacific at Billings, in Montana, it, though still managed by its own directors and officers, affords to the two purchasing railroads the needed mutual extension to transport their trains of lumber to desirable markets, and to bring return traffic, in coal, iron, steel, cotton, and other commodities, needed on the route of these two railroads and on the Pacific Coast, and in the trade growing up between Puget Sound and Alaska, China, and Japan.

The Union Pacific Railway extends from Omaha to Ogden, and, by its connection with the Central or Southern Pacific, to San Francisco, with the branches and connections which reach points on the Great Northern and Northern Pacific in Montana and Washington. As the Burlington system connects with the Union Pacific at Omaha and elsewhere in Nebraska, and extends east, north, and south from Omaha, much of the freight gathered by it, bound for the Pacific

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Coast, passed over the Union Pacific. Hence the purchase of the Burlington system by the Great Northern and Northern Pacific, which was completed about April 1, 1901, led the managers of the Union Pacific Company to fear a diversion of this traffic from the railway of the Union Pacific to the railways of the two purchasing companies; and Edward H. Harriman, representing the Union Pacific Company, applied to James J. Hill and J. Pierpont Morgan, who respectively represented the Great Northern and Northern Pacific Companies in such purchase, to permit the Union Pacific Company to join and share with them in the purchase of the Burlington system, but his application was declined. Thereupon the said Harriman and others acting in the interest of the Union Pacific Company began rapidly and quietly to purchase the stock of the Northern Pacific Company, intending thus to acquire a majority of that stock, and the control of that company, with its half interest in the Burlington system. The common stock of the Northern Pacific Company was $80,000,000, and it had issued and had outstanding preferred stock to the amount of $75,000,000, which had the same voting power as the common stock, but which the company, by the action of its directors, might pay off at par, and thus retire, on the 1st day of January, 1902, or on the 1st day of any succeeding year. During the month of April and first week in May, 1901, the said Harriman and others acting with him in the interest of the Union Pacific Company purchased and held a little more than $37,000,000 of the common stock, and a little more than $41,000,000 of the preferred stock, of the Northern Pacific Company; being more than $78,000,000 in all, and more than a majority of the aggregate **[696]** of the common and preferred stock of that company. But in the first week of May, 1901, J. P. Morgan & Co., becoming apprehensive, purchased $15,000,000 of the common stock of the Northern Pacific Company, which, with their previous holding of that stock, and those of Mr. Hill and other stockholders of the Northern Pacific Company, who in this matter acted with Mr. Morgan, gave the latter the control of more than $41,000,000 of such common stock; being more than a majority of that stock. As it was known that Mr. Morgan and his associates would

insist upon the payment and retirement of the preferred stock on January 1, 1902, and that the board of directors of the Northern Pacific Company would take action to that end, Mr. Harriman and his associates abandoned their attempt to obtain the control of that company.

For many years, including the period of the construction of the Great Northern Company's railroad from the state of Minnesota to Puget Sound, and its branches and extensions in other directions, Mr. Hill, with the acquiescence of all the stockholders, had been the president and active manager of that company. The stock of that company aggregated $125,000,000, and he, with a small number of other holders of large amounts of that stock, had for some time considered the project of uniting their holdings of stock by transferring the same to some corporation to whom any others of the holders of such stock might transfer their holdings, and thus assure permanency to the management and policy of the company.

The attempt in the interest of the Union Pacific Company to purchase a majority of the stock of the Northern Pacific Company, and obtain the control of that company, and through it of the Burlington system, alarmed the managers and stockholders of the Northern Pacific Company, and led them to consider the feasibility of forming a holding company which should purchase or secure in exchange for its own stock more than a majority of the stock of the Northern Pacific Company, and hold the same secure against any raid in the future in the interest of a rival or hostile railroad. Mr. Hill and the stockholders referred to of the Great Northern Company were likewise alarmed by such attempt in the interest of the Union Pacific Company to obtain control of the Northern Pacific, and through it of the Burlington system—a result which they apprehended would injuriously affect the property of the Great Northern Railroad, and the country traversed by it and by the Northern Pacific Railroad; and, in the project of establishing a holding company to purchase and hold a majority of the stock of the Northern Pacific Company, they joined for the purpose of selling to such holding company, and placing therein their own stock in the Great Northern Company, and permitting all other

stockholders of the same company who might so choose to do likewise, and thus accomplish their purpose above stated of giving permanency to the management and policy of the Great Northern Company.

The incorporation of the Northern Securities Company under the general laws of New Jersey, and with a capital of $400,000,000, was completed November 13, 1901. Neither the Great Northern Company nor the Northern Pacific Company, by any act of its directors, or any **[697]** corporate act, had anything to do with the formation or subsequent action of the Northern Securities Company; but Mr. Morgan, Mr. Hill, and other stockholders of the Northern Pacific Company and Great Northern Company were individually the promoters who caused and procured the incorporation of the Northern Securities Company for the purposes above stated. The Northern Securities Company, when formed, offered and agreed to purchase and to pay for in its own stock at par ($100 per share) any stock of the Northern Pacific Company at the price of $115 per share, and any stock of the Great Northern Company at the price of $180 per share; and large amounts of the stock of said two railroads were, at such rates, and so paid for, purchased from said promoters and other stockholders of said two railroad companies by said Northern Securities Company. About the same time Mr. Harriman and his associates sold to J. P. Morgan & Co. all the Northern Pacific Company stock which they had purchased as aforesaid—both common and preferred—amounting to more than $78,000,000, and said J. P. Morgan & Co. at the same time sold all the same stock to the Northern Securities Company, who paid the consideration therefor directly to Mr. Harriman and his associates; a part of such consideration being something more than $82,000,000 of the stock of said Northern Securities Company. That purchase was completed on November 18, 1901. On January 1, 1902, the Northern Pacific Company paid off and retired its preferred stock, having raised the money for that purpose by an issue of bonds, which were made convertible and were converted into common stock of that company. Other stockholders of each of said two railroad companies sold their stock to the Northern Securities Company, receiving

in payment or exchange therefor, at the rates aforesaid, stock of the last-named company, so that by December 1, 1901, said Northern Securities Company had become the owner of considerable more than a majority of the stock of the Northern Pacific Company, and a large amount, but less than a majority, of the stock of the Great Northern Company. Similar purchases from stockholders continued, and at the time of the commencement of this suit the Northern Securities Company had become, and still is, the owner of about 96 per cent. of all the stock of the Northern Pacific Company, and of about 76 per cent. of all the stock of the Great Northern Company.

CONCLUSIONS OF LAW.

1. It is obvious from the foregoing facts that the Northern Securities Company was incorporated with the purpose and intent on the part of its promoters that it should acquire by purchase, by exchange for its stock, and should own and control, a considerable majority of all the stock of the Northern Pacific Company, and thus secure that company against the danger of any future raid upon its stock which might place its management and the resulting control of the Burlington system in the power of any rival railroad corporation, whose interests might be hostile to the development and property of the Northern Pacific and Great Northern Companies, and their seaboard terminals, and of the region of country traversed by their railroad systems. This was the avowed purpose of Mr. Morgan and his associates who [698] acted with him in this matter, including Mr. Hill and other large stockholders of the Great Northern Company, who also held large amounts of stock in the Northern Pacific Company, and were apprehensive that any hostile control of the Northern Pacific Company which might sacrifice its interests to a rival would be disastrous to the development and prosperity of the Great Northern Company. And at the very time when the Northern Securities Company was formed and incorporated, by means of the large holdings of Northern Pacific Company stock by himself and his associates acting with him, and by the then purchase by J. P. Morgan & Co. of the Harriman holding of such stock, said

J. P. Morgan was able at once to transfer and have transferred to the Northern Securities Company a large and controlling majority of the stock of the Northern Pacific Company, as was done; thereby accomplishing, as was believed, the purpose of securing that stock against hostile raids in the future.

With respect to the stock of the Great Northern Company, the evidence shows that, when the Northern Securities Company was incorporated, it was the purpose and intent of Mr. Hill and other large stockholders of the Great Northern Company who acted with him to sell and dispose of to the Northern Securities Company, for its stock, their several holdings of stock in the Great Northern Company, aggregating then about $35,000,000, to the end that such large amounts of Great Northern Company's stock should be kept together, and, as it was hoped, aid in giving permanency to the management and policy which had controlled and was controlling the railway and development of that company. And it was their purpose that all other stockholders of the Great Northern Company who might choose to do so should be permitted to sell or exchange their stock of that company for stock of the Northern Securities Company on the same terms, and it was hoped and expected that many would do so. But the said Hill and his associates had no power or control which could enable them to transfer or cause to be transferred to the Northern Securities Company so much as one-third of the stock of the Great Northern Company. The evidence therefore fails to show that the Northern Securities Company was formed for the purpose of acquiring and holding a majority of the stock of the Great Northern Company, as well as that of the Northern Pacific Company, although that result followed soon after, and may have been desired and anticipated.

2. One question in this cause is whether the acquisition by the Northern Securities Company, in the manner above stated, of a majority of the capital stock of both the Great Northern and Northern Pacific Companies, which own and operate parallel and competing railroads across the state of Minnesota, and its ownership of such stock, is a violation of the Minnesota anti-trust law (Laws Minn. 1889, p. 487, c.

359), which provides, as above stated, that "any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust or otherwise hereafter entered into which is in restraint of trade or commerce within this state * * * is hereby prohibited and declared to be unlawful." Language in the act extending these provisions to interstate commerce is here omitted and disregarded, and the act considered valid as to trade and commerce within the state; [699] that being a proper subject for state legislation, though carried on by the same instrumentalities used in interstate commerce. The language just quoted is evidently taken from the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], known as the Sherman anti-trust act, which has received consideration by the Supreme Court of the United States in several cases.

In *United States* v. *E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, a New Jersey corporation, already in control of most of the manufactories of refined sugar in the United States, purchased with shares of its own stock the stock of four Philadelphia refineries, and acquired nearly complete control of that business in the country. It was charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that by entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations. Held, that though the contracts of purchase of these refineries would result in a monopoly in the manufacture of refined sugar, an article certain to enter into commerce, yet the manufacture of the article was no part of commerce, and therefore the contract had no direct relation to commerce, even though to dispose of the product the instrumentality of commerce would be necessarily invoked. The product would not enter into commerce till transportation began, and the contracts had no reference to transportation.

In *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, it was held that the Sherman anti-trust act applies to railroads, and prohibits all contracts in restraint of trade, whether reasonable or unreasonable, and also that articles of agreement by which some 17 railroad companies formed that association, in which each railroad company had a representative, empowering the association to fix reasonable rates for the transportation of freight on said railroads (many of whom were competitive), and change such rates on proper occasion, and binding the railroad companies, under penalties, to conform their charges for transportation to the rates so to be established, was a contract in violation of that anti-trust act. Plainly, the direct and only object of this agreement was its provision for the fixing, controlling, and maintaining rates for the transportation of freight over these railroads.

United States v. *Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, was like the case last cited. The association was formed between 31 railroad companies, engaged in transportation between Chicago and the Atlantic Coast. The association formed of representatives of the companies was given control over competitive transportation of freight and passengers, with power to fix rates, fares, and charges, and change the same from time to time; and to these rates the railroad companies bound themselves to conform. The principal difference between this case and the one last mentioned was that by the terms of this agreement the association was to cooperate with the interstate commerce commission, to secure stability and uniformity in the rates, fares, and charges established. It was held that this agreement also violated the anti-trust act.

[700] In *Hopkins* v. *United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, the members of the Kansas City Live Stock Exchange did business at the Kansas City Stockyards located partly in Kansas City, Kan., and partly in Kansas City, Mo., dealing on their own account, or as commission merchants in live stock shipped from surrounding states and territories, to the owners of which they often made advances before shipment. They were bound by articles of association and by-laws, which, among other things, fixed the minimum rates for commissions, forbade the giving of information of the condition of the market, except under specified circumstances, and forbade all dealing with any person who

violated the rules of the exchange, or with an expelled or suspended member. Held, that the business so transacted was not commerce, although it furnished aids and facilities to interstate commerce. The court said:

"The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. *Sands* v. *Manistee River Improvement Company*, 123 U. S. 288 [8 Sup. Ct. 113, 31 L. Ed. 149]; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 329, 330 [13 Sup. Ct. 622, 37 L. Ed. 463]; *Kentucky & Indiana Bridge Co.* v. *Louisville, etc., Railroad* (C. C.) 37 Fed. 567 [2 L. R. A. 289]."

In *Anderson* v. *United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, the facts were similar to those in the Hopkins Case, last cited. The holding of the court is expressed in the syllabus as follows:

"That where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld, as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and accidental, and not its purpose and object."

In *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, six corporations engaged in the manufacture, sale, and transportation of iron pipe, and being located in the states of Ohio, Kentucky, Tennessee, and Alabama, entered into a detailed agreement, parceling among themselves the business of a large number of cities in Western and Southern states, with the purpose and intent of largely increasing the price at which iron pipe should be furnished to such cities. When any such city sought competitive bids for iron pipe, the corporation entitled under this secret agreement to furnish such pipe would make its bid much above a fair market price, and the other companies would present still higher bids, to give the appearance of competition. The company intended would

thus get the contract, but, under the same agreement, would have to pay a large bonus, to be divided among the other companies. Although these corporations were manufacturers of iron pipe, the par- **[701]** ticular agreement had reference to the sale and delivery of such pipe to municipal customers, its intended and direct effect being to exclude competition and raise the price of the commodity. The court said:

"Where the contract is for the sale of the article and for its delivery in another state the transaction is one of interstate commerce, although the vendor may also have agreed to manufacture it in order to fulfill his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce, and not one relating only to manufacture."

The proper construction of the Sherman anti-trust act, so far as it relates to railroad transportation, as deduced from these decisions of the Supreme Court appears to be this: (a) The act applies to railroads. And all contracts made between railroad companies for the purpose and having the effect of preventing competition by fixing rates, or empowering persons to fix them, and agreeing to conform to them when fixed, are in restraint of trade, and within the provisions of the statute, whether the rates so fixed are reasonable or unreasonable. (b) That contracts between divers manufacturers of a commodity, respecting their sales of that commodity, to be delivered by them outside the state, having the direct effect of stifling competition and raising the cost of the article to the purchaser, are also in restraint of trade, and within the statute. (c) That contracts which do not directly and necessarily affect transportation, or rates therefor, are not in restraint of trade, or within the statute, even though they may remotely and indirectly appear to have some probable effect in that direction.

The state anti-trust act must have the same construction in respect to traffic on railroads within the state.

Neither the Great Northern Company nor the Northern Pacific Company were parties to, or in their corporate capacity had anything to do with, the formation of the Northern Securities Company, nor of any of the contracts or proceedings complained of in the bill. The Northern Securities Company is merely an invester in and owner of a majority of the stock of each of these two railroad companies. It

is not a railroad company, and has no franchise or power to manage or operate or direct the management or operation of either railroad in respect to rates or charges for transportation, or otherwise; and there is no scintilla of evidence that it has sought to control or interfere in respect to any of these matters. It has therefore done no act and made no contract in restraint of trade or commerce. Owning now a majority of the stock of each of these railroad companies, it has the power, by voting its stock, to elect the board of directors—the governing body—of each of these railroad companies. But the board of directors of each is a different body from the board of directors of the other, as no director of the Great Northern Company can be a director of the Northern Pacific Company. The directors of each railroad company will appoint its managing and other officers, and control its business and policy. Presumably, they will seek, in lawful ways only, to increase the business and prosperity of the railroad which they, as directors, represent.

The action of the defendant Hill in promoting the formation of the Northern Securities Company, under the circumstances and for the [702] purposes which the evidence discloses, and investing in its stock by the sale to it of his stock in the two railroad companies, involved no act or contract in restraint of trade or commerce, or affecting transportation or rates, more than any ordinary transfer of railroad stock from one person to another.

That my judgment, after most careful consideration of the facts and the law applicable thereto, as construed by the highest court, leads me to the conclusion that none of the defendants have violated the Minnesota anti-trust act—a conclusion apparently contrary to that reached by the eminent judges who, in this court, recently decided the case of *United States* v. *Northern Securities Company*, 120 Fed. 721, and who will doubtless in another court review this cause upon appeal—has necessarily caused hesitation and careful examination. But the rights of litigants and my own sense of duty alike require that my own deliberate judgment, guided by my understanding of authoritative expositions of the law, be given in all causes tried before me.

The decision of the case last cited, as I read it and understand it, does not specify or point out any contract, agreement, or act on the part of the defendants, or any of them, which is directly in restraint of trade or commerce, or which has any direct reference to trade, commerce, transportation, or rates, nor even any threat or avowed purpose on the part of any defendant to do any such act, or enter into any such contract or agreement. But it is argued that, because the Northern Securities Company has become the owner of a large majority of the stock of each of the two railroad corporations, it will be for its interest to suppress competition between them, by causing the two boards of directors of these railroad corporations, which it can fill by election, to enter into arrangements or agreements in restraint of trade, which will suppress competition; and as a corollary to this reasoning (or conjecture) the decision holds that the formation of the Northern Securities Company, and purchase by it of a majority of the stock of each of these railroad companies, are acts or contracts in restraint of trade, though of themselves, and without further action (not yet taken, and perhaps never to be taken) by the directors of the two railroad companies, the formation of the Northern Securities Company and its holdings of stock has and can have nothing to do, directly or indirectly, with trade, commerce, transportation, or rates.

To epitomize this decision: It is held that it will be for the interest of the Northern Securities Company to restrain trade by suppressing competition between these two railroad companies, and that by coercing or persuading the two boards of directors, whom it has the power to elect, it will certainly cause them to commit highly penal offenses, by entering into combinations, contracts, and arrangements in restraint of trade, in violation of the anti-trust act, and hence the Northern Securities Company is already guilty of these offenses that have never been committed or thought of by its officers or promoters, so far as appears, and it must be suppressed and destroyed. I am compelled to reject the doctrine that any person can be held to have committed, or to be purposing and about to commit, a highly penal offense, merely because it can be shown that his pecuniary interests will be thereby advanced, and that he has the power, either directly by him-

[703] self, or indirectly through persuasion or coercion of his agents, to compass the commission of the offense.

Although the bill avers that the acts of the defendants complained of are in violation of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]—the Sherman anti-trust act—the state of Minnesota has no authority to enforce that act by bill for injunction. Such a suit can only be instituted on behalf of the federal government by its attorney general, under the special provisions giving the United States Circuit Courts jurisdiction to prevent and restrain by injunction violations of that act. The state anti-trust act contains no provisions for restraining or enjoining violations of its provisions. As before stated, it is a highly penal statute; and without special statutory authority a court of equity has no jurisdistion to restrain the commission of criminal offenses which involve no threatened destruction of property or property rights.

3. The charge in the bill that the acts of the defendants contravene the statutes of Minnesota prohibiting the consolidation of parallel and competing lines of railroad presents a different question. Chapter 29, p. 154, Gen. Laws Minn. 1874, provides, as stated:

"No railroad corporation or the lessors, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line."

This is the only statute on that subject of consolidating parallel and competing railroads that need be considered, as it covers whatever is contained in any other. This statute is a valid exercise of the police power of the state. *Louisville, etc., Railroad* v. *Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849.

The prohibition against consolidating applies: (1) To railroad corporations. The Northern Securities Company is not a railroad corporation, and neither the Great Northern Company nor the Northern Pacific Company, in its corporate capacity, did any of the acts charged. (2) Lessees of railroad corporations. There were none. (3) Purchasers of railroad corporations. Construing this term as applying to

those who acquire by deed or decree, having capacity to hold and enjoy the franchises and operate the railroad, there were none in this case. (4) Managers of railroad corporations. A railroad manager is the person having the administration, charge, and oversight of the operation and business of the railroad. Among the parties concerned, Mr. Hill alone was a railroad manager. He did not effect any consolidation. He promoted the formation of the Northern Securities Company, and sold to it stock of both railroad companies.

But the complainant contends that when the Northern Securities Company had, about December 1, 1901, purchased and become the owner of a large and controlling majority of the stock of the Northern Pacific Company, it became the purchaser of that railroad corporation, within the meaning of that word as used in the act of 1874, and became thereby disabled from acquiring, as it afterwards did, a controlling majority of the stock of the Great Northern Company. And upon the subject of purchasing a railroad by buying all the stock, I am cited [704] to chapter 94, Gen. Laws Minn. 1881, which provides that any railroad corporation may lease or purchase or become the owner or control or hold stock of any other railroad, when their respective railroads can be connected together and form a continuous line, with or without branches. But in that case the purchase of the stock would be by a railroad corporation having capacity to operate the railroad, even aside from the authority to do so either expressly or impliedly granted by this statute; and such purchaser could therefore rightfully assume the control, management, and operation of the railroad, the stock of which it had so acquired.

I am also cited to the case of *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838. Pearsall was the owner of 500 shares of the stock of the Great Northern Company, and filed the bill, in behalf of himself and other stockholders, to enjoin the Great Northern Company from entering into and carrying out an agreement with bondholders under mortgages of the Northern Pacific Company, who were about to foreclose the mortgages and reorganize the company, issuing new bonds to the

amount of $100,000,000, to be guarantied by the Great Northern Company, also stock to a like amount, one-half of which was to be transferred to the stockholders of the Great Northern Company in consideration of such guaranty, and thereafter at all intersecting points traffic was to be exchanged between the two companies, and the common earnings therefrom divided on a mileage basis. The bill averred that the threatened contract, if carried out, would amount to a consolidation of the two railroads, in violation of the said Minnesota statute of 1874, and endanger the value of complainant's Great Northern stock. The court held that the transfer of one-half of the capital stock of the Northern Pacific Company to the shareholders of the Great Northern Company, as a body, for a consideration coming from the Great Northern Company as a corporation, was virtually a transfer of the stock to the Great Northern Company, who, having thus acquired one-half of the stock of the Northern Pacific Company, would easily and certainly obtain the little more necessary to assure it the mastership of the Northern Pacific Company, and result in the probable amalgamation of the two companies in violation of the statute; thus endangering the value of the complainant's shares. The relief sought by the complainant was therefore granted to protect his property interests against probable threatened danger. But there, again, the purport of the holding was that, if one railroad corporation acquired a controlling majority of the stock of another railroad corporation, it could operate it, or control its operation, under its own ample franchises and powers to operate railroads. The case is far from sustaining the idea that if a single investor in railroad stocks, whether a natural person or a corporation without railroad franchises, should acquire by purchase a majority or the whole of the stock of both the Northern Pacific Company and the Great Northern Company, that would work any consolidation of those two companies, or that such purchaser would have any power to manage or operate the railroads of both or either of said railroad companies. In the case under consideration the court is careful to note the difference in effect between the purchase of a controlling majority of the stock of a rail- **[705]** road corporation

by a rival railroad corporation, which might control, manage and operate it, and a purchase of the same stock by an individual or individuals, though holding whatever amount of stock in the same rival railroad company. The court says:

"Doubtless these stockholders [of the Great Northern Company] could lawfully acquire by individual purchases a majority or even the whole of the stock of the reorganized [Northern Pacific] company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations, with no interests, as such, in common."

I am not able to agree with the suggestion that this expression may be regarded as one not necessary to the decision, and therefore perhaps not carefully considered. On the contrary, it seems to me to be a carefully considered and necessary limitation or explanation of general language elsewhere made use of in that decision.

It follows that as the Northern Securities Company is merely an invester in the stocks of these railroad corporations, not being itself a railroad corporation, and being without franchise, power, or authority to manage, control, or operate any railroad, its ownership of a majority of the stocks of these two railroad companies does not come within the prohibitive language of the statute of 1874. The two companies still remain separate corporations, with no interests, as such, in common. The case would not be different if one natural person with abundant capital should invest in the majority of the stocks of one of these companies, and another like person should invest in the majority of the stocks of the other company. The interest of the two, if they chose to act in harmony, would be the same as the interest of one person owning the whole.

But it is urged that the ownership by the Northern Securities Company of such a large majority of the stock of these two parallel railroads creates a monopoly, having a tendency to prevent competition between these railroads, and presents a case within the mischief intended to be remedied by the statute of 1874, and should be held, even if outside of the language of that statute, to be within the intention of the Legislature which enacted that statute; also that it is contrary to the public policy of the state, which seeks to promote competition between railroads as well as other com-

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mon carriers. The terms "monopolies and trusts" are perhaps, in cases like this, too often employed at the bar to all business enterprises requiring and employing great aggregations of wealth, and in the vague sense in which, at the hustings, they are use to arouse envy and jealousy, forgetting the manifest necessity of such aggregations of wealth to produce the commodities, and their transportation, which our civilization and comfort require. Every railroad corporation is in one sense a monopoly. It has franchises giving rights and powers not common to all citizens. It alone can operate its own railroad, though subject to reasonable regulation by the state. All monopolies, in a strict sense, rest upon some grant by the sovereign power of an exclusive franchise or privilege. And with modern facilities for transportation and communication, all the statutes and learning respecting "forestalling," "regrating," and "engrossing" have become archaic, and even the meaning of those terms will hardly now be recognized. **[706]** Where a statute like that of 1874, with particular detail, designates parties whom it prohibits from doing specified acts, not otherwise unlawful, to ask a court to extend that statute to parties not named, or to acts not so specified, on the ground that such extension may be conjectured to be within the intention of the Legislature, is an invitation to enter the domain of judicial legislation. The policy of the state appears in its legislation, and, where a policy is made clear by uniform legislation, it has much weight in the interpretation of any doubtful statute. It is clear from several statutes that the policy of the state of Minnesota is opposed to the consolidation of parallel railroads, and to the control by any railroad company of the operation and management of another company's parallel and competing railroad. It is deemed advantageous to the public that at least reasonable competition between such lines of railroad shall continue. While acts of railroad corporations, lessees, purchasers, and managers contrary to this policy are prohibited, there is no statute disclosing any policy as to what parties (other than competing railroad corporations) shall own the stock of any railroad corporation, or of any number of such corporations, or respecting the amount of such stock which any one party

may own. The bill truthfully states, in substance (paragraph 7), that it has been the settled policy of Minnesota, since its organization as a territory, to develop its resources by the encouragement of railroad building therein, and refers to the many grants of land in aid of railroad construction. As showing the same policy, reference also might be made to very many donations for the like purpose by counties, cities, and towns, under legislative authority. The policy of the state in respect to the operation and management of railroads is disclosed by its statutes; especially by sections 379 to 403, vol. 1, General Statutes of Minnesota of 1894, under the heading of "Railroad and Warehouse Commission," which closely follows the provisions of congressional legislation respecting interstate commerce, and, under clearly specified regulations, places the supervision, oversight, and control of those matters—particularly the rates for transportation—in the hands of the designated state officials. It is plain from these statutes, as construed by the Supreme Court of the state, that it is the policy of the state that the railroads, with their rolling stock and appliances, shall be kept in a high state of safety and efficiency, and that rates of transportation, while kept ample to secure such result, shall always be fair, reasonable, stable, and uniform. Schedules of rates are to be kept publicly posted at every station, and no change or deviation from such published rates is permitted, nor any rebates allowed or advantage to one shipper over another, and no change in such rates is permitted until after 10 days' previous published notice has been given. Under this system shippers can count accurately the cost of transportation as an expense in their business, with the assurance that others engaged in like business must incur exactly the like expense; and untrammeled competition between rival railroads, resulting in rate wars, sporadic struggles for particular contracts or consignments, as well as all rebates, open or secret, all alike unfair or ruinous to carriers and shippers, are prohibited, under penalties, and intended to be entirely eliminated and **[707]** done away with, leaving as the only bases of competition between rival carriers the furnishing of the better accommodations, and the greater safety and celerity of carriage. All com-

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plaints that published rates are unreasonable are heard and determined by these state officials, who may fix rates binding on the railroads; thus necessarily making rates uniform as between rival railroads. As a result of this policy, and the absolute power of the state officials to fix rates, and keep them at the lowest reasonable figures, competition between rival railroads no longer reduces rates, as it did when railroad companies alone controlled them. On the contrary, where two or more railroads divide the transportation between two places, the necessity of considering greater fixed charges and greater cost of administration and operation may make the reasonable rate for transportation greater than if the whole business could be done, and was in fact done, by one railroad. However that may be, the Northern Securities Company is but an investing stockholder in these two railroad companies, without power to consolidate them or to interfere with the management or control of either. Because of its large holdings of these stocks, it may elect the board of directors of each, who must be composed of entirely different persons. Each board will appoint the officers and control the business and affairs of its own corporation, and will naturally seek to increase its business and property. Neither has any power to control the other nor to contract with the other in restraint of trade. There is no presumption that either will disobey the law, or be guilty of the commission of penal offenses. Should they do these things, then the anti-trust act of Minnesota will be for the first time violated, and the railroad corporations and their offending officials will be amenable to punishment, and to appropriate legal or equitable proceedings.

Decree will be entered dismissing the bill.

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[956] ELLIS *v.* INMAN, POULSEN & CO. ET. AL.[a]

(Circuit Court, D. Oregon. July 30, 1903.)

[124 Fed., 956.]

MONOPOLIES—ANTI-TRUST LAW—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.—A combination between all the lumber manufac-

[a] Judgment reversed by Circuit Court of Appeals, Ninth Circuit (131 Fed., 182). See p. 577.

Opinion of the Court.

turers of a city to raise and maintain the price of lumber to local consumers, and to refuse to sell lumber to consumers who purchase any part of their supply from outside mills, some of such mills supplying the local market being situated in another state, is not in violation of the Sherman anti-trust law, as in restraint of interstate commerce, its effect on such commerce being indirect and incidental only.[a]

At Law. On demurrer to complaint.

[957] *Veazie & Freeman*, for plaintiff.

Cake & Cake, for defendant Inman, Poulsen & Co.

Wm. D. Fenton, for other defendants.

BELLINGER, District Judge.

The defendants, comprising all the lumber manufacturers of Portland, have entered into a combination to monopolize the local lumber market, and to advance the price of lumber sold for use within the city. There are a number of outside mills, including two mills at Vancouver, in the state of Washington, convenient to the Portland market, and capable of supplying that market with rough lumber, but without adequate facilities for supplying finished and kiln-dried lumber. In consequence of the high prices charged by the combination, the plaintiff, who is a contractor and builder in Portland, and others similarly situated, purchased rough lumber at the Vancouver mills, and, being under the necessity of having finished and dried lumber, applied to the defendants therefor. The defendants refuse to sell plaintiff lumber of this character unless he will agree to buy hereafter all the lumber required by him for use in the city of Portland of them, and will pay, in addition to their usual prices, the difference between the prices at which plaintiff purchased rough lumber at Vancouver and the prices charged for that kind of lumber by the defendants. The combination in this case is to advance the price of lumber to Portland consumers. It has no reference to the trade in lumber with Vancouver. If this is a wrong, it is a wrong done to such consumers, who are compelled to pay extortionate prices to the monopoly.

[a] Syllabus copyrighted, 1903, by West Publishing Co.

Opinion of the Court.

It is not contended that the advance of price in the local market—the thing for which the combination was formed—operates in restraint of the trade in lumber with Vancouver. Such advance has a contrary tendency so far as rough lumber is concerned. And it is not apparent why the defendants, having a particular kind of lumber not obtainable elsewhere, may not refuse to sell such lumber to those who patronize outside mills in the purchase of a part of their supplies, or why the defendants may not discriminate in prices in favor of those who purchase exclusively from them. The tendency of this discrimination is to keep those who are compelled to have finished and dried lumber from purchasing rough lumber at outside mills. Assuming that this operates in restraint of the trade in rough lumber between Vancouver and Portland, it is not such a result as follows directly or immediately from the acts complained of. The discrimination is against all outside mills. A relatively small number of these happen to be located at Vancouver. The remainder are in Oregon, and convenient to the Portland market. Among the Portland purchasers of rough lumber at these outside mills there are some who are consumers of finished and dried lumber. Some of these purchasers of rough lumber resort to the mills at Vancouver, and of these some require finished and dried lumber; and it so happens (but as to this the allegations of the complaint are not definite) that the outside mills, including those at Vancouver, cannot or do not furnish an adequate supply of such lumber; and so we at length reach a point where, through the intervention of special and temporary conditions, [958] the working of the combination tends indirectly to restrain the trade in rough lumber between Vancouver and Portland. It also in the same way tends to create a trade in finished and dried lumber between these points, since there is no reason why the outside mills cannot, in a short time, be prepared to supply the demand for finished and dried as well as rough lumber; and yet the combination cannot be credited, because of this tendency, with being organized in furtherance of such a trade. If the defendants should greatly reduce the price of all kinds of lumber to all purchasers, it would have a tendency to lessen, if it did not destroy,

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the trade in lumber now carried on between Vancouver and Portland, yet they would not be accused in so doing of acting in restraint of that trade. No more can they be said to be so acting within the meaning of the act of congress when they raise the price of lumber to their Portland consumers, or discriminate in the sale of special kinds of lumber in favor of customers who buy exclusively from them.

The demurrer is sustained.

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[454] WHITWELL *v.* CONTINENTAL TOBACCO CO. ET AL.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1903.)

[125 Fed., 454.]

ANTI-TRUST ACT—WHAT CONTRACTS, COMBINATIONS, OR CONSPIRACIES VIOLATE.—Every contract, combination, or conspiracy, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, is in restraint of interstate commerce, and violates section 1 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

SAME—WHAT ACTS, CONTRACTS, AND COMBINATIONS DO NOT VIOLATE.—Acts, contracts, and combinations which promote, or only incidentally or indirectly restrict, competition in commerce among the states, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce, or violative of section 1 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

[455] SAME—CONSTRUCTION.—The anti-trust act should have a reasonable construction—one which tends to advance the remedy it provides, and to abate the mischief at which it was leveled.

SAME—ATTEMPTS TO MONOPOLIZE A PART OF INTERSTATE COMMERCE.—Every attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates section 2 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

SAME.—Attempts to monopolize a part of commerce among the states which promote, or only incidentally or indirectly restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were not, made illegal or

punishable by section 2 of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], because such attempts are indispensable to the existence of any competition in commerce among the states.

SAME—RESTRICTION OF SALES OF GOODS.—A manufacturer, a corporation, and its employé restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but refused to refrain from handling the goods of the corporation's competitors, and sued it for damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again. *Held*, the restriction of their own trade by the defendants to those purchasers who declined to deal in the goods of their competitors was not violative of the anti-trust act.

SALES—RESTRICTION—DAMAGES.—The owner of goods may dictate the prices at which he will sell them, and the damages which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit constitute no legal injury, and are not actionable, because they are not the result of any breach of duty or of contract by the owner.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

Dan W. Lawler (*Frank Arnold*, on brief), for plaintiff in error.

C. A. Severance and *Junius Parker* (*W. W. Fuller*, *F. B. Kellogg*, and *R. E. Olds*, on the brief), for defendants in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge.

This is an action by the plaintiff, Joseph P. Whitwell, to recover treble damages from the Continental Tobacco Company, a corporation, and from one of its employés, George E. McHie, under the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], on the sole ground that the defendants refused to sell the manufactured products

of the tobacco company to him at prices which would enable him to resell them to others at a profit, unless he refrained from buying, selling, or han- **[456]** dling plug chewing tobacco made by independent manufacturers who were competing with the tobacco company for the trade of the country. All the parties to the suit were engaged in interstate commerce, and the products in question were the subjects thereof. The main question which the case presents is, may one engaged in commerce among the states lawfully select his customers, and sell only to those who do not buy or sell the wares of his competitors, or is such a restriction of his own trade by a manufacturer or merchant and his employés a "contract, combination or conspiracy in restraint of trade" or an "attempt to monopolize any part of trade," within the meaning of the act of July 2, 1890, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] ?

An analysis of the averments of the complaint to which the court below sustained a general demurrer will demonstrate the fact that the crucial question in this case has been correctly stated. The material facts which those averments disclose are these: The plaintiff is a jobber of tobacco, and of the products of tobacco, at St. Paul, Minn. The tobacco company is a manufacturer and merchant, and McHie is its agent and employé. The tobacco company owns and controls most of the valuable and leading brands of plug and chewing tobacco in the United States, and fixes the market prices thereof. The company and its agent, McHie, had long been, and on May 1, 1902, still were, in the practice of selling its goods to jobbers in this way: They allotted to an intending purchaser an amount of its goods which he was required to buy during each succeeding period of four months. This allotment was much in excess of the amount which he would be able to sell during that time. They fixed the prices of the goods comprising the allotment so high that, if the purchaser paid the prices thus fixed, he could not make any profit by buying and selling the commodities. They required each purchaser to refrain from dealing in plug chewing tobaccos made by independent and competing manufac-

turers. If the purchaser complied with this requirement, they invariably reduced his allotment to the amount he was able to sell, and paid back to him such a percentage of the aggregate price of the goods he bought that the handling of these commodities was by reason of this repayment alone made profitable to him. If the purchaser refused to comply with this requirement, they refused to reduce the amount of his allotment or the prices of his goods, so that the business was unprofitable to him. The plaintiff had long participated in this method of transacting business, had been handling the products of the tobacco company in accordance with it, and had an established business in the purchase of tobacco and its products, and in the sale of them throughout the states of Minnesota, North Dakota, and South Dakota, when on May 1, 1902, the defendants made an allotment to him for the succeeding four months, and offered to furnish their commodities to him in accordance with their established practice. He, however, refused to refrain from handling the goods of independent manufacturers who were competing with the defendants. Thereupon the latter refused to reduce the allotment which they had made to him, or the prices thereof, so that the handling of the goods of the tobacco company would be profitable to the plaintiff, and he did [457] not purchase, or agree to purchase, their goods. He was unable to procure them elsewhere, and sustained damages in the sum of $280.

No other facts are stated in the complaint. There are, however, allegations that the defendants combined and conspired to regulate and to raise the prices of their goods, and to control the output thereof, with the intent to monopolize trade and commerce among the states of Minnesota and North Dakota and South Dakota; that they combined to arbitrarily fix the prices of their goods, independently of their natural market value, and to refuse to sell them on equal terms to all intending purchasers; and that they did all these things in restraint of trade and commerce among the states. But the only way in which the plaintiff avers that these defendants restrained or attempted to monopolize interstate trade, or disclosed their intent to do so, was by restricting the sale of their own goods to customers who

refrained from handling the wares of their competitors by making their sales on the terms which have been stated. The general averments of the intent, purpose, and effect of the acts of the defendants may therefore be laid aside here. They serve no purpose save to foreshadow the argument of counsel relative to the legal effect of the facts which the complaint sets forth. They neither state, nor aid in the statement of, any cause of action, because they disclose no fact, and the only question here is whether the facts stated in the complaint constitute a cause of action. The only facts thus stated are that the tobacco company and its employé refused to make sales of its products to the plaintiff, or to others who desired to purchase, on terms that would be profitable to them, unless they refrained from dealing in the goods of its competitors. Was this act, or the course of dealing which it illustrates, a violation of the anti-trust law of 1890? That law provides:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several states, or with foreign nations, is hereby declared to be illegal. * * *

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, * * * shall be deemed guilty of a misdemeanor. * * * *"

Under this act, every contract, combination, and conspiracy in restraint of trade among the states is illegal. Every person who engages in any such combination violates this law, and a corporation is a person. Act July 2, 1890, c. 647, §§ 1, 8, 26 Stat. 209, 210 [U. S. Comp. St. 1901, pp. 3200, 3202]. Hence the real question in every case which arises under this law is whether or not the contract, combination, or conspiracy challenged is in restraint of trade among the states. It has now been settled by repeated decisions of the Supreme Court that this question must be tried, not by the intent with which the combination was made, nor by its effect upon traders, producers, or consumers, but by the necessary effect which it has in defeating the purpose of the law. That purpose was to prevent the stifling or substantial restriction of competition, and the test of the legality of a combination under the act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among [458] the states. If its neces-

sary effect is to stifle or to directly and substantially restrict free competition, it is a contract, combination, or conspiracy in restraint of trade, and it falls under the ban of the law. *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505, 576, 577, 19 Sup. Ct. 25, 43 L. Ed. 259; *U. S.* v. *Northern Securities Co.* (C. C.) 120 Fed. 721, 725; *U. S.* v. *Jellico Mountain Coal & Coke Co.* (C. C.) 46 Fed. 432, 12 L. R. A. 753; *Lowry* v. *Tile, Mantel & Grate Ass'n* (C. C.) 98 Fed. 817, 826; *Id.* (C. C.) 106 Fed. 40, 45; *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 294, 29 C. C. A. 141, 163, 46 L. R. A. 122; *U. S.* v. *Coal Dealers Ass'n* (C. C.) 85 Fed. 252; *Chesapeake & O. Fuel Co.* v. *U. S.*, 115 Fed. 610, 619, 53 C. C. A. 256, 265; *Gibbs* v. *McNeeley*, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152; *Brown* v. *Jacobs Pharmacy Co.* (Ga.) 41 S. E. 553, 57 L. R. A. 547; *Arnot* v. *Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159.

If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation. *Hopkins* v. *U. S.*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson* v. *U. S.*, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S. Chemical Co.* v. *Provident Chemical Co.* (C. C.) 64 Fed. 946; *California Steam Navigation Co.* v. *Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Smalley* v. *Greene*, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; *Schwalm* v. *Holmes*, 49 Cal. 665; *In re Greene* (C. C.) 52 Fed. 104, 115, 116, 117; *In re Grice* (C. C.) 79 Fed. 627, 644; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 7 Sup. Ct. 427, 41 L. Ed. 832; *State* v. *Goodwill* (W. Va.) 10 S. E. 285, 286, 6 L. R. A. 621, 25 Am. St. Rep. 863; *People* v. *Gillson*, 109 N.

Y. 389, 398, 17 N. E. 343, 4 Am. St. Rep. 465; *Butchers' Union Co.* v. *Crescent City, etc., Co.*, 111 U. S. 746, 755, 4 Sup. Ct. 652, 28 L. Ed. 585; *Welch* v. *Phelps & Bigelow Windmill Co.* (Tex. Sup.) 36 S. W. 71; *Commonwealth* v. *Grinstead* (Ky.) 63 S. W. 427; *Walsh* v. *Dwight* (Sup.) 58 N. Y. Supp. 91, 93; *Brown* v. *Rounsavell*, 78 Ill. 589; Noyes on Intercorporate Relations, § 388, p. 563.

In *Hopkins* v. *U. S.*, 171 U. S. 592, 19 Sup. Ct. 45, 43 L. Ed. 290, the Supreme Court said:

"The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. * * * To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act."

[459] And at page 600, 171 U. S., page 48, 19 Sup. Ct., 43 L. Ed. 290, it said:

"The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements."

In *Anderson* v. *U. S.*, 171 U. S. 616, 19 Sup. Ct. 54, 43 L. Ed. 300, the court quoted this sentence from the opinion in *Smith* v. *Alabama*, 124 U. S. 465, 473, 8 Sup. Ct. 564, 566, 31 L. Ed. 508, "There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations," and then said:

"The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise there is scarcely an agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to in some obscure way affect that commerce, and to be therefore void."

In *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 568, 19 Sup. Ct. 31, 43 L. Ed. 259, the Supreme Court, after reviewing and af-

firming the case of *Hopkins* v. *U. S.* and the rule which has been quoted from that case, declared:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. * * * To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri Case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition. Strike down or stipulate away that right, and competition is not only restricted, but destroyed. Hence agreements of competing railroad companies to intrust their power to fix rates of transportation to the same man or body of men (*U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *U. S.* v. *Northern Securities Co.* [C. C.] 120 Fed. 721), and contracts of competitors in the production or sale of merchantable commodities to deprive each competitor of the right to fix the prices of his own goods, the terms of the sale, or the customers to whom he shall dispose of them, and either to fix these prices, terms, and customers by the agreement of **[460]** the competitors, or to intrust the power to dictate them to the same man or body of men (*U. S.* v. *Jellico Mountain Coal & Coke Co.* [C. C.] 46 Fed. 432, 12 L. R. A. 753; *U. S.* v. *Coal Dealers' Ass'n* [C. C.] 85 Fed. 252; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; *Chesapeake & O. Fuel Co.* v. *U. S.*, 115 Fed. 610, 53 C. C. A. 250; *Gibbs* v. *McNeeley*, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152; *Lowry* v. *Tile, Mantel & Grate Ass'n* [C. C.] 98 Fed. 817; Id. [C. C.] 106 Fed. 40), necessarily have the effect either to stifle competition entirely, or to directly and substantially restrict it, because such contracts deprive the rivals in trade of

their best means of instituting and maintaining competition between themselves.

In the contract, combination, or conspiracy which is charged against the defendants in this case there is nothing of this character. The tobacco company is a manufacturer and trader, and McHie is its employé. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employé, no such contract, combination, or conspiracy between them can be a violation of this law unless it is in restraint of interstate commerce; and the only combination charged against the defendants is their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition between them is or can be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their goods and the terms at which they would dispose of them to all intending purchasers.

The tobacco company and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi public service, like railroad and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale. *In re Greene* (C. C.) 52 Fed. 104, 115; *In re Grice* (C. C.) 79 Fed. 627, 644; *Walsh* v. *Dwight* (Sup.) 58 N. Y. Supp. 91, 93; *Brown* v. *Rounsavell*, 78 Ill. 589; *Commonwealth* v. *Grinstead* (Ky.) 63 S. W. 427; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 17

Sup. Ct. 427, 41 L. Ed. 832. There is nothing in the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], which deprived any of these competitors of these rights. If there had been, the law itself would have destroyed competition more effectually than any contracts or combi- **[461]** nations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade.

The acts of the defendant which are alleged by the complaint in this action to constitute an unlawful restraint upon interstate commerce are nothing more than the lawful exercise of these unquestioned rights which are indispensable to the existence of competition or to the conduct of trade. The tobacco company and its employé fixed the prices of its commodities so high that the plaintiff could not profitably buy them. This was no restriction upon free competition, because it left the rivals of the company free to sell their competing commodities at any price which they elected to charge for them. It would have been no violation of the law under consideration if the tobacco company and its employé had combined to refuse to sell any of its commodities at any price, and to retire from the business in which they were engaged entirely. Much less could it be a violation of this act for them to fix their prices too high for profitable investment by the plaintiff.

The tobacco company and its employé sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company.

The tobacco company and its employé were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills.

It is contended, however, that this selection by the defendants of customers who refrained from selling the goods of their competitors violated section 2 of the anti-trust act, because it was an **[462]** "attempt to monopolize * * * part of the trade or commerce among the several states." It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by section 2 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts

to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly. The purpose of the act of July 2, 1890, was, however, to prevent the stifling of competition, not to destroy it or to foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy, and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of interstate commerce is illegal. The act must, as the Supreme Court has twice declared (*Hopkins* v. *U. S.*, 171 U. S. 578, 600, 19 Sup. Ct. 40, 43 L. Ed. 290; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259), have a reasonable construction. The purpose of the second section is the same as that of the first—to prevent the restriction of competition—and the two sections ought to receive similar interpretations. The Supreme Court has declared that the true construction of the first section is that no contract, combination, or conspiracy is denounced by it unless its necessary effect is to directly and substantially restrict competition in commerce among the states. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the states is made illegal or punishable by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states. The acts of the defendants had no such effect. They evidenced nothing but the legitimate efforts of traders to secure for themselves as large a part of interstate trade as possible, while they left their competitors free to do the same. It was not—it could not have been—the purpose or the effect of the second section of this law

to prohibit or to punish the customary and universal attempts of all manufacturers, merchants, **[463]** and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. The acts of the defendants were of this nature, and they did not violate the second section of the law. An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states.

There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or of a duty to, him. The damages from other acts or omissions form a part of that damnum absque injuria for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price—much less, at prices so low that he could realize a profit by selling them again to others. The com-

plaint therefore fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants and the judgment below is affirmed.

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[593] PHILLIPS *v.* IOLA PORTLAND CEMENT CO.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1903.)

[125 Fed., 593.]

ANTI-TRUST ACT—TEST OF VALIDITY OF CONTRACT OR COMBINATION UNDER.—The test of the violation of the anti-trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), by a contract or combination, is its effect upon competition in commerce among the states. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law, but if it promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law.

SAME—CONTRACT RESTRICTING TERRITORY WITHIN WHICH PURCHASERS MAY SELL.—A contract of sale by a manufacturer to jobbers of some of its product, to be shipped across state lines to the latter, whereby the parties agree that the purchasers shall not sell, ship, or allow any of the product thus purchased to be shipped, outside of a certain state, is not in restraint of trade or illegal under the act of July 2, 1890.

(Syllabus by the Court.)

[594] In Error to the Circuit Court of the United States for the Western District of Missouri.

John Charles Harris (*Edward F. Harris*, on the brief), for plaintiff in error.

James C. Williams, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge.

This is a writ of error to review a judgment for the plaintiff below, the Iola Portland Cement Company, a corporation, against Thomas H. Phillips, in an action for damages

for the breach of a contract of sale of cement. The company was a manufacturer of cement in the state of Kansas. The defendant below, Phillips, was a member of the copartnership of William Parr & Co., who were merchants engaged in business at Galveston, in the state of Texas. On January 24, 1901, Parr & Co. made a contract with the cement company whereby they agreed to purchase of it, during the year 1901, 50,000 barrels of Iola portland cement to be delivered free on board the cars at Iola, in the state of Kansas, and to pay therefor $1.20 per barrel. They further agreed "not to sell said cement, ship same, or allow same to be shipped," outside of the state of Texas. Under this contract they accepted and paid for 24,580 barrels of the cement, and refused to accept 25,420 barrels thereof. The cement company brought an action against them to recover the damages which it sustained by the failure of the purchasers to accept and pay for these 25,420 barrels, and Phillips, the only defendant served with process, answered that the contract was illegal and void under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], because it provided that Parr & Co. should not sell the cement, ship it, or allow it to be shipped, without the state of Texas.

It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combina-

tions and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. *Hopkins* v. *U. S.*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson* v. **[595]** *U. S.*, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S.* v. *Northern Securities Co.* (C. C.) 120 Fed. 721, 725. The application of this rule to the facts of the case in hand leaves no doubt that there was nothing in the contract before us obnoxious to the provisions of the anti-trust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by competing manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the states. It left the manufacturers who were competing with the plaintiff for the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed. If it had the effect to restrain Parr & Co. from using the product which they purchased to compete with other jobbers or manufacturers in the country beyond the limits of the state of Texas, this restriction was not the chief purpose or the main effect of the contract of sale, but a mere indirect and immaterial incident of it. The agreement of sale imposed no direct restriction upon competition in commerce among the states, did not constitute a restraint of that commerce, and was not obnoxious to the provisions of the act of July 2, 1890.

For a more extended consideration of the principles upon which this decision is based, for a citation, review, and analysis of the authorities which sustain them and which compel the ultimate conclusion which we have reached in this case, reference is made to the opinion of this court in *Whitwell* v. *Continental Tobacco Co.* (which is filed herewith) 125 Fed. 454. A repetition of the citation and review of authorities, and of the more exhaustive discussion of principles there indulged in, would be useless here, and it is omitted.

The evidence disclosed the fact that shortly after the expiration of the year within which the defendants had agreed to receive and pay for the cement the plaintiff sold the 25,420 barrels, which the defendants refused to take, for $1.10 per barrel. The president of the plaintiff testified that the cost of selling this cement was about 10 cents per barrel, that it did not cost any more to sell the cement which had been previously sold to Parr & Co. than it did to sell any other cement, but that the cost of selling any cement was about 10 cents per barrel. The court below instructed the jury that, if they believed that the cost of selling this cement was 10 cents per barrel, they might allow that amount as a part of the damages which the plaintiff was entitled to recover. This instruction is assigned as error. But it was manifestly right. The plaintiff had once incurred and paid the cost of selling the cement in question to Parr & Co., and had obtained a valid contract for its purchase price. Their failure to comply with this agreement imposed upon the plaintiff the necessary expense of making a second sale of that portion of the cement already sold which the defendants refused to accept.

[596] It is assigned as error that the court below refused to admit in evidence a telegram from the president of the Iola company to Parr & Co., dated January 24, 1901, the day of the date of the contract, to the effect that the plaintiff would guaranty a rate of freight of five cents per hundred less than Kansas City rates to all Texas points. But there was no error in this ruling. The telegram was not admissible to establish any agreement to guaranty this rate of freight, and a breach of that agreement as a defense to the action, because no such defense was pleaded. It was not admissible to modify or change the written contract of January 24, 1901, because if it was sent before or at the time that the contract was executed it was merged in that contract and became ineffective, and if it was sent after that contract was made it was not pleaded and had no place in the trial of this case.

Another alleged error specified is that the court below

Syllabus.

refused to admit in evidence a letter from the plaintiff to the defendants, dated February 10, 1902, in which they wrote that they had not done an agency business and requested a proposition. It is contended that this letter was competent to establish the fact that the relation between the plaintiff and the defendants under the contract in suit was that of vendor and vendee, and not that of principal and agent. Conceding that this letter had a tendency to establish that fact, its rejection did not prejudice, and could not have prejudiced, the defendants, because the relation of vendor and vendee was proved by the contract, because the case was tried, and the court charged the jury, and this court has determined the case, upon that theory, and error without prejudice is no ground for reversal.

The judgment below is affirmed.

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[364] UNITED STATES CONSOLIDATED SEEDED RAISIN CO. *v.* GRIFFIN & SKELLEY CO.

(Circuit Court of Appeals, Ninth Circuit. November 9, 1903.)

[126 Fed., 364.]

MONOPOLIES—LEGALITY OF CONTRACTS—LICENSES UNDER PATENTS.—Contracts by which a number of patents covering similar inventions are conveyed by the several owners to one of the parties, which grants licenses under all to the others, are not void as against public policy, or as in violation of the Sherman anti-trust law, because of provisions intended to protect and keep up the patent monopoly by requiring the licensor to prosecute all infringers, limiting the licenses to be granted to such licensees as shall be agreed on, and imposing conditions on each licensee as to the use and ownership of the patented machines, and prohibiting him from using any others.[a] [b]

PATENTS—RIGHTS OF PATENTEE—EFFECT OF STATE LAWS.—Rights acquired under the patent laws of the United States cannot be affected by a state statute.

CONTRACTS—EFFECT OF ILLEGAL PROVISIONS—DIVISIBILITY.—Stipulations in a contract which are invalid as in restraint of trade, if

[a] Validity of monopolistic contracts as affected by public policy, see note to *Cravens* v. *Carter-Crume Co.*, 34 C. C. A. 486.

[b] Syllabus copyrighted, 1904, by West Publishing Co.

Statement of the Case.

capable of being construed divisibly, do not affect the validity of other provisions.

SAME—VALIDITY—WHEN QUESTION FOR JURY.—Conceding that a contract legal in its terms and in its consideration may be rendered illegal as against public policy by reason of the intention of the parties to so use it as to commit civil injury to third persons, where the evidence as to such intention is conflicting the contract cannot be declared illegal by the court as matter of law.

In Error to the Circuit Court of the United States for the Northern District of California.

The plaintiff in error is a corporation created under the laws of New York. Prior to June 26, 1900, it was the owner of two certain patents for machines for seeding and processing raisins. Other persons and corporations at Fresno, Cal., engaged in the raisin-seeding business, owned certain other patents. Litigation had arisen between the owners of these patents. To end this litigation, and to avoid it in the future, an agreement was made on June 26, 1900, between the plaintiff in error, as the party of the first part, and the Forsyth Raisin Process Company, the Forsyth Seeded Raisin Company, the Griffin & Skelley Company, the California Seeding Machine Company, William M. Griffin, Thomas E. Langley, Cary S. Cox, and Lee L. Gray, as parties of the second part. The agreement recites that the party of the first part is the owner of patents numbered 543833 and 543834, and that the parties of the second part own patents numbered 611782, 641938, 641939, 614178, 592131, 602698, 619698, and 679223, and that it is deemed expedient and for the interest of all parties that all of said letters patent be combined for mutual protection and assistance. It thereupon provides, in substance, that the parties of the second part shall assign their various patents to the party of the first part, and that the latter shall use every reasonable effort to defend and protect the several inventions and letters patent in the interest of all, and that it shall grant licenses under said patents, institute and defend suits to protect said inventions and letters patent. The agreement provides further that the royalties which shall be received on license contracts shall, after the deduction of expenses and other charges, as provided for in the agreement, be paid 40 per cent. to the plaintiff in error on [365] account of its patents, 30 per cent. to the Forsyth Raisin Process Company on account of its patent, 20 per cent. to the present owners of letters patent 619698, 6 per cent. to Thomas E. Langley and C. S. Cox, and 4 per cent. to the California Seeding Machine Company. The agreement provides for an appointment of an advisory committee of four members, two to be designated by the party of the first part, and two by the parties of the second part; said committee to have authority to determine to whom licenses shall be granted under the letters patent, the terms and conditions thereof; and it gives the committee power to employ a financial agent, whose duty it shall be to collect and distribute the royalties under such licenses. The agreement makes further provision for the payment of salaries of officers, taxes, and other expenses, makes reference to a suit then pending in the United States Circuit Court for the Northern District of California by the Forsyth Raisin Process Company against A. L. Hobbs & Co. on letters patent 611782, and provides that the same shall be prosecuted without delay at the expense of the

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plaintiff therein. The agreement proceeds to provide that, in case any of the said mentioned letters patent shall be judicially determined to be invalid by a court of last resort, then the share of royalties in the agreement apportioned to and on account of such letters patent shall thereafter not be paid.

The licenses issued under this agreement were all in the one form. They recited that the plaintiff in error, the licensor, is the sole owner of the letters patent referred to in the agreement; and, first, that it grants to the licensee the right to use machines and processes embodied in and covered by said letters patent throughout the United States for the life of said patents; second, that the party of the second part shall pay therefor as license fee one-eighth of one cent for each pound of raisins seeded or processed under said letters patent during the years 1900 and 1901, and thereafter one-fourth of a cent per pound; third, that the licensor shall from time to time lease to the licensee raisin-seeding machines, processes, appliances, fittings, etc., as the same may be required, upon payment of the actual cost of the same, title to such machines, however, to remain in the licensor; fourth, that the licensee "shall use every reasonable endeavor to secure and promote the business of raisin-seeding under this contract, shall neither sublet any of said machines, nor allow any parties, except its own employés, to have possession or control of or to use said machines; shall not use any other raisin-seeding machines during the life of this contract than those furnished by the first party, or with their consent; and shall not buy, sell, nor deal in raisins seeded or treated by any other machines or processes than those of the first party." The fifth provision requires the licensee to keep suitable books of account, open to the inspection of the licensor. The sixth prohibits the licensor from licensing any other party under said letters patent for less royalty or compensation than one-half a cent per pound for raisins seeded under or processed under the said patents, except with the consent of four of certain named of the licensees. The license contract contains the provision that the licensor shall vigorously prosecute infringers of said letters patent, so as to prevent, as far as possible, all unlawful interference with the business and rights of the licensee under and by virtue of the contract.

The plaintiff in error brought an action at law against the defendant in error, alleging that on June 27, 1900, one of the above-mentioned contracts of license was entered into and executed by the said parties; that thereafter, during the years 1900 and 1901, the defendant in error processed about 12,000,000 pounds of raisins, the license fees and rentals for the same, as provided for in said contract, being the sum of $15,000; that no part of said sum has been paid except $3,759.42, and that the remainder, $11,240.58, is due and unpaid. The plaintiff in error, as a second cause of action, alleged that after March 15, 1901, the defendant in error willfully and maliciously, and for the purpose and intent of damaging and injuring the plaintiff in error, failed, refused, and neglected to use every or any reasonable endeavor to secure or promote the business of raisin-seeding under said contract, and did sublet and transfer certain and sundry raisin-seeding and processing machines which it owned and was operating prior to the execution of the contract of June 27, 1900, to other parties, who were not its own employés, and did authorize, permit, and allow such other parties to use the same, and did [366] buy, sell, and deal in raisins seeded and treated by other machines and processes than those of the plaintiff in error, to its injury in the sum of $10,000. The defendant in error made its answer to this complaint by denying that it was indebted to the plaintiff in error for license fees or rentals or for damages, and alleged as matters of defense, in substance, that on February 25, 1901, the defendant in

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error rescinded its license contract with the plaintiff in error, and gave to it written notice thereof; and as reasons for such rescission alleged that prior to the execution of said contract it was understood and agreed between the defendant in error and the plaintiff in error that a similar contract should be entered into by the plaintiff in error with the Griffin & Skelley Company, Forsyth Seeded Raisin Company, Fresno Home Packing Company, Porter Bros. Company, Fruit Cleaning Company, Golden West Packing Company, and the Co-operative Packers' Association; that by reason of said representation the defendant in error was induced to sign said contract, and otherwise would not have signed the same, but that the plaintiff in error has wholly failed to obtain a contract with the Co-operative Packers' Association. The defendant in error, in its answer, further alleged that at the time of the execution of the contract of June 26, 1900, the plaintiff in error represented that it was the owner of patents numbered 631938 and 631939; that the defendant in error relied on such representation, but that thereafter it learned that the plaintiff in error did not own the said letters patent, or either of them, and on February 25, 1901, it learned that said representations were false, and that the plaintiff in error had not and would not acquire title to the said letters patent, or either of them. The answer further alleged, as ground for rescinding the contract of license, that the plaintiff in error willfully and negligently failed and refused vigorously to prosecute infringers of the letters patent enumerated in the contract of June 26, 1900, and that it did not prevent as far as possible all or any unlawful interference with the business and rights of the defendant in error under said agreement; that by reason of such failure the general public disregarded said letters patent, and without the consent of the plaintiff in error, in opposition to its rights and to the rights of the defendant in error, openly, continuously, and generally used the devices and processes covered by said letters patent without paying license fees or royalty to the plaintiff in error; that a material and chief consideration moving to said defendant in error should protect the defendant in error in its business and rights under said contract, and prevent unlawful interference with such business and rights by persons engaged in such business in competition with the defendant in error; that such consideration has utterly failed; that the plaintiff in error has failed to protect the business and rights of the defendant in error, and has permitted general, continuous, and open use of the patented devices and processes referred to in said contract. Upon these issues the cause was tried before the court and a jury. At the conclusion of the evidence and the arguments of counsel, the court submitted to the jury the decision of the various questions raised upon the issues so presented. After the jury had retired to consider of their verdict, the court recalled them, and gave them a peremptory instruction to find for the defendant in error. In so instructing them the court said: "There are three propositions only in the case, and I think upon either one of them you should find for the defendant. I think the contract is void, first, because it is contrary to a provision of your statute, section 1673, as explained to you. I think it is void because it is in contravention of public policy, because, if carried out to the full extent that it was intended to be, it would have amounted to a monopoly of the business. In the next place, I think it is void because it provided for certain litigation, and I am inclined to think the testimony justifies the belief that that litigation must be pressed, regardless of the rights of other parties, and with a view of oppressing them and driving them out of business. Courts cannot sustain any such contracts."

The evidence on which the court held that the combination contemplated oppressive litigation was the testimony of William Forsyth

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and A. Gartenlaub. Forsyth, who was president of three of the corporations who were parties of the second part to the contract, and attorney in fact for the remainder of the parties of the second part in signing the contract of June 26, 1900, testified [367] that in the negotiations leading up to the contract the plaintiff in error was represented by its secretary, James Williamson, and its treasurer, C. F. Allen. The court drew from the witness the following testimony: "The Court: I do not know whether I got a wrong impression or not, but I want to know what the fact was. What was the understanding as to the prosecution of the holders of other patents? Was it the design of the organization, or the understanding among you, that these prosecutions should be urged for the purpose of wearing them out, or because they were infringers? A. Other patents, you mean; people using the same machines? Q. No, sir; I mean those that were engaged in the business; these outside parties that you expected to close out. A. Both for the purpose of wearing them out and to stop them using the machines. Q. I inferred that, and I wanted to know whether that was a part of the combination. That was a part of this combination? A. Yes, sir." The witness proceeded to refer to litigation pending at that time for infringements of patents held by the plaintiff in error, after which he gave the following testimony: "Q. What was said, if anything, in regard to closing up any other concern, and how did they propose to close them up? A. By bringing suits against them. Q. Suits for what? A. For infringing of patents." A. Garteulaub, who was in the seeded raisin business at Fresno, and who refused to take a license from the plaintiff in error, testified to a conversation which he had with James Williamson, as follows: "Q. When he said he was going to sue people who did not take out a license, did he give you to understand that he was going to sue for an infringement of some of these patents? A. He said he was going to close them up; he would worry them out of business. Q. Did you not ask him how he was going to close them up? A. I did not. He told me how. He explained to me. Q. Did he not say he was going to bring suits on these patents for infringements? A. He said he owned all the patents, and, the patent litigation being so expensive that you could not defend a suit for less than $5,000 or $10,000, that, if he kept on filing five or six suits, he would worry a man out so that he would either close up or take out a license. Q. The suits were for infringement of the patents? A. He did not explain to me how he was going to file his suits." As opposed to this testimony were the depositions of Williamson and Allen, taken in New York before the trial; taken, it is true, on the issues raised on the answer, yet referring in general terms to the negotiations which led up to the contract. Williamson, being asked whether anything was said as to the purpose or objects of the combination, answered: "Nothing further than that the United States Consolidated Seeded Raisin Company was to become the owner of the patents, and, as the owner of the patents, license certain people." Charles F. Allen was asked the following questions: "Q. State whether or not all the representations made by the plaintiff to the defendant—that is to say, such representations as were made to induce them to sign the contract—are contained in the license contract itself which was issued to them. A. Yes, sir. * * * Q. Was it not one of the purposes of the combination that you should get a sufficient number of patents to control the raisin-seeding art? A. No, sir. Q. What was the object in getting together this considerable number of patents? A. Because those who gave their patents did it to stop litigation that we had brought against them." Alfred Nichols, the president of the plaintiff in error, also deposed "that no representations or statements were made by the plaintiff to induce defendant to enter into this

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license contract other than such statements and representations and promises and agreements as were contained in the written document itself." As tending to contradict the testimony of Forsyth and Gartenlaub, other witnesses testified as to the representations made by the plaintiff in error to induce them to join the combination. T. E. Langley testified that Williamson said that they would prevent others who did not take out licenses from operating by bringing suits against them. "Q. What were they to sue them for? What was to be the basis of the suits? A. Infringement of the patents." A. L. Hobbs, who was asked to join the combination, testified that in the representations made to him it was not said that the plaintiff in error would bring suits for anything except what they claimed was an infringement. John Bonner, who declined to join the combination, gave similar testimony.

[368] *John H. Miller*, for plaintiff in error.

Platt & Bayne and *H. H. Welsh*, for defendants in error.

Before GILBERT and Ross, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The Circuit Court instructed the jury to return a verdict for the defendant in error, holding the contract void on three grounds: First, that it was contrary to public policy, in that it tends to create a monopoly; second, that it is prohibited by the provisions of section 1673 of the Civil Code of the State of California; and, third, that it was contrary to public policy, for the reason that it provided for oppressive litigation. That such a contract is not void as against public policy, in that it tends to create a monopoly, has been decided by the Supreme Court in the case of *Bement* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. In that case a contract had been entered into between the National Harrow Company and various other corporations and firms engaged in manufacturing float spring tooth harrows, their frames and attachments, under various patents, 85 in number, which were assigned to the National Harrow Company. That corporation then entered into contracts with the other parties to the agreement, and gave to each a license very similar to the license in question in the present suit. The license provided that the licensee

should pay a fixed royalty, should make verified reports of its business, and that it should not sell its products manufactured under the license at a lower price or on more favorable terms of payment than was set forth in a schedule which was made a part of the license, except that the licensor reserved the right to reduce the selling price and to reduce the royalty. The licensee agreed that it would not, during the continuance of the license, directly or indirectly engage in the manufacture or sale of any other float spring tooth harrows, etc., than those which it was licensed to manufacture and make under the terms of the license, except such as it might manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee should be licensed by the National Harrow Company to manufacture and sell, except such other style and construction as it might be licensed to manufacture and sell by the National Harrow Company. Provision was made for the payment of fixed liquidated damages for breach of certain of the terms of the license, and the licensee agreed not to, directly or indirectly, in any way contest the validity of any patent under which it was licensed to manufacture, or which it might manufacture for another licensee; and it agreed also not to alter or change the construction of the float spring tooth harrow, the frames, etc., which it was authorized to manufacture under the license and under the patents. The licensor covenanted not to grant licenses to any other person or any right to manufacture articles of the peculiar style and construction, or embodying the peculiar features thereof, used by the licensee. It was agreed that the license should continue during **[369]** the life of the patent or patents applicable thereto, and during the term of any reissue thereof. There were other provisions of the contract not necessary here to be considered. The licensee having violated the contract, suit was brought to recover damages and to restrain further breaches. The licensee, in defense thereof, answered that the license grew out of a combination of the National Harrow Company and other manufacturers and dealers, which amounted to a combination to regulate the manufacture and provide for the

sale of float spring tooth harrows at fixed prices throughout the United States, and that said combination was void, as in restraint of trade, and a monopoly prohibited by the Sherman act. In the opinion of the court Mr. Justice Peckham said of the patent laws of the United States:

"The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

Concerning the application of the Sherman act to the contract in question, the court said:

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. * * * The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article. It is also objected that the agreement of the defendant not to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture and make under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is void under the act of Congress. The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning."

We think the principles announced in that case must control our decision of the question which is here presented, and under its authority we hold that the contract in question in the present case is not void as against public policy, as tending to create a monopoly, or as obnoxious to the provisions of the Sherman anti-trust act.

The principles announced in the case just cited are applicable also to the question whether the contract was prohibited

by section 1673 [370] of the Code of Civil Procedure of California. That section reads as follows:

"Every contract by which one is restrained from exercising a lawful profession, trade, or business of any kind otherwise than as provided by the next two sections, is to that extent void."

The next two sections referred to have no relevancy to the questions involved in the present case, and need not be quoted. That the provisions of a state law cannot affect rights acquired under a patent of the United States, is too plain to require discussion. In *Columbia Wire Co.* v. *Freeman Wire Co.* (C. C.) 71 Fed. 302, 306, the court said:

"The entire theory and purpose of our patent laws is to create a limited monopoly. In consideration that a patentee will give his invention to the public, with full drawings and specifications, so as to enable the public to freely use it at the expiration of 17 years, a grant is made to him of an exclusive right to the monopoly of the patented device during that time. The rights so acquired by the patentee under a grant from the United States are entirely inconsistent with the patentee's being made subject to the provisions of the anti-trust laws of the several states."

But, whatever may be the effect of the section of the California statute quoted as regards the contract in question, we hold that it can have no relevancy to any portion thereof except that covenant of the licensee embodied in the fourth provision of the license contract that it shall "neither sublet any of said machines, nor allow any parties, except its own employés, to have possession or control of, or to use said machines; shall not use any other raisin-seeding machines during the life of this contract than those furnished by the first party, or with their consent; and shall not buy, sell, nor deal in raisins seeded or treated by any other machines or processes than those of the first party." If that provision of the contract is, indeed, rendered void by the local statute, none of the questions presented in this case is thereby affected, as that provision is not involved in the litigation. The plaintiff in error sued on two covenants only of the license contract—the covenant to pay a royalty, and the covenant not to sublet the machines. These are valid and subsisting covenants, and are not affected by section 1673, which provides that the contract which contravenes that section is only "to that extent void." In *Oregon Railway & Navigation Co.* v. *Winsor*, 20 Wall. 64, 70, 22 L. Ed. 315, the court affirmed the doctrine "that agreements in restraint of trade, whether under seal or not, are divisible; and accordingly it has been held that, when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether."

It remains to be considered whether the original contract of June 26, 1900, is void, or so tainted with inequity that a court will not enforce its provisions, for the reason that it provides for oppressive litigation against third persons. The contract itself contains in its terms no provision for oppressive litigation. It contains a covenant on the part of the plaintiff in error to "institute and defend suits based [371] upon or concerning the inventions and letters patent above specified, and such others as may hereafter be acquired by it under and by virtue of this agreement." The license contract contained a provision requiring the plaintiff in error to "vigorously prosecute infringers of said letters patent, so as to prevent as far as possible all unlawful interference with the business and rights of said party of the second part under and by virtue of the contract." These are proper provisions, and they are not open to criticism. The ruling of the trial court was based upon certain oral testimony adduced upon the trial. There was no issue raised by the pleadings to which such testimony was applicable. The defendant in error had, it is true, alleged in its answer "that the object of the said combination was not only the purpose aforesaid, but also for the purpose of forcing out of the seeded raisin business the individuals, companies, and corporations who did not unite with the said plaintiff and join with it in its scheme and plan." That purpose, as pleaded in the answer, was not necessarily an illegal one. The answer did not aver that the said alleged purpose was expressed in the terms of the contract of June 26, 1900, or that the contract itself provided in any way for unjust or oppressive litigation. So far from making that allegation, the defendant in error set up in its answer as one of its grounds of defense, and as a reason for rescinding the contract, that

the plaintiff in error, having promised vigorous prosecution of infringers of said letters patent, failed to perform the promised service. The averment of the answer that one of the unexpressed purposes of the combination was to force out of the seeded raisin business those who did not take licenses thereunder is presumably true, when it is considered that the whole of the new art of seeding raisins by machinery was covered by the patents which were pooled in the combination. The natural result of such a combination would be to force out of business all who did not obtain licenses from the plaintiff in error, for they would necessarily be infringers. The oral evidence which prompted the action of the trial court in withdrawing the case from the jury was the testimony of the president of the defendant in error, who had been an active agent in effecting the combination, that it was the "design of the organization or the understanding," that litigation was to be instituted against those who refused to take licenses, "both for the purpose of wearing them out and because they were infringers." The same witness testified later, however, that it was the purpose to close up such third parties by bringing suit against them "for infringing of patents." There was the testimony, also, of another, who said that Williamson, the secretary of the plaintiff in error, stated to the witness that he was going to close up and wear out of business all who did not take out a license. Admitting that a contract legal in its terms and in its consideration may be rendered illegal, as against public policy, by reason of the intention of the parties thereto at the time of entering into it to so use it as thereby to commit civil injury to third persons, it may nevertheless be doubted whether the mere existence in the minds of some of the contracting parties of such a purpose—a purpose different from the main purpose, and never in fact carried into execution—is, after the contract has been acted upon and acquiesced in inter partes **[372]** for eight months, ground sufficient to justify the denial of any remedy thereon. But, however that may be, we are clearly of the opinion that if, in view of the pleadings and the law applicable thereto, the question of the existence of such an illegal purpose was properly before the court as affecting the legality of the contract, it was,

under the evidence, a question of fact which should have been submitted to the jury for its decision. There was evidence before the court and jury tending to contradict the evidence that such a purpose existed. There was the testimony of three of the officers of the plaintiff in error taken upon depositions in New York upon the general issues raised by the answer, in which they deposed in substance that the contract itself embodied all of the representations made to induce its execution, and that its objects were fully expressed in its terms. There was the testimony, also, of others who were asked to take out licenses under the contract, who stated that the officers of the plaintiff in error made no representation to them that suits would be brought against others, except on account of infringement of the patents.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

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[23] CITY OF ATLANTA *v.* CHATTANOOGA FOUNDRY & PIPEWORKS ET AL.[a]

(Circuit Court of Appeals, Sixth Circuit. December 8, 1903.)

[127 Fed., 23.]

MONOPOLIES—ANTI-TRUST ACT—ACTION BY CITY FOR INJURY TO BUSINESS.—A municipal corporation engaged in operating water, lighting, or similar plants, from which a revenue is derived, is, in relation to such matters, a business corporation, and may maintain an action under section 7 of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act.[b]

SAME—LIABILITY OF MEMBERS OF COMBINATION.—Every member of an illegal combination in restraint of interstate trade or commerce in violation of the anti-trust act is liable for the damages resulting to

[a] Suit originally brought in the Circuit Court of the United States for the Eastern District of Tennessee, where it was entitled "City of Atlanta *v.* Chattanooga Foundry & Pipe Co." (101 Fed., 900). See p. 11. Judgment reversed by Circuit Court of Appeals, Sixth Circuit (127 Fed., 23). See above. Affirmed by Supreme Court December 3, 1906 (203 U. S., ——). Not yet officially reported.

[b] Syllabus and statement copyrighted, 1904, by West Publishing Co.

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the business or property of a plaintiff by reason of such combination, and it is immaterial that there were no direct contract relations between plaintiff and defendant.

SAME—INJURY TO BUSINESS.—If the effect of an illegal combination between manufacturers to prevent competition in the sale of a commodity which is a subject of interstate commerce be to enhance the price of such commodity to a purchaser, he is entitled to recover the difference between the price paid and the reasonable price under natural competitive conditions, as an injury to his business, whether such business is interstate or not, provided the transaction by which the purchase was made was interstate.

SAME—ACTION FOR DAMAGES—LIMITATION.—An action under section 7 of the anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States * * * and shall recover three-fold the damages by him sustained," is not an action for a penalty or forfeiture, within Rev. St. § 1047 [U. S. Comp. St. 1901, p. 727], prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but one for the enforcement of a civil remedy given by statute for a private injury, compensatory in its purpose and effect; the recovery permitted in excess of actual damages being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the state in which it is brought.

[24] SAME—TENNESSEE STATUTE.—An action under said section based on an alleged excessive price plaintiff was compelled to pay for a manufactured article by reason of a combination between defendants and others to prevent competition and enhance the price of such article in violation of the act is not one for an injury to personal property, within Shannon's Code Tenn. § 4470, which prescribes a limitation of three years for "actions for injuries to personal or real property," but is one to enforce a statute liability, and within section 4473, which prescribes a limitation of ten years for certain actions, and in "all other cases not expressly provided for."

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

See 101 Fed. 900.

This was an action to recover damages under the seventh section of the act of Congress of July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], known as the "Anti-Trust Act." The plaintiff is a municipal corporation of the state of Georgia. The defendants are two manufacturing corporations of the state of Tennessee,

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engaged in the business of making and selling cast-iron pipe and fittings.

The declaration averred that on or about the 28th of December, 1894, the said two companies entered into an unlawful combination for the purpose of restraining interstate trade and commerce with four other corporations engaged in the same line of manufacture, to wit, the Anniston Pipe & Foundry Company, and the Howard-Harrison Iron Company, both corporations of the state of Alabama, and conducting business in that state; the Dennis, Long & Co., a corporation of the state of Kentucky, and carrying on its business in said state; and the Addyston Pipe & Steel Company, a corporation of the state of Ohio, engaged in business at Cincinnati, in that state. The illegal trust agreement complained of is the identical trust which was dissolved by decree of this court in the case reported as *The United States* v. *The Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, and affirmed by the Supreme Court in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. Reference may be made to the opinions in those cases for the nature and methods of the trust out of which has arisen the present action.

The declaration, in substance, charges that the plaintiff was engaged in conducting a system of waterworks, and that it derived a large revenue from the sale of water to private consumers, the income going into the city treasury; that, for the purposes and uses of its said waterworks business, it bought during the operations of said unlawful trust a large supply of iron water pipe, and that the contract for its supply of such pipe was given to the Anniston Pipe & Foundry Company as the lowest bidder. It is then averred that, by reason of the said unlawful agreement between the said producers of said pipe, all competition was suppressed, and that the said Anniston Company obtained the contract through an arrangement by which it was to be allowed to obtain same at a price agreed upon between said conspirators, without any competition, and that for this privilege it agreed to pay and did pay to the said association a large sum, called a "bonus," which was to be divided between the parties to said arrangement in agreed proportions. It is, in effect, charged that the "bonus" constituted the difference between the fair and reasonable value of the pipe so bought by plaintiff, and the price which it was compelled to pay, and that this large and unreasonable price was extorted from plaintiff through the unlawful suppression of competition, and by the instrumentality of fictitious bids put in by the other parties to said association, so arranged as to create the semblance of competition, and yet secure the contract for the Anniston Company at the price set by the combination as the ostensible lowest bidder. The plaintiff avers that, by reason of the formation of said illegal combination, interstate commerce in cast-iron pipe was restrained, and plaintiff compelled to deal only with the said Anniston Company, and to pay a price agreed upon by the members of the combination, which was unreasonable; that the bonus so paid out of the price **[25]** paid by plaintiff was paid into a common pocket, and divided among the conspirators in an agreed way; and that the two Tennessee corporations here sued received their due proportion of said bonus according to the terms and plans of the scheme. By all of which the plaintiff avers that it was compelled to pay for the cast-iron pipe so bought and used in its said waterworks $15,000 more than would have been paid but for the said unlawful trust between the producers of such pipe, and it lays the damage to its business and property at triple the said excess price so paid and reasonable attorneys' fees.

Opinion of the Court.

The defendants plead the general issue of not guilty, and the Tennessee statutes of limitations of one and three years.

Upon the conclusion of all of the evidence, the court instructed the jury to find for the defendants. This has been assigned as error, and this writ sued out by the plaintiff below.

George Westmoreland and *C. P. Goree*, for plaintiff in error.

Frank Spurlock, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The plaintiff's action is to recover damages incurred in its "business or property" by reason of a combination forbidden by the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], known as the "Anti-Trust Act," and its right to a recovery depends wholly upon the seventh section of that law.

It is true that plaintiff is a municipal corporation. Nevertheless it was maintaining a system of waterworks, and furnished water to consumers, charging for same precisely as would a private corporation engaged in a like business. That a municipal corporation may be empowered to engage in the business of furnishing water or gas, or in the operation of street railways, as well as many other quasi public occupations, must be conceded. That the profit resulting inures to the public does not alter the fact that when thus engaged it is pro hac vice a business corporation. If its "business" as a corporation engaged in the occupation of supplying water for a consideration has been injured by the unlawful combination complained of, it is just as much entitled to maintain this suit as a private corporation engaged in a like occupation. That it was not engaged in an interstate water business is true. But if it has no standing to recover damages for an injury to its "buisness," it is not easy to see how it has any better standing to recover for an injury to its "property." That there was evidence tending to show that the plaintiff had been compelled to pay an unreasonable price for the pipe which it bought during the continuance of the unlawful combination complained of is not to be disputed. That its purchases were made exclusively from the Anniston Pipe Company, a corporation doing business in Alabama, and that it is not suing that corporation, is of no vital significance. The Alabama company and the two Tennessee companies which are sued were members of an association which included practically every pipe manufacturing concern in a situation to compete for the business of the plaintiff. The evidence also tended to show that the object of the combination was to prevent any other producer of such pipe from competing with the Anniston Company for plaintiff's business, and that practices were adopted intended to compel [26] it to deal exclusively with the Alabama member of the association, and to pay a price settled by the combination in advance of any bidding. For this privilege the Alabama corporation agreed to pay a large sum into the pool treasury, called a "bonus," which was to be divided among the confederates in agreed proportions. An appearance of competition was to be maintained by bids put in by the other associates, every such bid being higher than the bid to be made by the company to whom the contract had been assigned. There was to be no chance for any other person to secure a contract with the plaintiff than that member of the combine selected in advance of the open biddings.

Opinion of the Court.

Mr. Justice Peckham, in *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 243, 20 Sup. Ct. 96, 108, 44 L. Ed. 136, where this very combination was under consideration, speaking for the court of the results of the agreement between the corporations who were members of this trust, said:

"The combination thus had a direct, immediate, and intended relation to, and effect upon, the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction the resulting high prices for the pipe would not have been obtained. It is useless for the defendants to say that they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement."

Undoubtedly it was not competent for the Congress to regulate by legislation commerce which is purely intrastate, and this limitation was recognized in *Addyston Pipe Co.* v. *United States*, where the court said:

"In regard to such of these defendants as might reside and carry on business in the same state where the pipe provided for in any particu-

lar contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some nonresident of the state eventually obtained it."

The direct intention and effect of the combination was to limit and restrict the right of each of the several companies to compete for business with Atlanta, as well as to enhance the price of the commodity which was the subject of the agreement.

We have, then, a direct action by this plaintiff against two of the members of this unlawful combine. That there was no purchase made direct from either of them is of no importance. Their guilt is as great as that of the Alabama corporation from whom the plaintiff did buy its pipe. If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination. These defendants have themselves participated in the benefits resulting from the bonus paid by the Alabama member of the association, and have no ground to complain that they have been alone sued. *Stockwell* v. *U. S.*, 13 Wall. 351, 20 L. Ed. 491; *Van Horn* v. *Van Horn*, 52 N. J. Law, 286, 20 Atl. 485, 10 L. R. A. 184; *Robertson* v. *Parks*, 76 Md. 118, 135, 24 Atl. 411.

[27] Replying to the argument that if the combination did not prevent any particular contract that it had not restrained trade, Justice Peckham, in *Addyston Pipe Co.* v. *United States*, 175 U. S. 245, 20 Sup. Ct. 109, 44 L. Ed. 136, said:

"It is not material that the combination did not prevent the letting of any particular contract. Such was not its purpose. On the contrary, the more contracts to be let, the better for the combination. It was formed, not for the object of preventing the letting of contracts, but to restrain the parties to it from competing for contracts, and thereby to enhance the prices to be obtained for the pipe dealt in by those parties. * * * The question is as to the effect of such combination upon the trade in the article; and if that effect be to destroy competition, and thus advance the price, the combination is one in restraint of trade."

If, then, the price of a commodity which is the subject of an interstate contract be unlawfully enhanced by a combination for the purpose of suppressing competition, shall the vendee thus compelled to pay this unlawfully enhanced price

be without remedy against the combination because he may happen not to be engaged in the conduct of an interstate business? If the effect of a combination to enhance the price of a commodity which is the subject of interstate commerce be to restrain such commerce, within the meaning of the law of Congress, by reason of its tendency to affect the volume of such trade, then the effect upon the business of one who has paid the enhanced price, in an interstate transaction, must be to correspondingly affect the volume or profit of that business. The difference between what he was thus compelled to pay and the reasonable price of the commodity under natural competitive conditions would be an injury to that business directly resulting from such unlawful combination. The injury to his business, whether it be in its volume or profit, is the same whether that business be inter or intra state—whether he buy to extend his plant, or to sell again in an interstate business. This excessive price is the expected and intended result of the unlawful combination to restrain interstate trade in that commodity. That such a plaintiff is entitled to recover the damages thus sustained in his business, whatever its character, would seem to be the plain purpose of the seventh section of the law of Congress, under the logic of the decision in *Addyston Pipe Co.* v. *United States*. It is possible to so construe this seventh section as to devitalize this section by confining compensatory relief to such persons as shall sustain an injury in some interstate business whose volume or profit has been diminished. But this construction does not seem consistent with the wide economic purposes of Congress, as manifested by the whole tenor of the act. Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law. The act gives the remedy to "any person" "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act." If Congress had the power to declare unlawful a combination which was intended to restrain interstate commerce by en-

hancing the value of a commodity when the subject of interstate commerce, it had the power to give a [28] compensatory remedy to any person directly affected by the unlawful agreement.

We see no application of the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, to the case at bar. Undoubtedly the contract of purchase and sale of pipe was a contract wholly collateral to the unlawful trust agreement between the makers of such pipe, and the vendor could make out a case for the purchase price without reliance upon the unlawful agreement between such makers. The contract of bargain and sale between the Anniston Pipe Company and the plaintiff was therefore a valid and enforceable agreement, and the plaintiff could not defend a suit for the price by showing that the seller was a partner in an illegal association. The court in that case did decide that the damages recoverable under the seventh section were recoverable only in a direct action, and could not be set off in a suit under a contract for the price. But this was based, not upon any construction of that section, but upon the general principle of law which forbids the setting off of unliquidated damages not directly growing out of the principal transaction. The present suit is a direct action, and is therefore unaffected by anything decided in that case.

This brings us to the question of the limitation applicable to the suit. Under the evidence, it was very plain that plaintiff's right of action accrued more than three and less than five years before action commenced. The anti-trust act provides no limitation, and, if any has been prescribed by federal law, it is that found in section 1047, Rev. St. [U. S. Comp. St. 1901, p. 727], which provides that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," shall be maintained unless commenced within five years from accrual of penalty or forfeiture. If this is an action to recover a penalty, within the meaning of this statute, the suit was in time. The shorter statute of the state, limiting the time for the commencement of suits for statutory penalties to one year, would have no application to a suit for a penalty under an act of Congress. It is only when there is no

federal statute that the limitation prescribed by the law of the state is applicable. *Campbell* v. *Haverhill*, 155 U. S. 610, 614, 15 Sup. Ct. 217, 39 L. Ed. 280; *Brady* v. *Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109.

We find ourselves in agreement with the court below in holding that an action under the seventh section of the act of July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], is not a penal action. The three first sections of the act are undoubtedly penal. They forbid certain contracts and combinations, and provide that persons doing any of the forbidden things shall be guilty of a misdemeanor, and subject to punishment by both fine and imprisonment. The fourth and fifth sections give jurisdiction to the Circuit Courts to prevent and restrain violations of the act, and deal with procedure under the restraining power thus granted. The sixth section provides for the forfeiture to the United States of property in course of transportation owned by any such unlawful combination, etc. The seventh section alone gives any remedy to one injured by such a [29] forbidden combination or contract, and that measures the relief by the "damages by him sustained," costs of suit, and his reasonable attorney's fees. The remedy is not given to the public, for no one may bring the action save the person "who shall be injured," etc., and the recovery is for the sole benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action a penal action, within the meaning of section 1047, Rev. St. [U. S. Comp. St. 1901, p. 727]. Thus in *Goodridge* v. *Rogers*, 22 Pick. 495, and *Adams* v. *Palmer*, 6 Gray, 338, the action was for a tort for entering upon land and committing trespass, and was brought under a statute which gave to the plaintiff threefold damages. It was nevertheless held not to be an action for a statute penalty, so as to

bring it under a statute which barred all actions and suits for penalties and forfeitures within one year. In suits for the infringement of patents, judgment for threefold the actual damages may be rendered, but suits under the statute have never been regarded as penal actions. *Campbell* v. *Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 280. In *Woodward* v. *Alston*, 12 Heisk. 581, an action against a clerk for fees illegally collected was held not to be a penal action, although called a "penalty" in the statute giving the particular remedy. In *Brady* v. *Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109, the suit was under section 4966, Rev. St. [U. S. Comp. St. 1901, p. 3415], providing that one publicly presenting a copyrighted dramatic performance, without the owner's consent, shall be liable for all damages, "to be assessed at such sum, not less than one hundred and fifty dollars for the first, and fifty dollars for every subsequent performance as to the court may seem just." The suit was held not to be a suit for the recovery of a penalty or forfeiture.

The whole subject of penal and compensatory actions has been so thoroughly considered in *Huntington* v. *Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, and *Brady* v. *Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109, as well as by the very full and able opinion of Judge Clark in the court below in disposing of a demurrer to a plea, that we feel we can add nothing to the subject.

The limitation applied by the court below was that prescribed by section 4470, Shannon's Revision, Tenn. Code. Prior to the Tennessee Code of 1858 the statute of limitations operated upon the remedy, and applied to the form of action. By the Code then adopted, and its amendments, the limitation now applies to the cause of action. *Kirkman* v. *Philips' Heirs*, 7 Heisk. 222; *Callaway* v. *McMillian*, 11 Heisk. 557. The limitations of actions other than real are found in sections 4466 to 4483 inclusive, Shannon's Code. Section 4466 provides that:

"All civil actions, other than those for causes embraced in the foregoing article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided."

[30] Section 4469, among other things, prescribes that actions for "statute penalties" shall be brought within one year.

Sections 4470, 4472, and 4473 must come under consideration, and are here below set out in full:

"Sec. 4470. Actions for injuries to personal or real property; actions for the detention or conversion of personal property within three years from the accruing of the cause of action."

"Sec. 4472. Actions for the use and occupation of land and for rent; actions against the sureties of guardians, executors and administrators, sheriffs, clerks and other public officers, for nonfeasance, misfeasance and malfeasance in office; actions on contracts not otherwise expressly provided for, within six years after the cause of action accrued.

"Sec. 4473. Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decress of courts of record of this or any other state or government, and all other cases not expressly provided for, within ten years after the cause of action accrued."

The learned trial judge held this action to be one for an injury to property, within the meaning of section 4470, and therefore barred in three years. To this we cannot assent. That section plainly applies only to causes of action arising out of some injury to property, as distinguished from its detention or conversion. Property, either personal or real, may be injured or damaged without its being either detained or converted. But whether the cause of action be an injury or damage to the property, or for its taking or detention, the suit must be brought within the same period. This distinction between the two kinds of injury to tangible personal property is of very ancient origin. Sir William Blackstone (volume 3, 145, 153), in his chapter entitled "Of Injuries to Personal Property," says:

"The rights of personal property in possession are liable to two species of injuries—the amotion or deprivation of that possession, and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches—the unjust and unlawful taking them away, and the unjust detaining them, though the original taking might be lawful."

Touching injuries to property, as distinguished from its taking or detention, the same author says:

"As to the damage that may be offered to things personal while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in any wise taking from the value of any of his chattels, or making them in a worse condition than before, these are injuries too obvious to need explanation. I have only,

therefore, to mention the remedies given by the law to redress them, which are in two shapes: By action of trespass vi et armis, where the act is in itself immediately injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action on the case, where the act is in itself indifferent, and the injury only consequential, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction, for the action will lie against the master as well as the servant. And if a man keeps a dog or other brute animal used to do mischief, as by worrying sheep or the like, the owner must answer for the consequences, if he knows of such evil habit."

We find in the very carefully selected verbiage of section 4470 a recognition of the two kinds of injury to which tangible property is **[31]** susceptible—one by a damage which does not affect the possession, and the other by a taking or detention which does.

While the precise question has not been decided by the Supreme Court of Tennessee, we do find an indisposition to give to the section any such broad and indeterminate meaning as would include a suit which does not involve any actual injury to property. Thus this section was held not to apply to a suit against an attorney for the negligent loss of a debt intrusted to him for collection. *Bruce* v. *Baxter*, 7 Lea, 477; *Ramsey* v. *Temple*, 3 Lea, 253. Nor to the suit of a stockholder, in behalf of the corporation, against bank directors, for the negligent discharge of their duties, by which the corporation had sustained losses. *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 631, 15 S. W. 448, 24 Am. St. Rep. 625.

In *Kirkman* v. *Philips' Heirs*, 7 Heisk. 222, 225, the court said: "The statute of limitations applicable depends upon the nature and character of the action, and not upon its form." In the same case it was held that, although the forms of action have been abolished by the Code, an owner of personal property, whose right to sue for damages for its conversion was barred by the statute of three years, might waive the tort, and sue for the value upon the implied assumpsit, in which case his suit would not be barred in six years; that being the time within which a suit upon a contract might be brought. See, also, *Alsbrook* v. *Hathaway*, 3 Sneed, 454. Actions on statute liabilities, not being a statute penalty, and not dependent upon any contract, ex-

press or implied, are actions not otherwise "expressly provided for by any of the other sections of the chapter upon the limitations of actions other than real." Such an action is at the common law—one in the nature of an action upon a specialty—and is of a similar kind to those enumerated in section 4473, Shannon's Code. Under the statute of 21 James I, c. 16, all actions "upon the case," with certain exceptions, and "all actions of debt grounded upon any lending or contract without specialty," were barred unless commenced within the time named in the statute. But an action of debt which was grounded upon a specialty was not within the statute. Specialties were not within the evil intended. Angell on Limitations, § 80; *Jones* v. *Pope*, 1 Saunders, 38; *White* v. *Parkin*, 12 East, 578; Browne on Actions at Law, 345; *Bullard* v. *Bell*, 1 Mason, 243, Fed. Cas. No. 2121; 4 Bacon, Abridgment, 471. But the statute of James operated upon the form of action. Thus all actions "upon the case," whatever the cause of action, were within the bar of the statute, and so were "all actions of debt grounded upon any lending or contract without specialty."

In *Carrol* v. *Green*, 92 U. S. 509, 23 L. Ed. 738, it was held that a suit by creditors of a corporation to enforce their claims against stockholders under a clause of the charter rendering them individually liable was barred by the South Carolina statute; being, in substance, the act of 21 James I, c. 16. The reason given for this result was that the charter was a mere offer or proposal by the state, which the stockholders could accept or reject, and that by taking stock they assented to the liability imposed, and that the assent thus given and promise implied was the ground of liability, and that the action of case would lie upon such an implied promise, which action was within **[32]** the bar of the statute. The court, however, went further, and held that the action or suit was not on the statute, and was therefore not an action on a specialty. "The statute," said the court, "was only inducement. The implied promise of the stockholders to fulfill its requirements was the agreement on their part, and it was without specialty." The distinctions made in the case are quite refined, and turn upon common-law forms of action. So far as the case goes upon the ground that

Syllabus.

the charter involved a mere proposal, and that the liability of the shareholder was grounded upon his implied agreement, it is in accord with the great current of authority.

The statute of James, as amended by Act N. C. 1715, c. 21, was in force in Tennessee until adoption of the Tennessee Code of 1858. Act N. C. 1715, c. 31, Scott's Revisal, vol. 1; *Pea* v. *Waggoner*, 5 Hayw. 19; *Tisdale* v. *Munroe*, 3 Yerg. 320. By the Code, the statutes no longer operate upon the form, but upon the cause, of action; and, by section 4473, every cause of action not otherwise expressly provided for is barred, without regard to whether it be upon a specialty or not.

It is impossible, having any regard to the verity of things, to conceive how any action would lie, under the seventh section of the anti-trust act, upon any implied agreement of the defendants to compensate the plaintiff for the injury to its business and property. But if we could torture an implied agreement out of the transaction, the defendants would not be in better plight, for, if the cause of action be a contract, express or implied, the action would not be barred for six years. Shannon's Code, § 4472. We are, however, of opinion that this is an action on a statute liability, and that the cause of action does not arise out of any agreement, and that such an action is not barred for ten years.

The third and fourth pleas were bad, and the demurrer to them should have been sustained. The direction to find a verdict for the defendants was also error.

The judgment will be reversed, with directions to grant a new trial.

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[804] ROBINSON *v.* SUBURBAN BRICK CO.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1904.)

[127 Fed., 804.]

FEDERAL COURTS—JURISDICTION [a]—ALLEGATION OF AMOUNT IN CONTROVERSY.—It is not essential that a bill in a federal court should state the amount or value in controversy, if it appears to be within the jurisdictional limit, from the allegations of the bill, or otherwise from the record, or from evidence taken in the case before the hearing of objections to the jurisdiction.

CONTRACTS IN PARTIAL RESTRAINT OF TRADE—VALIDITY [a]—SALE OF GOOD WILL.—A covenant in a contract by which the owners of brickmaking plants conveyed them to a corporation in exchange for its stock, binding the sellers not to engage in competing business within a radius of 50 miles from the place of business of the corporation for a term of 10 years, is valid, and may be enforced in a court of equity by a suit to enjoin its violation.

SAME—LAW GOVERNING.—Such a covenant is personal, and is not brought within the statutes of a state other than that in which the contract was made by the fact that the property sold was situated in such state.

MONOPOLIES—ANTI-TRUST ACT—MANUFACTURING COMBINATION.—The anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), does not apply to a contract or combination relating to the business of manufacturing within a state.

ABATEMENT [b]—PENDENCY OF ACTION IN STATE COURT.—The pendency of a suit in a state court is not a bar to one on the same cause of action in a federal court.[c]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling.

Henry M. Russell and *J. B. Driggs*, for appellant.

Nelson C. Hubbard (*Hubbard & Hubbard*, on briefs), for appellee.

Before GOFF and SIMONTON, Circuit Judges, and McDOWELL, District Judge.

SIMONTON, Circuit Judge.

This case comes up on appeal from the Circuit Court of the United States for the Northern District of West Virginia. It has been twice argued in this court. In the year 1898 George O. Robinson, the appellant here, was engaged in the business of manufacturing brick in the town of Bellaire, in the state of Ohio. At the same time George K. Wheat was engaged in the same business in or near the city

[a] Jurisdiction of Circuit Courts as determined by amount in controversy, see notes to *Auer* v. *Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co.* v. *Roper*, 36 C. C. A. 459.

[a] Validity of monopolistic contracts, as affected by public policy, see notes to *Chicago, M. & St. P. Ry. Co.* v. *Wabash, St. L. & P. Ry. Co.*, 9 C. C. A. 666; *Cravens* v. *Carter-Crume Co.*, 34 C. C. A. 486.

[b] See Abatement and Revival, vol. 1, Cent. Dig. § 87.

[c] Syllabus copyrighted, 1904, by West Publishing Co.

Opinion of the Court.

of Wheeling, W. Va. The Belmont Brick & Tile Company had a manufactory at Martin's Ferry, in the state of Ohio. B. F. Hodgman was conducting the manufacture of brick at [805] Moundsville, W. Va. The owners of these factories entered into an agreement on 24th December, 1898, whereby they all agreed to sell and convey their several plants to a corporation to be organized under the laws of West Virginia, which would have its principal place of business at Wheeling. They were each to receive, in payment for the plant, specified amounts of stock in the new company. The agreement contained the following stipulation:

"It is mutually agreed between the parties hereto, and each for himself specifically promises and agrees, not to hereafter engage in the brickmaking business, or in any lines that may be manufactured hereafter at any of the several plants to be operated by the corporation whose creation is here contemplated, or to furnish means, aid or advice to others seeking to do so in such a way as to come in competition with the said corporation within a territory which may be described as within a radius of 50 miles from the city of Wheeling, W. Va., within a period of ten years from and after the signing of this agreement."

The agreement was carried out, and the property exchanged for the stock in the new company called the Suburban Brick Company. George O. Robinson took an active part in the management and control of the new company for some time. He afterwards sold out all his interest, and then ceased to have anything to do in the business of the company. Very soon thereafter he became a stockholder in the Standard Brick & Stone Company, a corporation organized under the laws of Ohio, and engaged in manufacturing brick substantially the same as that of the Suburban Brick Company, at Bellaire, Ohio, within 10 miles of Wheeling.

The bill in this case is filed by the Suburban Brick Company against George O. Robinson in order to compel the specific performance of his contract as above set forth. It states the facts above set out, and prays that the defendant, George O. Robinson, be enjoined from prosecuting the business of brickmaking as manager or adviser of the Standard Brick & Stone Company, or of any others who may seek to engage in business within the said territory.

The answer did not deny the execution of the agreement set out in the bill, nor the violation of it by the defendant.

It justifies the breach of the agreement; insisting that it was unlawful and invalid under the laws of the state of Ohio, under the trust laws of the United States, at common law, and against the principles of equity. The answer also set up the pendency of a suit between the same parties in a court of Ohio, involving the same question as is involved in this case.

With this answer the defendant also filed a demurrer:

"(1) The said bill is defective, in that it does not allege facts showing that this court has jurisdiction of this cause, nor are such facts otherwise shown by the record. (2) The agreement set forth in the said bill is void, by reason of the laws of the state of Ohio, and also by reason of the acts of Congress of the United States; and, except by virtue of the said agreement, the plaintiff shows no right to relief. (3) The facts stated in the bill do not present a case in which a court of equity has jurisdiction, even if the agreement were valid, to award an injunction or to grant the relief prayed for. (4) The said bill is in other respects uncertain, informal, and erroneous."

At the hearing, all the evidence having been taken and submitted, the court below overruled the demurrer. The second, third, and fourth grounds of demurrer are clearly superseded by the answer. The first [806] ground of demurrer, based upon the failure of complainant to state in so many words that the matter in controversy exceeded $2,000, besides interest and costs, was overruled; the court holding that it may be determined from the evidence herein that the amount in controversy exceeds the required jurisdictional amount. The decree, on bill, answer, and evidence, granted complainant the relief asked, and ordered the injunction to issue, to remain in force until 24th December, 1908, the date fixed by the agreement in the record.

Leave to appeal was granted the defendant, and the case is here on assignments of error as follows:

"(1) The said decree is erroneous in overruling and refusing to sustain the defendant's demurrer to the bill in the said suit. (2) The said decree is erroneous in awarding the injunction against the said defendant which is thereby awarded and decreed. (3) The said decree is erroneous in granting the plaintiff the relief prayed for instead of refusing such relief and dismissing the plaintiff's bill."

As to the demurrer: It is not essentially necessary that the bill should state the amount of the matter in controversy, if this fact is either manifest from the allegations of the bill, or it be made to appear in any part of the record. The

courts go farther than this, and permit this jurisdictional fact to be established by affidavits, if it appears in no part of the record. *Carr* v. *Fife*, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 311, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Whiteside* v. *Haselton*, 110 U. S. 296, 4 Sup. Ct. 1, 28 L. Ed. 152; *Wilson* v. *Blair*, 119 U. S. 387, 7 Sup. Ct. 230, 30 L. Ed. 441; *Red River Cattle Co.* v. *Needham*, 137 U. S. 632, 11 Sup. Ct. 208, 34 L. Ed. 799. And in *Rector* v. *Lipscomb*, 141 U. S. 557, 12 Sup. Ct. 83, 35 L. Ed. 857, the court, notwithstanding allegations in the record, went into the testimony, and, under all the showing presented, held that the matter in controversy was not within the jurisdictional limit. In the case at bar the testimony showed that the threatened damage from the act of the defendant amounted to many thousands of dollars.

As to the merits: It is charged that this contract sought to be enforced is in restraint of trade and void. Contracts of this character, whereby a party binds himself not to carry on a particular business within a limited territory and for a limited time, have always been sustained by courts, especially if the contract accompanies, as a part of the consideration thereof, a sale by a vendor to a vendee. The rule is clearly stated by Mr. Pomeroy in his Equity Jurisprudence (volume 2, 443, 444):

"Contracts in partial restraint of trade are valid. To this end, they must be partial with respect to the territory included; reasonable with respect to the amount of territory, the circumstances and rights of the party burdened, and the one benefited by the restriction, and the number and interests of the public whose freedom of trade is circumscribed; and made upon a valuable and sufficient consideration. The jurisdiction of equity is generally exercised, in respect to these contracts, for the purpose of indirectly compelling their specific performance, by means of an injunction preventing their violation. Such contracts are frequently made in connection with a sale of a business and good will; the vendor stipulating that he will not carry on the same business within a specified distance from the old place, or for a specified time, or will not solicit the old customers for their trade, and the like. These kind of stipulations, [807] if reasonable as to territory and time, will be enforced against the vendor, often by an injunction."

This seems to be the law of Ohio. "Restraint of trade, founded on good consideration, reasonable, and not oppressive, is valid." *Lange* v. *Werk*, 2 Ohio St. 519; *Grasselli* v. *Lowden*, 11 Ohio St. 349. "A restriction as to one city for

five years is valid." *Thomas* v. *Miles' Adm'r*, 3 Ohio St. 274. So in North Carolina. *Kramer* v. *Old*, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650: "Good will is property which the owner has the right to sell to the full extent of the field from which he derives his profit, and for a reasonable time. Its market value is lessened if he cannot bind himself not to compete. The space limit may be enough to secure to the buyer the full benefit of the business he has bought." In the Federal courts the same principle prevails. *Oregon S. Nav. Co.* v. *Winsor*, 20 Wall. 69, 22 L. Ed. 315: "Restraint is invalid at common law, except when it is ancillary to a lawful contract, involving relations of vendor and vendee, and necessary to protect the covenantee in the lawful fruits of his contract." *U. S.* v. *Addyston Pipe Line Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; *Hitchcock* v. *Anthony*, 83 Fed. 779, 28 C. C. A. 80.

It is suggested that this contract is invalid under the laws of Ohio, especially as it involves the purchase of land in Ohio. But the question we are considering is not the validity or invalidity of the purchase of defendant's land. He nowhere seeks a recission of that sale. Nor has he offered to return the consideration received by him on its purchase. On the contrary, he retains it. The question before us is a personal covenant by defendant with complainant, made in West Virginia, to be construed and enforced according to the law of West Virginia. There is no question of its validity under the law of West Virginia.

It is also urged that this transaction is void under the "act to protect trade and commerce against unlawful restraints and monopolies." Act July 2, 1890, c. 647, 26 Stat. p. 209 [U. S. Comp. St. 1901, p. 3200]. But this statute is intended to protect interstate trade and commerce, and does not relate to manufactories within a state. *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; illustrated in *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 237, 20 Sup. Ct. 96, 44 L. Ed. 136. The doctrine is well stated in *Gibbs* v. *McNeeley*, 107 Fed. 211:

"Manufacture within a state of an article of commerce is not within the purview of the act, although the manufacturing combination constitutes a monopoly. * * * It makes no difference that the manufacturer intends his product for sale in other states and foreign

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countries. * * * It must go further, and provide for the sale and transportation to other states; otherwise what is proposed cannot be said to look to interstate commerce."

The pendency of the suit in the court of Ohio cannot affect the suit in the Circuit Court of the United States. *Gordon* v. *Gilfoil*, 99 U. S. 168, 25 L. Ed. 383; *Stanton* v. *Embry*, 93 U. S. 548, 23 L. Ed. 983. See, also, *Anderson* v. *U. S.*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300.

From a consideration of the whole case, we are satisfied with the conclusion reached by the court below. The decree is affirmed.

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[875] A. BOOTH & CO. *v.* DAVIS ET AL.[a]

(Circuit Court, E. D. Michigan. S. D. January 19, 1904.)

[127 Fed., 875.]

MONOPOLIES—ANTI-TRUST ACT—SCOPE.—The Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) has no application to a contract by which the stockholders of a corporation engaged in dealing in fish at different places, in consideration of the purchase of the business and good will of the company by another, agreed not to enter into competition with him in such business for the term of 10 years.[b]

SAME—MICHIGAN STATUTE.—The Michigan act of June 23, 1899 (Sess. Laws, 1899, p. 409, No. 255), to prevent trusts and monopolies, is prospective only in its operation, and does not affect a contract made prior to its passage which was valid when made.

CONTRACT IN PARTIAL RESTRAINT OF TRADE[c]—VALIDITY—SALE OF BUSINESS AND GOOD WILL.—A covenant by the stockholders of a corporation which sold its property, business, and good will, that, in consideration of such sale and as an inducement thereto, they would not directly or indirectly engage in the same or like kind of business as that carried on by the company in the same territory or in the immediate vicinity of such territory for 10 years after the sale, rests upon a good consideration and is lawful, and the right of the

[a] Affirmed by Circuit Court of Appeals, Sixth Circuit (131 Fed., 31). See p. 566. Petition for writ of certiorari denied by the Supreme Court (195 U. S., 636). Memorandum decision. Not reprinted.

[b] Syllabus copyrighted, 1904, by West Publishing Co.

[c] Validity of monopolistic contracts as affected by public policy, see notes to *Chicago, M. & St. P. Ry. Co.* v. *Wabash, St. L. & P. Ry. Co.*, 9 C. C. A. 666; *Cravens* v. *Carter-Crume Co.*, 34 C. C. A. 486.
See Contracts, vol. 11, Cent. Dig. § 555.

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purchaser to enforce it cannot be affected by the question whether he has conducted the business lawfully since his purchase.

SAME—SUIT TO ENFORCE—DEFENSES.—In a suit to enjoin a defendant from violating a contract by which for a valuable consideration he covenanted not to engage in business for himself or another in competition with that of complainant for a term of years, and to enjoin a codefendant from employing his services in a competing business, it is no defense that his codefendant hired him in ignorance of the contract, and will suffer damage if deprived of his services.

In Equity. On motion for preliminary injunction.

Chas. S. Thornton and *Henry M. Duffield*, for complainant.

Fred A. Baker and *E. E. Kane*, for defendants.

SWAN, District Judge.

In this cause the motion to vacate the restraining order issued herein and the motion for a preliminary order was continued until the further order of the court. The main defense to the bill presented, it was then thought, a question to be determined upon plenary proofs rather than upon affidavits. In the expectation that the taking of proofs, then in progress, would obviate the labor of [876] digesting the many voluminous affidavits submitted upon the hearing of the motion for injunction, and reviewing upon the proofs and facts in issue, the formal disposition of that motion was postponed with that end in view. The taking of the testimony, however, has been extended by stipulations of the parties, and is not completed. The defendants now urge that their interests will suffer injury by deferring decision until the completion of the proofs. To avert that result, and to facilitate the review of this matter, the conclusions here reached are founded upon the affidavits filed, notwithstanding the unsatisfactory nature of such data compared with plenary proofs.

The bill is filed to restrain the defendant Davis from a breach of his contract hereinafter set forth, which contract, it is claimed by complainant, was and is a part of the consideration for the purchase by complainant of the property and good will of the Davis Fresh & Salt Fish Company, a

corporation organized under and by virtue of the laws of the state of Michigan, and transacting a general fish business, and also engaged in buying, catching, producing, and selling salt and fresh fish. The company had its principal office in the city of Detroit, in said state. It also carried on business at Cleveland, Columbus, and Dayton, Ohio; Louisville, Ky.; Nashville, Tenn.; St. Louis and Kansas City, Mo.; Buffalo and New York City, in the state of New York; Grand Rapids, Jackson, East Saginaw, Lansing, Port Huron, and Detroit, Mich. The bill also seeks to have the Wolverine Fish Company, Limited, restrained from aiding Davis to violate his contract with complainant by employing said Davis in its business.

On August 14, 1898, in consideration of the sum of $17,473.14, the Davis Fresh & Salt Fish Company sold to William Vernon Booth, of Chicago, with the consent of all of its officers and stockholders, all of the goods, chattels, and property of every kind, nature, and description to it belonging, or in which it had any interest at that time, and, as part thereof, the good will of the business conducted by it at Detroit, and gave said Booth a bill of sale, with warranty of title, signed by defendant Davis, its president, and James T. Donaldson, its secretary, appended to which was the following, signed by said Davis:

"For and in consideration of one dollar and other valuable consideration, which I acknowledge, I hereby agree to perform the covenants and agreements above made and to be performed by the Davis Fresh & Salt Fish Company.

"Witness my hand and seal this 14th day of September, A. D. 1898."

Said Davis was a stockholder and the principal officer and manager of the vendor corporation, and apparently very desirous that the contract of sale should be completed, and he and other stockholders of the Davis Fresh & Salt Fish Company executed the following agreement:

"This instrument witnesseth, That William Vernon Booth has purchased the plant, business and good will of the business of the Davis Fresh & Salt Fish Company, and has paid therefor the sum of $17,473.14; that in making said transfer, and as an inducement to said William Vernon Booth to purchase said plant, business and good will and pay the sum aforesaid for the same, we have each agreed that we would not, and we now do agree, each for himself, jointly and severally with him, the said William Vernon Booth, his heirs and assigns, forever,

that we will not, during the next ten years, in the territory or the immediate vicinity of the territory dealt in by our company, or operated in by ourselves or the agents or employés of the company, engage or in any [877] manner be interested in, either directly or indirectly, for ourselves or for others, the same or like kind or character of business as that heretofore conducted and now being carried on by said company, and that we will not, during the said period of ten (10) years, either directly or indirectly, be guilty of any act interfering with the business, its good will, its trade or its customers, or come in competition with the same; and we will not, jointly or severally, either in firms or corporations, or as individuals, or in any other way, directly or indirectly interfere with the said trade or business or do any act prejudicial to the same or any part thereof, or interfere with the persons employed therein; the meaning hereof being that the said William Vernon Booth is buying and paying for the good will of the business in the largest and fullest scope of the term; and that we will not, and each agrees that he will not, do anything to interfere with or injure the said business, but will during said period, lend his aid and best influence to the promotion and advancement of the same.

"In witness whereof we have hereunto subscribed our names and affixed our seals, jointly and severally, this first day of August, A. D. 1898.

"EDGAR A. DAVIS.
"JAMES T. DONALDSON.
"BELLE R. HARPER.
"ED. E. KANE.
"BELLE B. DAVIS."

The consideration named in the instrument quoted above was paid on or about the 14th of September, 1898, to the Davis Fresh & Salt Fish Company, and by it distributed among its stockholders, defendant Davis receiving his full share thereof. The purchase and agreement recited above were made by said Booth, as agent for complainant, and a formal transfer was made by Booth to his principal of all the property, rights, and contracts involved in the transaction. The property was duly delivered. The complainant has entered into the possession thereof, and, the bill claims, is continuing such business in Detroit and the other places where the Davis Fresh & Salt Fish Company conducted its business before said sale. The bill seeks an injunction against Davis from violating his said agreement, and against the Wolverine Fish Company, Limited, and other defendants (except Edson, who was not served), from aiding and assisting Davis in the violation of his contract. The answer of the defendants, and the separate answer of defendant Davis, do not dispute the purchase of the property and good will of the Davis Fresh & Salt Fish Company. The defense is, first, that the

contract is against public policy and in restraint of trade; that it is void under the provisions of the "Sherman Act," so-called (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and an act of the Legislature of the state of Michigan, entitled "An act to prevent trusts, monopolies and combinations of capital, skill and arts, and carrying out restraints in trade and commerce," etc., approved June 23, 1899 (Sess. Laws 1899, p. 409, No. 255).

The Sherman act has no bearing upon this controversy. Its purpose and scope is to avoid all contracts and combinations in the form of trusts or otherwise, or conspiracy in restraint of trade and commerce among the several states and with foreign nations. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *United States* v. *Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. The business of the complainant is lawfully conducted by the sale of its commodities at the different points where the business acquired from the Davis Fresh & Salt Fish Company was carried on. It had noth- [878] ing to do with the interstate or foreign trade or commerce subject to congressional legislation. It produced and sold its goods at the several places where it did business, just as its vendor had and as any individual or corporation might do, and it had the same right to engage in such business on complying with the laws in the states in which it was carried on. The statute of Michigan which defendants have invoked as invalidating the contracts and business of the complainant acquired from the Davis Fresh & Salt Fish Company was not passed until a year after the purchase by complainant of that company's property and good will. It is in terms prospective, and cannot be invoked to defeat a contract lawful when made. Its first section defines a trust as—

"A combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either, any or all of the following purposes:

"(1) To create and carry out restrictions in trade or commerce.

"(2) To limit or reduce the production, or increase or reduce the price of merchandise or any commodity.

"(3) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"(4) To fix at any standard or figure whereby its price to the public or consumer shall be in any manner controlled or established any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state."

Examination of the provisions of this act is convincing that it is directed only against combinations of persons, firms, partnerships, corporations, or associations of persons conspiring to co-operate in violation of its provisions, and that it contains nothing prohibitive of the acquisition by a person, persons, corporation, or association of the business or property of any person or association, natural or artificial. All such persons or associations may acquire property and carry on business at as many different places as their capital will warrant, and fix their own prices for their commodities, providing they do not, for that purpose and in its accomplishment, combine with other persons, firms, or organizations to effect any of the ends denounced by the statute. The prior Michigan statute of 1889, in existence at the time of the execution of the contracts under which complainant claims, was repealed by an act of 1899. There is grave question as to its validity, and that doubt probably prompted the act of 1899. The transaction by which the complainant acquired the title and interest for which it seeks protection in this cause was an out and out purchase of the vendor corporation's property and good will, and of the ancillary agreement of its stockholders, the breach of which agreement is the gravamen of the complainant's case. That such a transaction is lawful seems clear. In *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271–281 et seq., 29 C. C. A. 141, 46 L. R. A. 122, Judge Taft considers the question here involved, and in a forcible opinion demonstrates that agreements by the seller of property or business not to compete with the buyer in such a way as to impair the business sold are perfectly valid. The opinion has so carefully and fully reviewed the authorities in support of this proposition as to exhaust the subject. The judgment of the Court of Appeals (except in a minor part having [879] no concern with the main question) was affirmed by the Supreme Court of the United States. 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. It is therefore a matter of no concern whether or not the complainant is conducting its business in such a way as to reduce the cost of its commodity, and to increase its profits in

that way, or by raising the price otherwise. The contract of purchase which it made with the Davis Fresh & Salt Fish Company, and its agreement with the defendant Davis and the other stockholders, by which they engage not to compete, individually or otherwise, directly or indirectly, with the complainant, was a contract wholly collateral to the scheme and method of its business and its rights and equities under the contract of sale; and the agreement with Davis and the other stockholders can be enforced with as much propriety as any other lawful contract or agreement into which it might enter. *Atlanta* v. *Chattanooga F. & P. Works* (C. C. A., Sixth Circuit, decided Dec. 8, 1903) 127 Fed. 23. It is well settled that an agreement which operates merely as a partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In *Oregon Steamship Navigation Co.* v. *Winsor*, 20 Wall. 67, 22 L. Ed. 315, Mr. Justice Bradley says:

"In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the protection of the party with whom the contract is made: * * * but a contract not to use a trade at a particular place, if it be founded upon a good consideration and be made for a good purpose, is valid. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void."

Examining this agreement between complainant and Davis, it will be found that it has no feature which the law condemns. It is limited, as to time, for the 10 years ensuing its date; "and to the territory or immediate vicinity of the territory dealt in by the company, or operated in by ourselves or the agents or employés of the company." Its validity is fully sanctioned by the case of the *Oregon Steamship Navigation Company* v. *Winsor*, 20 Wall. 67, 22 L. Ed. 315. The execution of the contract is admitted by the defendants. It is no answer to its enforcement against Davis that he did not get the consideration he expected from the sale, because, as he alleges, complainant did not carry out an understanding subsequently made with him. The defense that the Davis Fresh & Salt Fish Company had no business and no good will, but its business at the time of the contract was carried on by Davis as trustee for the company, is unconscionable and without merit. The objection

that the complainant is a trust and a monopoly is answered by the view taken of the statute of Michigan of 1899, and it is shown by the affidavits that the complainant's business in this line is but a small fraction of that done by other dealers in the same commodities in the territory covered by its operations, and that it is but one of several hundred dealers in that territory.

It is further claimed that the bill does not aver that the complainant has complied with the statute with regard to foreign corporations. The affidavits submitted by complainant completely negative this objection.

It is urged that the agreement with Davis and the other stockholders is not supported by any consideration. There is no force in this position. **[880]** It recites that the signers do agree, "as an inducement to said William Vernon Booth to purchase said plant, business and good will and pay the sum aforesaid ($17,473 14) for the same, we each have agreed that we would not, and we now do agree, each for himself, jointly and severally * * * that we will not during the next ten (10) years, in the territory or the immediate vicinity of the territory dealt in by our company, or operated in by ourselves or the agents or employés of the company, engage or in any manner be interested in, either directly or indirectly, for ourselves or for others, the same or like kind or character of business as that heretofore conducted and now being carried on by said company, its officers, agents, employés or assigns," etc. The signers of this instrument are estopped from denying want of consideration for its provisions. Their express acknowledgment in the instrument is that an inducement to the purchase at the time was their several contracts not to compete, directly or indirectly, as individuals or otherwise, with their vendee during the time and in the territory designated. The effect of such competition, it is obvious, would be to impair the value of the property and good will purchased, and, as has been said, a contract which would insure against this is not in restraint of trade, but valid. In *Hendrick* v. *Lindsay*, 93 U. S. 148, 23 L. Ed. 853, it is said:

"Damage to the promisee constitutes as good a consideration as benefit to the promisor. In *Pillan* v. *Van Mierop*, 3 Burr. 1663, the court say: 'Any damage or suspension of a right, or possibility of a

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loss, occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrued to the party promising.' This rule is sustained by a long list of adjudged cases."

The restraint upon the defendants secured by this contract, it is clear beyond question from the terms of the contract itself, was regarded by both parties thereto as consideration. It does not lie in the mouth of Davis, when he has deliberately and for the purpose of inducing the complainant to pay the large sum of $17,473.14 for the business, which he now states was worthless, to deny that there was any consideration for his agreement. In fact, the denial of want of consideration, and Davis' objections to the contract that the Davis Fresh & Salt Fish Company had no business or good will at the time of the sale, are inconsistent in themselves, and compel the conclusion that, if the vendor corporation had no business, the sale of its property and the inventory upon which it was made was a fraud upon the purchaser, which discredits the claim of Davis that the agreement of himself and fellow stockholders was an independent transaction.

In behalf of the Wolverine Fish Company, Limited, it is urged that it had no knowledge of the agreement entered into by Davis to refrain, directly or indirectly, from engaging in the fish business for himself or others, and that to deprive it of his services and experience is a hardship. The equities of the case in favor of the complainant, in view of the facts, are much stronger than the consideration urged by the Wolverine Company against being enjoined from the employment of Davis in violation of his contract with complainant. Whatever injury results to the Wolverine Fish Company, Limited, from the enforcement of Davis' contract with complainant, is chargeable, not to the latter, but to Davis himself. If that company is injured, it is because **[881]** of Davis' willful breach of his contract with the complainant, and not by reason of any act or omission of the complainant. It is no answer to the enforcement of complainant's contract that Davis has broken it and entered into relations with others whereby the benefit of his experience and services will operate inevitably to the detriment of the complainant, although Davis' employer did not know

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of his self-imposed disability. To hold otherwise would sanction the doctrine that one entering into a like contract to that executed by Davis to the complainant might be absolved from his obligations under the contract by hiring his services to one ignorant of his disability. Such a construction of the letter and spirit of like engagements would make them entirely nugatory, and would be grossly unjust to the party who had paid in good faith a valuable consideration for the property and good will of a business which his vendors collectively and individually have covenanted not to impair or invade.

It results from these views that the complainant is entitled to the injunction restraining Davis from a breach of his contract with the complainant, and restraining the Wolverine Fish Company, Limited, from benefiting in any way by his services and experience in the fish business, as defined in the contract between complainant and Davis, and an injunction will be issued, according to the prayer of the bill, against Davis and the Wolverine Fish Company, Limited.

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[38] MONTAGUE & COMPANY *v.* LOWRY.[a]

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 46. Submitted October 27, 1903.—Decided February 23, 1904.

[193 U. S. 38.]

An association was formed in California by manufacturers of, and dealers in, tiles, mantels and grates; the dealers agreed not to purchase materials from manufacturers who were not members and not to sell unset tiles to any one other than members for less than list prices which were fifty per cent higher than the prices to members; the manufacturers, who were residents of States other than California agreed not to sell to any one other than members; viola-

[a] Begun in the Circuit Court for the Northern District of California, and there entitled *Lowry* v. *Tile, Mantel and Grate Ass'n. of Cal.* Demurrer overruled (98 Fed., 817). See vol. 1, p. 995. Charge to jury (106 Fed., 38). See p. 53. Judgment affirmed by Circuit Court of Appeals, Ninth Circuit. (115 Fed., 27). See p. 112. Case then and subsequently entitled Montague & Co. *v.* Lowry. Affirmed by Supreme Court (193 U. S. 38.)

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tions of the agreement rendered the member subject to forfeiture of membership. Membership in the association was prescribed by rules and dependent on conditions, one of which was the carrying of at least $3,000 worth of stock, and whether applicants were admitted was a matter for the arbitrary decision of the association. In an action by a firm of dealers in tiles, mantels and grates, in San Francisco, whose members had never been asked to join the association and who had never applied for admission therein, and which did not always carry $3,000 worth of stock, to recover damages under § 7 of the Anti-Trust Act of July 2, 1890—

Held that although the sales of unset tiles were within the State of California and although such sales constituted a very small portion of the trade involved, agreement of manufacturers without the State not to sell to any one but members was part of a scheme which included the enhancement of the price of unset tiles by the dealers within the State and that the whole thing was so bound together that the transactions within the State were inseparable and became a part of a purpose which when carried out amounted to, and was, a combination in restraint of interstate trade and [39] commerce. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, followed; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604, distinguished.

Held that the association constituted and amounted to an agreement or combination in restraint of trade within the meaning of the act of July 2, 1890, and that the parties aggrieved were entitled to recover threefold the damages found by the jury.

Held that the amount of attorney's fees allowed as costs under the act is within the discretion of the trial court and as such discretion is reasonably exercised this court will not disturb the amount awarded.[a]

[48 L. ed., 608.] [b]

[An association of wholesale dealers in tiles, mantels, and grates in San Francisco and vicinity, and nonresident manufacturers of tiles and fireplace fixtures, in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tiles to nonmembers for less than list prices, which are more than fifty per cent higher than prices to members, while the manufacturers agree not to sell their products or wares to nonmembers at any price, under penalty of forfeiture of membership, is an agreement or combination in restraint of trade within the meaning of the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202).]

[a] The foregoing syllabus and the abstract of argument copyrighted, 1904, by The Banks Law Publishing Co.

[b] The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 48, p. 608. Copyrighted, 1903, 1904, by the Lawyers' Co-Operative Publishing Co.

Statement of the Case.

[The discretion of the trial court under the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), § 7, to allow a reasonable attorney's fee to the successful plaintiff in an action brought under that section to recover damages for a violation of the provisions of that act against combinations in restraint of trade, is not abused by an allowance of $750, although the verdict was for but $500, where the trial took five days, and from the proof offered it appeared that from $750 to $1,000 would be a reasonable sum.]

THIS action was brought under section 7 of the act of July 2, 1890, 26 Stat. 209; 3 Comp. Stat. 3202, commonly called the Anti-Trust Act. The section reads as follows:

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Plaintiffs in error (defendants below) seek to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, 115 Fed. Rep. 27, affirming a judgment for plaintiffs, entered in the Circuit Court for the Northern District of California, upon a verdict of a jury. 106 Fed. Rep. 38.

It appeared in evidence on the trial in the United States Circuit Court that the plaintiffs for many years prior to the commencement of this action had been copartners, doing business as such in the city of San Francisco in the State of California, and dealing in tiles, mantels and grates, and that The Tile, Mantel and Grate Association of California, and the officers and members thereof, had since, on or about the — day of January, 1898, constituted under that name an unincorporated organization composed of wholesale dealers in tiles, mantels and grates, who were citizens and residents of the city and county of San Francisco, or the city of Sacramento, or the city of San José in the State of California, and such organization was also composed of the manufacturers of tiles, mantels [40] and grates, who were residents of other States, and engaged in the sale of their manufactured articles (among others) to the various other defendants in the State of California. There were no manufacturers of tiles within the State of California, and all the defendants

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who were residents of that State and who were also dealers in tiles, in the prosecution of their business, procured the tiles from outside the State of California and from among those manufacturers who were made defendants herein. The manufacturers and dealers were thus engaged in the prosecution of a business which, with reference to the sales of tiles, amounted to commerce between the States. Under these circumstances the dealers in tiles, living in San Francisco, or within a radius of 200 miles thereof, and being some of the defendants in this action, together with the Eastern manufacturers of tiles, who are named as defendants herein, formed an association called The Tile, Mantel and Grate Association of California. The objects of the association, as stated in the constitution thereof, were to unite all acceptable dealers in tiles, fireplace fixtures and mantels in San Francisco and vicinity, (within a radius of 200 miles,) and all American manufacturers of tiles, and by frequent interchange of ideas advance the interests and promote the mutual welfare of its members.

By its constitution, article I, section 1, it was provided that any individual, corporation or firm engaged in or contemplating engaging in the tile, mantel or grate business in San Francisco, or within a radius of 200 miles thereof, (not manufacturers,) having an established business and carrying not less than $3,000 worth of stock, and having been proposed by a member in good standing and elected, should, after having signed the constitution and by-laws governing the association, and upon the payment of an entrance fee as provided, enjoy all the privileges of membership. It was provided in the second section of the same article that all associated and individual manufacturers of tiles and fireplace fixtures throughout the United States might become non-resident members of the association upon the payment of an entrance fee as provided, and after having signed the constitution and by-laws govern- [41] ing the association. The initiation fee was, for active members, $25, and for non-resident members $10, and each active member of the association was to pay $10 per year as dues, but no dues were charged against non-residents.

An executive committee was to be appointed, whose duty

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it was to examine all applications for membership in the association and report on the same to the association. It does not appear what vote was necessary to elect a member, but it is alleged in the complaint that it required the unanimous consent of the association to become a member thereof, and it was further alleged that by reason of certain business difficulties there were members of the association who were antagonistic to plaintiffs, and who would not have permitted them to join, if they had applied, and that plaintiffs were not eligible to join the association for the further reason that they did not carry at all times stock of the value of $3,000.

The by-laws, after providing for the settlement of disputes between the members and their customers, by reason of liens, foreclosure proceedings, etc., enacted as follows, in article III:

"SEC. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.

"SEC. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents or manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel and Grate Association of California, shall forfeit their membership in the association."

The term "list prices," referred to in the seventh section, was a list of prices adopted by the association, and when what are called "unset" tiles were sold by a member to any one not a member, they were sold at the list prices so adopted, which [42] were more than fifty per cent higher than when sold to a member of the association.

The plaintiffs had established a profitable business and were competing with all the defendants, who were dealers and engaged in the business of purchasing and selling tiles, grates and mantels in San Francisco prior to the formation of this association. The plaintiffs had also before that time been accustomed to purchase all their tiles from tile manufacturers in Eastern States, (who were also named as parties defendants in this action,) and all of those manufacturers subsequently joined the association. The plaintiffs were not members of the association and had never been, and had

never applied for membership therein and had never been invited to join the same.

The proof shows that by reason of the formation of this association the plaintiffs have been injured in their business, because they were unable to procure tiles from the manufacturers at any price, or from the dealers in San Francisco, at less than the price set forth in the price list mentioned in the seventh section of the by-laws, *supra*, which was more than fifty per cent over the price at which members of the association could purchase the same. Before the formation of the association the plaintiffs could and did procure their tiles from the manufacturers at much less cost than it was possible for them to do from the dealers in San Francisco after its formation.

There was proof on the part of the defendants below that the condition of carrying $3,000 worth of stock, as mentioned in the constitution, had not always been enforced, but there was no averment or proof that the article of the constitution on that subject had ever been altered or repealed.

The jury rendered a verdict for $500 for the plaintiffs, and, pursuant to the provisions of the seventh section of the act, judgment for treble that sum, together with what the trial court decided to be a reasonable attorney's fee, was entered for the plaintiffs.

Mr. William M. Pierson for plaintiffs in error:

The association is not obnoxious to the provisions of the Sherman Anti-Trust Act.

[43] This case can be distinguished from the *Trans-Missouri Case*, 166 U. S. 290, and the *Joint Traffic Case*, 171 U. S. 505. So far as the transactions between the dealers and the manufacturers are concerned, the association fixes no tariff or prices whatever; and it must be observed generally that the association itself does no business. It is lawful for a man to decline to work for another man or class of men, or to do business with another man or class of men, as he sees fit; and what is lawful for one man to do in this regard, several men may agree to act jointly in doing, and may make express and simultaneous declaration of their purpose. The lawfulness of a provision as between dealers and manufacturers, such as is contained in the constitution and by-laws of the plaintiffs in error, is impliedly recognized in the *Hopkins Case*, 171 U. S. 578, and is aptly recognized and approved in the *Anderson Case*, 171 U. S. 604. See also *U. S.* v. *Greenhut*, 51 Fed. Rep. 205; *In re Greene*, 52 Fed. Rep. 104; *U. S.* v. *Nelson*, 52 Fed. Rep. 646; *Dueber Mfg. Co.* v. *Howard Co.*, 55 Fed. Rep. 851; *S. C.*, 14 C. C. A. 14; *Gibbs* v. *McNeely*, 102 Fed. Rep. 594; *Steamship Co.* v. *McGregor*, L. R. 23 Q. B. 598; *Bohn* v. *Hollis*, 54 Minnesota, 223.

Within these authorities and on a view of the constitution and by-laws of the association in question, it will appear that the provisions touching transactions between dealers and manufacturers are not obnoxious to the act of Congress, and it will appear further that the association in question has none of the elements of a monopoly. Indeed, the object of the association is said to be to unite all acceptable dealers and all American manufacturers.

An association cannot be in restraint of trade when its doors are open to all in the trade, and it fixes no price whatever. The only limitation was to have established homes with $3,000 worth of stock.

The transactions in unset tiles at list prices are local transactions, intra-state transactions, in no respect taking on the quality of interstate commerce and being purely local, are not within the purview of the act. *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211. Assuming, however, for argu- **[44]** ment, the transactions in unset tiles to be along the line of interstate commerce,—they are so trifling, incidental and remote in their bearing upon interstate trade and commerce as to be what mathematicians call negligible quantities which may be left out of consideration without impairing the general result. *Trans-Missouri case*, the *Joint Traffic case*, and *Hopkins case*, *supra*.

The attorney fee allowed was excessive. Plaintiffs below asked for $10,000 damages and were only allowed $500 and the fee is out of proportion.

Mr. J. C. Campbell for defendant in error:

The Tile, Mantel and Grate Association of California is a combination declared to be illegal by the act of July 2, 1890,

for it is in restraint of trade or commerce among the several States, and was formed to and does monopolize such trade or commerce. *United States* v. *Freight Association*, 166 U. S. 290, 323; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 241, 244; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *United States* v. *Coal Dealers Association*, 85 Fed. Rep. 252; *Hopkins* v. *United States*, 171 U. S. 578, and see p. 597; *Anderson* v. *United States*, 171 U. S. 604, distinguished.

The counsel fee was fair and reasonable.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court.

The question raised by the plaintiffs in error in this case is, whether this association, described in the foregoing statement of facts, constituted or amounted to an agreement or combination in restraint of trade within the meaning of the so-called Anti-Trust Act of July 2, 1890?

The result of the agreement when carried out was to prevent the dealer in tiles in San Francisco, who was not a member of the association, from purchasing or procuring the same upon any terms from any of the manufacturers who were such members, and all of those manufacturers who had been accustomed to sell to the plaintiffs were members. The non- **[45]** member dealer was also prevented by the agreement from buying tiles of a dealer in San Francisco who was a member, excepting at a greatly enhanced price over what he would have paid to the manufacturers or to any San Francisco dealer who was a member, if he, the purchaser, were also a member of the association. The agreement, therefore, restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enhanced prices to the non-member as already stated.

The plaintiffs endeavored in vain to procure tiles for the purposes of their business from these tile manufacturers, but the latter refused to deal with them because plaintiffs were not members of the association. It is not the simple case of manufacturers of an article of commerce between the several

States refusing to sell to certain other persons. The agreement is between manufacturers and dealers belonging to an association in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tiles to any one not a member of the association for less than list prices, which are more than fifty per cent higher than the prices would be to those who were members, while the manufacturers who became members agreed not to sell to any one not a member, and in case of a violation of the agreement they were subject to forfeiting their membership. By reason of this agreement, therefore, the market for tiles is, as we have said, not only narrowed but the prices charged by the San Francisco dealers for the unset tiles to those not members of the association are more than doubled. It is urged that the sale of unset tiles, provided for in the seventh section of the by-laws, is a transaction wholly within the State of California and is not in any event a violation of the act of Congress which applies only to commerce between the States. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as **[46]** one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tiles by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the State of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.

Again, it is contended the sale of unset tiles is so small in San Francisco as to be a negligible quantity; that it does not amount to one per cent of the business of the dealers in tiles in that city. The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small, it would probably largely increase when those who formerly purchased tiles from the manufacturers are

shut out by reason of the association and their non-membership therein from purchasing their tiles from those manufacturers, and are compelled to purchase them from the San Francisco dealers. Either the extent of the trade in unset tiles would increase between the members of the association and outsiders, or else the latter would have to go out of business, because unable to longer compete with their rivals who were members. In either event, the combination, if carried out, directly effects a restraint of interstate commerce.

It is also contended that, as the expressed object of the association was to unite therein all the dealers in San Francisco and vicinity, the plaintiffs had nothing more to do than join the association, pay their fees and dues and become like one of the other members. It was not, however, a matter of course to permit any dealer to join. The constitution only provided for "all acceptable dealers" joining the association. As plaintiffs were not invited to be among its founders, it would look as if they were not regarded as acceptable. However that may be, they never subsequently to its formation applied for admission. It is plain that the question of their admission, if they had so applied, was one to be arbi- **[47]** trarily determined by the association. The constitution provided for the appointment of an executive committee, whose duty it was to examine all applications for membership in and to report on the same to the association, after which it was to decide whether the applicants should be admitted or not. If they were not acceptable the applicants would not be admitted, and whether they were or not, was a matter for the arbitrary decision of the association. Its decision that they were not acceptable was sufficient to bar their entrance.

Again, it appears that plaintiffs were not eligible under the constitution, because they did not always carry stock worth $3,000, which by section 1 of article I, was made a condition of eligibility to membership. True, it was stated in evidence that this provision had not been enforced, but there was no averment or proof that it had been repealed, and there was nothing to prevent its enforcement at any time that an application was made by any one who would not come up to the condition. The case stands, therefore,

that the plaintiffs had not been asked to join the association at its formation; that they did not fill the condition provided for in its constitution as to eligibility, and that if they had applied their application was subject to arbitrary rejection.

The plaintiffs, however, could not, by virtue of any agreement contained in such association, be legally put under obligation to become members in order to enable them to transact their business as they had theretofore done, and to purchase tiles as they had been accustomed to do before the association was formed.

The consequences of non-membership were grave, if not disastrous, to the plaintiffs. It has already been shown how the prices of tiles were enhanced so far as plaintiffs were concerned, and how by means of this combination interstate commerce was affected.

The purchase and sale of tiles between the manufacturers in one State and dealers therein in California was interstate commerce within the *Addyston Pipe case*, 175 U. S. 211. It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, **[48]** which was an article of commerce between the States. *United States* v. *E. C. Knight Company*, 156 U. S. 1, did not therefore cover it. It is not brought within either *Hopkins* v. *United States*, 171 U. S. 578, or *Anderson* v. *United States*, 171 U. S. 604. In the first case it was held that the occupation of the members of the association was not interstate commerce, and in the other that the subject matter of the agreement did not directly relate to, embrace or act upon interstate commerce, for the reasons which are therein stated at length. Upon examination we think it is entirely clear that the facts in the case at bar bear no resemblance to the facts set forth in either of the above cases and are not within the reasoning of either. The agreement directly affected and restrained interstate commerce.

The case we regard as a plain one and it is unnecessary to further enlarge upon it.

There is one other question which, although of secondary importance, is raised by the plaintiffs in error. After the

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rendition of the verdict the plaintiffs below claimed a reasonable attorney's fee under the seventh section of the act, and made proof of what would be a reasonable sum therefor, from which it appeared that it would be from $750 to $1,000. The trial court awarded to the plaintiffs $750. The verdict being only for $500, the plaintiffs in error claimed that the allowance was an improper and unreasonable one. The trial took some five days. The judgment in effect pronounced the association illegal. The amount of the attorney's fee was within the discretion of the trial court, reasonably exercised, and we do not think that in this case such discretion was abused.

The judgment is

Affirmed.

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[197] NORTHERN SECURITIES COMPANY *v.* UNITED STATES.[a]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

[193 U. S. 197.]

No. 277. Argued December 14, 15, 1903.—Decided March 14, 1904.

Stockholders of the Great Northern and Northern Pacific Railway companies—corporations having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound—combined and conceived the scheme of organizing a corporation, under the laws of New Jersey, which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation. Pursuant to such combination the Northern Securities Company was organized as the holding corporation through which that scheme should be executed; and under that scheme such holding corporation became the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the sockholders of the companies, who delivered their stock, receiving, upon the agreed basis, shares of stock in the holding corporation.[b]

[a] Decree of the Circuit Court (120 Fed., 721, 731). See pp. 215, 231.

[b] Syllabus and extracts of briefs, arguments, etc., copyrighted, 1904, by The Banks Law Publishing Co.

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Held, that, necessarily, the constituent companies ceased, under this arrangement, to be in active competition for trade and commerce along their respective lines, and became, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease.

Held, that the arrangement was an illegal combination in restraint of interstate commerce and fell within the prohibitions and provisions of the act of July 2, 1890, and it was within the power of the Circuit Court, in an action, brought by the Attorney General of the United States after the completion of the transfer of such stock to it, to enjoin the holding company, from voting such stock and from exercising any control whatever over the acts and doings of the railroad companies, and also to enjoin the railroad companies from paying any dividends to the holding corporation on any of their stock held by it.

Held, that although cases should not be brought within a statute containing criminal provisions that are not clearly embraced by it, the court should not by narrow, technical or forced construction of words exclude cases from it that are obviously within its provisions and while the act of July 2, 1890, contains criminal provisions, the Federal court has power under § 4 of the act in a suit in equity to prevent and restrain violations [198] of the act, and may mould its decree so as to accomplish practical results such as law and justice demand.

HARLAN, BROWN, MCKENNA and DAY, JJ.[a]

The combination is, within the meaning of the act of Congress of July 2, 1890, known as the Anti-Trust Act, a "trust"; but if not, it is a combination in restraint of interstate and international commerce, and that is enough to bring it under the condemnation of the act.

From prior cases in this court, the following propositions are deducible and embrace this case:

Although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it embraces and declares to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which

[a] Mr. Justice HARLAN announced the affirmance of the decree of the Circuit Court and delivered an opinion in which BROWN, MCKENNA and DAY, JJ., concurred. Mr. Justice BREWER delivered a separate opinion in which he concurred in affirming the decree of the Circuit Court.

Mr. Justice WHITE delivered a dissenting opinion in which the CHIEF JUSTICE and PECKHAM and HOLMES, JJ., concurred; Mr. Justice HOLMES delivered a dissenting opinion in which the CHIEF JUSTICE and WHITE and PECKHAM, JJ., concurred.

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directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations.

The act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy, or monopoly upon such trade or commerce.

Railroad carriers engaged in interstate or international trade or commerce are embraced by the act.

Combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained, are equally embraced by the act.

Congress has the power to establish rules by which interstate and international commerce shall be governed, and by the Anti-Trust Act has prescribed the rule of free competition among those engaged in such commerce.

Every combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act.

The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce.

To vitiate a combination, such as the act of Congress condemns, it need not [199] be shown that such combination, in fact, results, or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition.

The constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce.

Under its powers to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Montague & Co.* v. *Lowry*, 193 U. S. 38.

Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution.

If in the judgment of Congress the public convenience or the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

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When Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce.

Subject to such restrictions as are imposed by the Constitution upon the exercise of all power, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce.

No State can, by merely creating a corporation, or in any other mode, project its authority into other States, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Cogress for such commerce; nor can any State give a corporation created under its laws authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land.

Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress.

[200] By Mr. Justice Brewer.

The act of July 2, 1890, was leveled, as appears by its title, at only unlawful restraints and monopolies. Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld.

The general language of the act is limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen.

A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person, but it is an artificial person, created and existing only for the convenient transaction of business.

Where, however, no individual investment is involved, but there is a combination by several individuals separately owning stock in two competing railroad companies engaged in interstate commerce, to place the control of both in a single corporation, which is organized for that purpose expressly and as a mere instrumentality by which the competing railroads can be combined, the resulting combination is a direct restraint of trade by destroying competition, and is illegal within the meaning of the act of July 2, 1890.

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A suit brought by the Attorney General of the United States to declare this combination illegal under the act of July 2, 1890, is not an interference with the control of the States under which the railroad companies and the holding company were, respectively, organized.[a]

[48 L. ed., 679.] [b]

[A combination by stockholders in two competing interstate railway companies to form a stock-holding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, violates the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), which declares illegal every combination or conspiracy in restraint of interstate commerce, and forbids attempts to monopolize such commerce or any part of it.]

[Congress did not exceed its power under the commerce clause of the Federal Constitution in enacting the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), declaring illegal every combination or conspiracy in restraint of interstate commerce, and forbidding attempts to monopolize such commerce or any part of it, although such statute is construed to embrace a combination of stockholders of two competing interstate railway companies to form a stock-holding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies.]

[The enforcement of the provisions of the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by a Federal court decree enjoining a corporation organized in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the power acquired by such corporation by virtue of its acquisition of such stock, does not amount to an invasion by the Federal Government of the reserved rights of the States creating the several corporations.]

[The constitutional guaranty of liberty of contract is not infringed by the enforcement of the provisions of the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by a Federal court decree enjoining a corporation formed in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the powers acquired by such corporation by virtue of its acquisition of such stock.]

[A Federal court, by its decree in a suit instituted under the authority

[a] The foregoing syllabus and the abstracts of briefs and arguments, etc., copyrighted, 1904, by The Banks Law Publishing Co.

[b] The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 48, p. 679. Copyrighted, 1903, 1904, by the Lawyers' Co-Operative Publishing Co.

Bill in Equity.

of the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), § 4, to prevent and restrain violations of the act, may properly enjoin a corporation organized in pursuance of a combination of stockholders of two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from acquiring any further stock therein, from voting such stock as it then holds or may subsequently acquire, and from exercising any control over the railway companies by virtue of its holdings, and may restrain the railway companies from permitting or suffering any such action on the part of the stock-holding corporation, and from paying any dividends on account of the stock held by it.]

THE pleadings in this action and the decree of the Circuit Court are as follows:

PETITION.[a]

To the judges of the Circuit Court of the United States for the District of Minnesota:

Now comes the United States of America, by Milton D. [201] Purdy, the United States attorney for the District of Minnesota, acting under direction of the Attorney-General of

[a] Bill in equity of United States, this page, *supra*.

Exhibit: Certificate of Incorporation of Northern Securities Company, page 216, *post*.

Answer of Northern Securities Company, page 221, *post*.

Answer of Hill and other defendants, page 241, *post*.

Answer of Great Northern Railway Company, page 241, *post*.

Answer of Northern Pacific Railway Company, page 242, *post*.

Answer of Morgan and other defendants, page 247, *post*.

Answer of Lamont, defendant, page 255, *post*.

Decree of the Circuit Court, page 255, *post*.

Summary of facts from argument and brief of Mr. George B. Young for appellants, page 257, *post*.

Abstract of argument of Mr. John G. Johnson for appellant Northern Securities Company, page 268, *post*.

Abstract of argument of Mr. Charles W. Bunn for appellant Northern Pacific Railway Company, page 273, *post*.

Abstract of brief submitted by Mr. John W. Griggs for appellant Northern Securities Company, page 276, *post*.

Abstract of brief submitted by Mr. M. D. Grover for appellant Great Northern Railway Company, page 280, *post*.

Abstract of brief submitted by Mr. Francis Lynde Stetson and Mr. David Willcox for appellants Morgan, Bacon and Lamont, page 290, *post*.

Abstract of argument and brief of Mr. Attorney General Knox and

the United States, and brings this its proceeding by way of petition against the Northern Securities Company, a corporation organized and existing under the laws of the State of New Jersey; the Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota; the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin; James J. Hill, a citizen of the State of Minnesota and a resident of St. Paul, and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel Lamont, citizens of the State of New York and residents of New York City, and, on information and belief, complains and says:

I. The defendants, the Northern Pacific Railway Company and the Great Northern Railway Company, were, at the times hereinafter mentioned, and now are, common carriers, employed in the transportation of freight and passengers among the several States of the United States and between such States **[202]** and foreign nations, and, as such carriers so employed, were and are engaged in trade and commerce among the several States and with foreign nations.

II. On and prior to the 13th day of November, 1901, the defendants, James J. Hill, William P. Clough, D. Willis James, and John S. Kennedy, and certain other persons whose names are unknown to the complainant, but whom it prays to have made parties to this action when ascertained (hereinafter referred to as James J. Hill and his associate stockholders), owned or controlled a majority of the capital stock of the defendant, the Great Northern Railway Company, and the defendants, J. Pierpont Morgan and Robert Bacon (members of and representing the banking firm of J. P. Morgan & Co., of New York City), George F. Baker and Daniel S. Lamont, and certain other persons whose names are unknown to the complainant, but whom it prays to have

Mr. William A. Day, assistant to Attorney General, for the United States, appellee, page 297, *post*.

Opinion of Mr. Justice Harlan, page 317, *post*.

Opinion of Mr. Justice Brewer, page 360, *post*.

Opinion of Mr. Justice White, page 364, *post*.

Opinion of Mr. Justice Holmes, page 400, *post*.

made parties to this action when ascertained (hereinafter referred to as J. Pierpont Morgan and his associate stockholders), owned or controlled a majority of the capital stock of the defendant, the Northern Pacific Railway Company.

III. The Northern Pacific Railway Company and the Great Northern Railway Company, at and prior to the doing of the acts hereinafter complained of, owned or controlled and operated two separate, independent, parallel, and competing lines of railway running east and west into or across the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, the Northern Pacific system, extending from Ashland, in the State of Wisconsin, and from Duluth and St. Paul, in the State of Minnesota, through Helena, in the State of Montana, and Spokane, in the State of Washington, to Seattle and Tacoma, in the State of Washington, and Portland, in the State of Oregon, and the Great Northern system, extending from Superior, in the State of Wisconsin, and from Duluth and St. Paul, in the State of Minnesota, through Spokane, in the State of Washington, to Everett and Seattle, in the State of Washington, and to Portland, in the State of Oregon, with a branch line to Helena, in the State of Montana, thus furnishing **[203]** to the public two parallel and competing transcontinental lines connecting the Great Lakes and the Mississippi River with Puget Sound and the Pacific Ocean. At the times mentioned, these two railway systems, which will hereafter be referred to respectively as the Northern Pacific system and the Great Northern system, each of which, with its leased and controlled lines, main and branch, aggregates over 5,500 miles in length, were the only transcontinental lines of railway extending across the northern tier of States west of the Great Lakes, from the Great Lakes and the Mississippi River to the Pacific Ocean, and were then engaged in active competition with one another for freight and passenger traffic among the several States of the United States and between such States and foreign countries, each system connecting at its eastern terminals, not only with lines of railway, but with lake and river steamers to other States and to foreign countries, and at its western terminals with sea-going vessels to other States, Territories, and possessions of the United States and to foreign countries.

IV. Prior to the year 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized and existing under certain acts and resolutions of Congress. During that year the company became insolvent, and the line was placed in the hands of receivers by the proper courts of the United States. While in this condition, awaiting foreclosure and sale, an arrangement was entered into between a majority of the bondholders of the Northern Pacific Railroad Company and the defendant, the Great Northern Railway Company, for a virtual consolidation of the Northern Pacific and Great Northern systems and the placing of the practical control of the Northern Pacific system in the hands of the defendant, the Great Northern Railway Company. This arrangement contemplated the sale, under foreclosure, of the property and franchises of the Northern Pacific Railroad Company to a committee of the bondholders, who should organize a new corporation, to be known as the Northern Pacific Railway Company, which was to become the **[204]** successor of the Northern Pacific Railroad Company; one-half of the capital stock of the new company was to be turned over to the shareholders of the defendant, the Great Northern Railway Company, which in turn was to guarantee the payment of the bonds of the Northern Pacific Railway Company. An agreement was to be entered into for the exchange of traffic at intersecting and connecting points and for the division of earnings therefrom. The carrying out of this arrangement was defeated by the decision of the Supreme Court of the United States in the case of *Pearsall* v. *The Great Northern Railway Company* (which was decided March 30, 1896, and is reported in the one hundred and sixty-first volume of the reports of said court, beginning on page 646, to which reference is made), in which it was held that the practical effect would be the consolidation of two parallel and competing lines of railway, and the giving to the defendant, the Great Northern Railway Company, a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, to the detriment of the public and in violation of the laws of the State of Minnesota.

V. Early in the year 1901 the defendants, the Great Northern and Northern Pacific Railway companies, acting for the purpose of promoting their joint interests, and in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems under a common source of control, united in the purchase of the total capital stock of the Chicago, Burlington and Quincy Railway Company, of Illinois, giving the joint bonds of the Great Northern and Northern Pacific Railway companies, payable in twenty years from date, with interest at 4 per cent per annum, for such stock, at the rate of $200 in bonds in exchange for each $100 in stock, and in this manner purchased and acquired about $107,000,000 of the $112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, or about 98 per cent thereof. In this manner, at the time stated, the defendants, the Great Northern and Northern Pacific Railway companies, secured control of the vast system of rail- **[205]** way lines known as the Burlington system, about 8,000 miles in length, extending from St. Paul, in the State of Minnesota, where it connects with the Great Northern and Northern Pacific Railway systems, through the States of Minnesota, Wisconsin, and Illinois, to Chicago, in the State of Illinois, and from these two cities through said States and through the States of Iowa, Missouri, Nebraska, Colorado, South Dakota, Wyoming, and Montana, to Quincy, in the State of Illinois; to Burlington and Des Moines, in the State of Iowa; to St. Louis, Kansas City, and St. Joseph, in the State of Missouri; to Omaha and Lincoln, in the State of Nebraska; to Denver, in the State of Colorado; to Cheyenne, in the State of Wyoming, and to Billings, in the State of Montana, where it again connects with the Northern Pacific Railway system, these States lying west of Chicago and south of the States crossed by the Great Northern and Northern Pacific systems, and constituting the territory occupied in part by what is known as the Union Pacific Railway system, which has been and is a parallel and competing system within said territory with the said Burlington system.

VI. The attempt to turn over a controlling interest in the stock of the Northern Pacific Railway Company to the Great Northern Railway Company and thus effect a virtual con-

solidation of the two railway systems, having thus, in the year 1896, been defeated by a decision of the Supreme Court of the United States, the defendants James J. Hill and his associate stockholders of the defendant, the Great Northern Railway Company, owning or controlling a majority of the stock of that corporation, and the defendants J. Pierpont Morgan and his associate stockholders of the defendant, the Northern Pacific Railway Company, owning or controlling a majority of the stock of that corporation, acting for themselves as such stockholders and on behalf of the said railway companies in which they owned or held a controlling interest, on and prior to the 13th day of November, 1901, contriving and intending unlawfully to restrain the trade or commerce among the several States **[206]** and between said States and foreign countries carried on by the Northern Pacific and Great Northern systems, and contriving and intending unlawfully to monopolize or attempt to monopolize such trade or commerce, and contriving and intending unlawfully to restrain and prevent competition among said railway systems in respect to such interstate and foreign trade or commerce, and contriving and intending unlawfully to deprive the public of the facilities and advantages in the carrying on of such interstate and foreign trade or commerce theretofore enjoyed through the independent competition of said railway systems, entered into an unlawful combination or conspiracy to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce, through the instrumentality and by the means following, to wit: A holding corporation, to be called the Northern Securities Company, was to be formed under the laws of New Jersey, with a capital stock of $400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over and transferred the capital stock, or a controlling interest in the capital stock, of each of the defendant railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stocks. In this manner, the individual stockholders of these two independent and competing railway companies were to be eliminated and a single common stockholder, the Northern Securities Company, was to be substituted; the interest of the individual stockholders in the property and franchises of the two railway companies was to terminate, being thus converted into an interest in the property and franchises of the Northern Securities company. The individual stockholders of the **[207]** Northern Pacific Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Northern Pacific system, and the individual stockholders of the Great Northern Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Great Northern system, but having ceased to be stockholders in the railway companies and having become stockholders in the holding corporation, both were to draw their dividends from the earnings of both systems, collected and distributed by the holding corporation. In this manner, by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both systems for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established.

VII. In pursuance of the unlawful combination or conspiracy aforesaid, and solely as an instrumentality through which to effect the purposes thereof, on the 13th day of November, 1901, the defendant, the Northern Securities Company, was organized under the general laws of the State of

New Jersey, with its principal office in Hoboken, in said State, and with an authorized capital stock of $400,000,000. A copy of the articles of incorporation of such company is attached to and made a part of this petition. Among the purposes and powers designedly inserted in said articles is the purpose and power, not only to "purchase" and "hold" "shares of the capital stock of any other corporation or corporations," under which said company wrongfully claims and is exercising the power to acquire by exchange **[208]** and hold the stock of the Northern Pacific and the Great Northern railway companies, but the purpose and power, while owner thereof, "to exercise all the rights, powers, and privileges of ownership;" that is, to vote such stock, collect the dividends thereon, and in all respects act as a stockholder of such railway companies; and the purpose and power "to aid in any manner any corporation * * * of which any bonds * * * or stock are held, * * * and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds * * * or stock," meaning thereby to do whatever it may deem necessary to aid in any manner the Northern Pacific and the Great Northern Railway companies, or to preserve or enhance the value of their stocks or bonds.

VIII. In further pursuance of the unlawful combination or conspiracy aforesaid, and solely as an instrumentality through which to effect the purposes thereof, on or about the 14th day of November, 1901, the defendant the Northern Securities Company was organized by the election of a board of directors and the selection of a president and other officers, the defendant James J. Hill, the president and controlling power in the management of the defendant the Great Northern Railway Company, being chosen a director and president thereof; and thereupon, in further pursuance of the unlawful combination or conspiracy aforesaid, the defendants James J. Hill and his associate stockholders of the defendant the Great Northern Railway Company assigned and transferred to the defendant the Northern Securities Company, a large amount of the capital stock of the Great Northern Railway Company, the exact amount being unknown to complainant, but constituting a controlling interest therein, and complainant believes a majority thereof, upon the agreed basis of exchange of $180, par value, of the capital stock of the said Northern Securities Company for each share of the capital stock of the Great Northern Railway Company; and the defendants J. Pierpont Morgan and his associate stockholders of the Northern Pacific Railway Company assigned and transferred to the defendant the Northern Securities Company a **[209]** large majority of the capital stock of the defendant the Northern Pacific Railway Company, the exact amount being unknown to complainant, upon the agreed basis of exchange of $115, par value, of the capital stock of the said Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; and thereafter, in further pursuance of the unlawful combination or conspiracy aforesaid, the defendant, the Northern Securities Company, offered to the stockholders of the defendant railway companies to issue and exchange its capital stock for the capital stock of such railway companies, upon the basis of exchange aforesaid, no other consideration being required. In further pursuance of the unlawful combination or conspiracy aforesaid the defendant the Northern Securities Company has acquired an additional amount of the stock of the defendant railway companies, issuing in lieu thereof its own stock upon the basis of exchange aforesaid, and is now holding, as owner and proprietor, substantially all of the capital stock of the Northern Pacific Railway Company and, as claimant believes and charges, a majority of the capital stock of the Great Northern Railway Company, but if not a majority, at least a controlling interest therein, and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof in the organization, management, and operation of said railway companies, and in the receipt and control of their earnings, and will continue to do so, unless restrained by the order of this court. By reason whereof a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific Railway systems has been affected, a combination or conspiracy in restraint of the trade or commerce among the several States and with foreign nations formerly carried on by the defendant railway companies independently and in free competition one with the other has been

formed and is in operation, and the defendants are thereby attempting to monopolize, and have monopolized, such interstate and foreign trade or commerce, to the great and irreparable damage of the people of the United [210] States, in derogation of their common rights, and in violation of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

IX. If the defendant the Northern Securities Company has not acquired a large majority of the capital stock of the defendant the Great Northern Railway Company, it is because the individual defendants named, and their associates in the combination or conspiracy charged in this petition, or some of them, since it became apparent that the legality of their corporate device for the merger of the stock of competing railway companies, through the instrumentality of a central or holding corporation, would be assailed in the courts, have purposely withheld, or caused to be withheld, a large amount of the capital stock of said railway company from transfer for the stock of the Northern Securities Company, and have purposely discouraged and prevented the transfer and exchange of such stock for the stock of the Northern Securities Company, all for the purpose of concealing the real scope and object of the unlawful combination or conspiracy aforesaid, and of deceiving and misleading the state and Federal authorities, and of furnishing a ground for the defence that the Northern Securities Company does not hold a clear majority of the stock of the Great Northern Railway Company. The complainant avers that such stock, so withheld or not transferred to the Northern Securities Company, is now in the hands of some person or persons (unknown to the complainant) friendly to and under the influence of the individual defendants named and their associates aforesaid, or some of them, and will either not be voted, or be voted in harmony with the Great Northern stock held by the Northern Securities Company, until the question of the legality of this corporate device for merging competing railway lines shall be finally and judicially determined, when such stock will either be turned over to the Northern Securities Company or continue to be held and voted outside said company but in harmony with the

Great Northern [211] stock held and voted by it, as may at the time seem advisable.

X. In further pursuance of the unlawful combination or conspiracy aforesaid, the Northern Securities Company (subject, it may be, to the condition stated in the next preceding paragraph) is about to and will, unless restrained by the order of this court, receive and acquire, and hereafter hold and control as owner and proprietor, substantially all of the capital stock of the defendant railway companies, issuing in lieu thereof its own capital stock to the full extent of the authorized issue, of which, upon the basis of exchange aforesaid, the former stockholders of the Great Northern Railway Company have received or will receive and hold about 55 per cent thereof, the balance going to the former stockholders of the Northern Pacific Railway Company.

XI. No consideration whatever has existed, or will exist, for the transfer as aforesaid of the stock of the defendant railway companies from their stockholders to the Northern Securities Company, other than the issue of the stock of the Northern Securities Company to them in exchange therefor, for the purpose, after the manner, and upon the basis aforesaid.

The defendant, the Northern Securities Company, was not organized in good faith to purchase and pay for the stocks of the Great Northern and the Northern Pacific Railway companies. It was organized solely to incorporate the pooling of the stocks of said companies and to carry into effect the unlawful combination or conspiracy aforesaid. The Northern Securities Company is a mere depositary, custodian, holder, and trustee of the stocks of the Great Northern and the Northern Pacific Railway companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool. The Northern Securities Company does not have and never had any capital sufficient to warrant such a stupendous operation. Its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 is just sufficient, when all issued, to [212] represent and cover the exchange value of

substantially the entire stock of the Great Northern and Northern Pacific Railway companies, upon the basis and at the rate agreed upon, which is about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par.

XII. If the Government fails to prevent the carrying out of the combination or conspiracy aforesaid, and the defendant, the Northern Securities Company, is permitted to receive and hold and act as owner of the stock of the Northern Pacific and Great Northern Railway companies as aforesaid, not only will a virtual consolidation of two competing transcontinental lines, with the practical pooling of their earnings, be effected, and a monopoly of the interstate and foreign commerce formerly carried on by them as competitors be created, and all effective competition between such lines in the carrying of interstate and foreign traffic be destroyed, but thereafter, to all desiring to use it, an available method will be presented, whereby, through the corporate scheme or device aforesaid, the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," may be circumvented and set at naught, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged, and consolidated, thus placing the public at the absolute mercy of the holding corporation.

XIII. In furtherance of the purpose and object of the unlawful combination or conspiracy aforesaid to monopolize or attempt to monopolize the trade or commerce among the several States, and between such States and foreign countries, formerly carried on in free competition by the defendants, the Northern Pacific and Great Northern Railway companies, and to place a restraint thereon, the individual defendants named and their associate stockholders of the defendant railway companies, have combined or conspired with one another and with other persons (whose names are unknown to the complainant, but whom it prays to have made parties to this action when ascertained) to use and employ, in addition to the corporate scheme **[213]** or device aforesaid, and in aid thereof, various other schemes, devices, and instrumentalities, the precise details of which are at

present unknown to the complainant but will be laid before the court when ascertained, by means of which, unless prevented by the order of this court, the object and purpose of the unlawful combination or conspiracy aforesaid may and will be accomplished.

PRAYER.

In consideration whereof, and inasmuch as adequate relief in the premises can only be obtained in this court, the United States of America prays your honors to order, adjudge, and decree that the combination or conspiracy hereinbefore described is unlawful, and that all acts done or to be done in carrying it out are in derogation of the common rights of all the people of the United States and in violation of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and that the defendants and each and every one of them, and their officers, directors, stockholders, agents, and servants, and each and every one of them, be perpetually enjoined from doing any act in pursuance of or for the purpose of carrying out the same, and, in addition, that the several defendants be respectively enjoined as follows:

First. That the defendant, the Northern Securities Company, its stockholders, officers, directors, executive committee, and its agents and servants, and each and every one of them, be perpetually enjoined from purchasing, acquiring, receiving, holding, voting (whether by proxy or otherwise), or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific Railway Company or the Great Northern Railway Company; and that a mandatory injunction may issue requiring the Northern Securities Company to recall and cancel any certificates of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of **[214]** either of said railway companies, surrendering in return therefor to the holders thereof the certificates of stock in the respective railway companies in lieu of which they were issued.

Second. That the defendant, the Northern Pacific Railway Company, its stockholders, officers, directors, agents, and servants, and each and every one of them, be perpetually

enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting such company to vote such stock, whether by proxy or otherwise, and from paying any dividends upon such stock to said company or its assigns, unless authorized by this court, and from recognizing as valid any transfer, mortgage, pledge, or assignment by such company of such stock, unless authorized by this court.

Third. That the defendant, the Great Northern Railway Company, its stockholders, officers, directors, agents, and servants, and each and every one of them, be perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting such company to vote such stock, whether by proxy or otherwise, and from paying any dividends upon such stock to said company or its assigns, unless authorized by this court, and from recognizing as valid any transfer, mortgage, pledge, or assignment by such company of such stock unless authorized by this court.

Fourth. That the individual defendants named, and their associate stockholders, and each and every stockholder of either of said railway companies who has exchanged his stock therein for the stock of the Northern Securities Company, be each, respectively, perpetually enjoined from in any manner holding, voting, or acting as the owner of any of the stock of the Northern Securities Company, issued in exchange for the stock of either of the said railway companies, unless authorized by this court; and that a mandatory injunction may issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by him, and accept [215] therefor the stock of the defendant railway company in exchange for which the same was issued.

Fifth. That the individual defendants named, and their associate stockholders, and each and every person combining or conspiring with them, as charged in Paragraph XIII hereof, and their trustees, agents, and assigns, present or future, and each and every one of them, be perpetually enjoined from doing any and every act or thing mentioned in said paragraph, or in furtherance of the combination or conspiracy described therein, or intended or tending to place the capital stock of the defendant railway companies, or the competing railway systems operated by them, or the competitive interstate or foreign trade or commerce carried on by them, under the control, legal or practical, of the defendant, the Northern Securities Company, or of any person or persons, or association or corporation, acting for or in lieu of said company, in the carrying out of the unlawful combination or conspiracy described in said paragraph.

The United States prays for such other and further relief as the nature of the case may require and the court may deem proper in the premises.

To the end, therefore, that the United States of America may obtain the relief to which it is justly entitled in the premises, may it please your honors to grant unto it writs of subpœna directed to the said defendants, the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, and John S. Kennedy, and their associate stockholders of the Great Northern Railway Company, as their names may become known to complainant and the court be advised thereof, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, and their associate stockholders of the Northern Pacific Railway Company, as their names may become known to complainant and the court be advised thereof, and the persons referred to in Paragraph XIII hereof, as their names may become known to complainant and the court be advised thereof, and to each of them, commanding them, and [216] each of them, to appear herein and answer (but not under oath) the allegations contained in the foregoing petition, and abide by and perform such order or decree as the court may make in the premises; and that, pending the final hearing of this case, a temporary restraining order may issue enjoining the defendants and their associates, and each of them, and their stockholders, directors, officers, agents, and servants as hereinbefore prayed.

Bill in Equity; exhibit.

The petition was signed and verified by Milton D. Purdy, Attorney of the United States for the District of Minnesota, and also signed by Philander C. Knox, Attorney-General of the United States, and John K. Richards, Solicitor-General of the United States.

Annexed to the petition as an exhibit was the charter of the Northern Securities Company, as follows:

CERTIFICATE OF INCORPORATION OF NORTHERN SECURITIES COMPANY.

STATE OF NEW JERSEY, *ss:*

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the act of the legislature of the State of New Jersey entitled "An act concerning corporations" (revision of 1896), and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

First. The name of the corporation is Northern Securities Company.

Second. The location of its principal office in the State of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein, and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Such office is to be the registered office of the corporation.

Third. The objects for which the corporation is formed are:

(1) To acquire by purchase, subscription, or otherwise, and to hold as investment, any bonds or other securities or evidences of [217] indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner thereof to exercise all the rights, powers, and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner of such stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon.

(4) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

(5) To acquire, own, and hold such real and personal property as may be necessary or convenient for the transaction of its business.

The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage, and convey real and personal property out of this State.

Fourth. The total authorized capital stock of the corporation is four

Bill in Equity; exhibit.

hundred million dollars ($400,000,000), divided into [218] four million (4,000,000) shares of the par value of one hundred dollars ($100) each. The amount of the capital stock with which the corporation will commence business is thirty thousand dollars.

Fifth. The names and post-office addresses of the incorporators, and the number of shares of stock subscribed for by each (the aggregate of such subscriptions being the amount of capital stock with which this company will commence business), are as follows:

Name and post-office address.	Number of shares.
George F. Baker, jr., 258 Madison avenue, New York, N. Y.	100
Abram M. Hyatt, 214 Allen avenue, Allenhurst, N. J	100
Richard Trimble, 53 East Twenty-fifth street, New York, N. Y.	100

Sixth. The duration of the corporation shall be perpetual.

Seventh. The number of directors of the corporation shall be fixed from time to time by the by-laws; but the number, if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year, the directors of the second class for a term of two years, and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose term shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

In case of any increase of the number of the directors the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting, and one-third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one-third of their number for the unexpired portion [219] of the term of the directors of the second class, and one-third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification, or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside the State of New Jersey at such places as from time to time may be designated by the by-laws, or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number of the directors.

As authorized by the act of the legislature of the State of New Jersey passed March 22, 1901, amending the seventeenth section of the act concerning corporations (revision of 1896), any action which heretofore required the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or required their consent

in writing to be filed, may be taken upon the consent of, and the consent given and filed by, the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employé of the corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws or by vote of the board of directors.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum, [220] and to such extent as shall be provided in the by-laws such committee shall have and may exercise all or any of the powers of board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors may appoint one or more vice-presidents, one or more assistant treasurers, and one or more assistant secetaries, and, to the extent provided in the by-laws, the persons so appointed, respectively, shall have and may exercise all the powers of the president, of the treasurer, and of the secretary, respectively.

The board of directors shall have power from time to time to fix and determine and to vary the amount of the working capital of the corporation; to determine whether any, and if any, what part of any accumulated profits shall be declared in dividends and paid to the stockholders; to determine the time or times for the declaration and payment of dividends, and to direct and to determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of the capital stock of the corporation to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the capital stock of the corporation to the extent authorized by law.

The board of directors, from time to time shall determine whether and to what extent, and at what times and places and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholders shall have any right to inspect any account or book or document of the corporation except as conferred by statute of the State of New Jersey, or authorized by the board of directors or by a resolution of the stockholders.

[221] The board of directors may make by-laws, and from time to time may alter, amend, or repeal any by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting or at any special meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof we have hereunto set our hands and seals the 12th day of November, 1901.

Signed, sealed and acknowledged by Geo. F. Baker, Jr., Abram M. Hyatt and Richard Trimble.

The answer of the Northern Securities Company to the petition of the United States of America, was as follows:

I. This defendant admits and avers that the defendant railway companies were, at the time mentioned in the petition, and are now common carriers employed in transportation of freight and passengers within and among those States of the United States in which the railways operated by them are situated, and not further or otherwise, but were and are engaged in commerce among the several States and with foreign nations.

II. This defendant admits that, on and prior to November 13, 1901, the capital stock of the defendant railway companies was owned and controlled by their respective shareholders, and it avers, on information and belief, that the outstanding capital stock of the Great Northern Railway Company was owned by more than eighteen hundred (1,800) separate owners, and the outstanding capital stock of the Northern Pacific Railway Company was owned by more than thirty-five hundred (3,500) separate owners; and that among the shareholders of the Great Northern Railway Company (hereinafter called the Great Northern Company) were the defendants Hill, Clough, James, Morgan, and Kennedy; and that among the shareholders of the Northern Pacific Railway Company (hereinafter called the Northern Pacific Company) were the defendants Morgan, Bacon, Baker, Hill, Kennedy, James, and Lamont. It avers that the persons named and meant to be designated in the peti- [222] tion as owning, controlling, or as being associated in the ownership and control of a majority of the stock of the Great Northern Company, did not at any time, nor in any manner, own or control a majority of said stock, nor as much as one-third ($\frac{1}{3}$) part thereof. Their holdings in said stock were at all times separate and individual, and not in association with each other, or with any other person or persons, and neither of them was under any obligation or promise to any of the others, or to any other person, to hold, use, or vote his stock otherwise than as he should, from time to time, determine to be best for his own individual interest. The persons named and meant to be designated in the petition as owning, controlling, or as being associated in the ownership and control of a majority of the stock of the Northern Pacific Company, did not, at the date named, nor at any time, or in any manner, own or control a majority of such stock, nor as much as one-third ($\frac{1}{3}$) part

thereof. Their holdings in said stock were at all times separate and individual, and neither of them had any control of the holdings of the other, or of any other person or persons, and neither of them was under any promise of obligation to the other, or to any person, to hold, use or vote his stock otherwise than as he should, from time to time, determine to be best for his own individual interest.

Except as herein admitted and averred, this defendant denies each and every allegation of subdivision II of the petition.

III. This defendant admits that the Northern Pacific Company owned and operated a railway from Ashland, in Wisconsin, via Duluth, and from St. Paul, across Minnesota, North Dakota, Montana, Idaho, and Washington, and into Oregon, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle in Washington, and to Portland in Oregon; and that the Great Northern Company operated lines of railway extending from St. Paul, in the State of Minnesota, across said State and North Dakota, Montana, Idaho, and Washington to Everett and Seattle in Washington, passing through Spokane in that State.

[223] It admits that the said lines so operated by said companies connected with other railway lines, and that, either directly or by means of such other railway lines, they connected with lines of steamships on the Great Lakes and the ocean; and that the mileage operated by said companies aggregated about fifty-five hundred (5,500) miles for the Northern Pacific Company and about forty-one hundred and twenty-eight (4,128) miles for the Great Northern Company.

It denies that the lines operated by said companies are parallel or competing, except for the short distances and to the limited extent hereinafter mentioned, and denies that said companies were engaged in active competition with each other, except in the manner and to the extent hereinafter stated.

Except as hereinabove and hereinafter stated, it denies each and every allegation in subdivision III of said petition.

IV. This defendant admits and avers that prior to 1893 those portions, and those portions only, of the lines of the

Northern Pacific Company which had been built and were operated by virtue of the act of Congress incorporating the Northern Pacific Railroad Company, approved July 2, 1864, were owned and operated by the last-named company, and that in the year 1893 that company became insolvent and its lines passed into the hands of receivers appointed by various Federal courts.

It admits that while in this condition a contract was made, as set forth in the report of the *Pearsall* case, referred to in the petition. It avers that said contract was made under and in conformity with the provisions of the act of incorporation of the Great Northern Company, and that the only objection made to the validity of the contract was that the provisions in said charter under which it was made had been repealed by subsequent general laws of the State. It denies that the case, or that the decision therein, is correctly stated in the petition. And it avers that neither the said contract nor the issues raised and decided in the said case have any relevancy to the matters in controversy in this case.

V. This defendant admits and avers that in the winter and **[224]** spring of 1901 the defendant railway companies, for the purpose of promoting their several interests and the interests of the country traversed by their lines and by those of the Chicago, Burlington and Quincy Railroad Company, purchased in equal parts the stock of the last-named company to the amount and at the price and upon the terms of payment stated in the petition. It admits that the lines operated by the Chicago, Burlington and Quincy Railroad Company and its connections are substantially as stated in the petition. It denies that what is called in the petition the Burlington system was or is parallel to or competing with what is therein called the Union Pacific system, but admits that some of the lines of each system compete with some lines of the other.

It denies that said purchase of stock was made in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems under a common source of control, or that it was made for any other motive or with any other purpose than as hereinafter stated.

Except as herein admitted, it denies each and every allegation in subdivision V of the petition.

VI. This defendant denies that prior to its organization the defendants James J. Hill or J. Pierpont Morgan, or said Hill and Morgan, or any persons associated with them, or either of them, owned or controlled a majority of, or held a controlling interest in, the stock of either of said railway companies.

It denies that said persons, or that any of the persons concerned in its organization, contrived or intended any of the things alleged in subdivision VI of the petition or entered into any agreement or conspiracy to do any of the things charged in said subdivision.

It admits and avers that said James J. Hill and other holders (not exceeding ten in number) of the stock of the Great Northern Company, but not including the defendants Morgan, Bacon, or Lamont, did plan its organization with an authorized capital of four hundred million dollars ($400,000,000) for the purposes, and those only, set forth in its certificate of incorporation. **[225]** It denies that James J. Hill and J. P. Morgan agreed between themselves, or with other stockholders of either of the defendant railway companies, or with either of said railway companies, or with anyone whomsoever, that a controlling interest of the stock of either of said railway companies should be turned over or transferred to this defendant, whether in exchange for its stock or otherwise.

It denies that any of the matters stated in said subdivision VI of the petition were contemplated or intended, or have resulted, or will result, from its formation and operation. And it denies the allegation that it is the duty of the directors of said railway companies to pursue a policy which will promote the interest of both systems at the expense of the public.

It alleges that the motives and intentions of the persons so forming this defendant were and are such, and such only, as are in this answer stated, and it denies each and every allegation in subdivision VI of the petition not herein expressly admitted or specifically denied.

VII. This defendant admits its formation under the laws of New Jersey, with the articles, a copy of which is attached

to the petition, and that the provisions of said articles were designedly inserted therein and were fully authorized by the general corporation laws of that State. And it says that the exercise of the powers of a stockholder provided for in said articles was not, as wrongly stated in the petition, confined to the stock of the defendant railway companies which this defendant might hold. It avers that the clause in said articles, partially quoted in paragraph VII of the petition, was not intended to, and does not, enlarge its powers, as the same are set forth in the preceding clauses of said articles, but makes clear its power to do such acts as making or procuring advances of money to any corporation whose securities are held by it, the indorsement or guaranty by it of the obligations of such corporation, becoming surety therefor, or in any lawful manner using its name or resources in aid of such corporation.

VIII. This defendant admits and avers that on or about the **[226]** 14th day of November, 1901, its directors and officers were elected, and among them the defendant James J. Hill as a director and president, but denies that he was or is the controlling power in the management of the Great Northern Company.

It admits and avers that thereafter the defendant James J. Hill and other stockholders of the Great Northern Company, severally and each acting for himself alone, and without any agreement to that effect with any other stockholder, sold to this defendant a large amount of Great Northern stock at one hundred and eighty dollars ($180) per share in exchange for stock of this defendant at par, but it avers that the stock so sold was not within twenty-six million dollars ($26,000,000) of a majority of the stock of the Great Northern Company.

It admits and avers that thereafter and about November 22, 1901, it offered like terms of purchase to the other shareholders of the Great Northern Company, the offer to hold good for sixty days from its date, and that many of the shareholders of that company, each acting for himself alone, accepted such offer and made such sale.

It admits and avers that the defendant J. P. Morgan and other shareholders of the Northern Pacific Company sold to the defendant a majority of the stock of the Northern Pacific Company; and that this defendant has received such divi-

dends as have been paid on the shares held by it, in the same manner and at the same rate as other shareholders; but it denies that it has acted, whether as owner of stock or otherwise, in the management or direction of either of said railway companies or in receipt or control of the earnings of either of them, and it avers that no change whatever has taken place in the management of the said railway companies, or either of them, and that each of them is managed by the same board of directors and officers as existed before the organization of this defendant.

It denies that any of the things done by the defendants James J. Hill and J. Pierpont Morgan, or by either of them, or by this defendant or its promoters, directors, officers, or stockholders, or any of them, were done in pursuance of the pre- [227] tended combination or conspiracy alleged in subdivision VIII of the petition, or as an instrumentality to effect the purposes thereof, and it denies that by reason of the matters or any of them in the petition alleged a virtual or any consolidation of said defendant railway companies or their business has been effected or intended; and it denies any conspiracy or combination in restraint of trade or commerce among the States, or with foreign nations, or that the defendants or any of them are attempting or intending to monopolize or restrain any such trade or commerce.

IX. It denies each and every allegation in subdivision IX of the petition.

X. This defendant says that it does not know and cannot set forth how much additional stock of either defendant railway company it is likely to acquire, since each acquisition of shares by it depends, among other contingencies, on the willingness of the holders of the said stock to sell it upon terms which this defendant may be willing to accept.

XI. This defendant says it has bought and paid for and has caused to be transferred to it upon the records of the Great Northern Company, in accordance with the by-laws of that company, about five-twelfths ($\frac{5}{12}$) of the shares of that company's stock; and has also negotiated for, but has not yet caused to be presented to the Great Northern Company for transfer upon its records, other shares of the stock of that company aggregating about four-twelfths ($\frac{4}{12}$) of the total

amount of its stock, but has not acquired a right to vote as stockholder of the Great Northern Company on stock not so transferred. This defendant, in acquiring shares of the Great Northern Company and of the Northern Pacific Company, dealt solely with the separate owners of the said shares in their respective individual capacities. It has no knowledge of any agreement, promise, or understanding between any of the holders of said stock concerning the sale thereof to it, and it denies that any such agreement, promise, or understanding was ever made. All the sales and transfers of the said stock to this defendant [228] were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person.

This defendant has not paid for all the stock of the Great Northern Company and of the Northern Pacific Company acquired by it in shares of its own stock, but, on the contrary, has expended upward of forty million dollars ($40,000,000) cash in the making of such purchases. Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and so long as it remains the property of this defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders or officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts its right and power immediately to sell or otherwise dispose of the same, or that restricts or controls to any extent any use of the same, which might lawfully be exercised by any other owner of said stocks. There has been and is no agreement, promise, or understanding between any of the holders of said stock so acquired by this defendant, or between any of them and any other person or corporation, that any of said shares should at any time be held, used, or voted by this defendant for the purpose of combining or consolidating or placing under one common management or control the railways of the Great Northern Company and of the Northern Pacific Company, or the business thereof, or for the purpose of monopolizing or restraining traffic or competition between the said railways. Many

stockholders of the said companies have not sold, and may never sell, their shares to this defendant; and the said railway companies have not nor have any of the directors of either of them, by any act, formal or informal, or by suggestion, ever solicited any of their respective shareholders to sell their shares to this defendant. This defendant was organized in good faith, and it denies all the allegations in subdivision XI of the petition.

[229] XII. This defendant denies each and every allegation in subdivision XII of the petition.

XIII. This defendant denies each and every allegation in subdivision XIII of the petition.

SECOND.

Further answering the petition, this defendant, upon information and belief, says that the facts as to the purchase of the shares of the Chicago, Burlington and Quincy Railroad Company (hereinafter called the Burlington Company) and the planning and forming of this defendant and the motives, intentions, and purposes of the persons and corporations concerned in these enterprises, or either of them, were not as erroneously stated in the petition, but were and are as follows:

I. When projecting the line of the Great Northern Company to the Pacific coast, that company and its directors contemplated the necessity of creating for the line not merely State and interstate, but an international commerce. Nearly all the country traversed or reached by the line was then but sparsely settled or not settled at all. It was principally agricultural, grazing, or timber land, with mineral deposits in the mountain ranges believed to be large and valuable, but not developed or explored. Whatever commodities the region might furnish for carriage would be raw material, of great weight and bulk in proportion to its value, which would not bear transportation to market except at a low mileage rate, such as could be made possible only by every practical reduction in the cost of transportation. The available market for all such products was far from the places of production.

In Washington and Oregon are the largest and finest bodies of standing timber in the United States, the best market for

which is in the prairie States of the Mississippi Valley east of the Rocky Mountains; but the lumber and shingles from the Pacific coast would not bear the cost of transportation to those States if the cars carrying them had to be hauled back empty, or nearly so, for a distance of from 1,500 to 2,000 miles. And **[230]** the same is true of the other products. On the other hand, the unoccupied or sparsely populated country along the line, or reached by it, could not furnish a market for commodities enough to load the returning cars; the result being that unless the company could secure traffic for carriage beyond the Pacific coast no great traffic either way could exist or be created.

To meet these conditions the Great Northern Company not only went to great additional expense in the construction of its line to obtain gradients lower than those of any other line to the Pacific coast, but also made great efforts to create and increase in the countries of eastern Asia a demand for the products of this country; and soon after the completion of its railway in 1893 it induced a Japanese company to run a line of steamships, connecting with its railway, on the route between Seattle and ports of Japan, China, and Russian Siberia, and succeeded in creating and has since been actively engaged in building up a commerce in which the flour manufactured along its line, cotton (both raw and manufactured), iron and steel (especially steel rails and plates), machinery, and such other manufactures of this country as a market could be found or made for in eastern Asia, have been carried to oriental ports, and return cargoes of such oriental products as are consumed in this country have been brought back. A large west-bound, as well as an increased east-bound, traffic has thus been secured by the company, enabling it to make such rates on lumber and other products of the country served by it as permit them to be shipped to Eastern markets with a profit to the shippers.

One year before the Burlington purchase, this oriental traffic had reached such proportions that the Great Northern Company caused to be begun the construction of steamships to run from Seattle to ports in Japan, China, and the Philippines, which, from their great carrying capacity (being the

largest in the world), will be able to carry at very low rates (if full cargoes can be secured), and thus enable the company to move the largest volume of west-bound traffic (and also of east-bound traffic) at the lowest cost.

[231] In the interstate and international commerce which the Great Northern Company has thus built up, it competes both in this country and on the ocean with the other transcontinental lines (including the Canadian Pacific), and at the oriental ports it competes for commerce of the world. Its rates are and must be made in competition with the rates of ocean carriers and by way of the Suez Canal.

The policy thus followed by the Great Northern Company in building up an international, and thereby interstate, commerce has been followed by the Northern Pacific Company since its reorganization in 1896.

In creating and maintaining this competitive interstate and international commerce both the Great Northern Company and the Northern Pacific Company were hampered and placed at a disadvantage with the other transcontinental railways, as well as with European competitors, by the want of sufficient direct connection with the territory offering the best markets for the products of the country along their lines, and with the places of production and great centers of distribution from which their traffic must be supplied. For many months before the purchase of the Burlington shares they had considered the best means of getting closer to such markets and sources of supply. The lines of the Burlington, better than those of any other company, fulfilled the requirements of both the Great Northern Company and the Northern Pacific Company in respect of markets for east-bound and freight for west-bound traffic. The Burlington lines traverse the treeless States of Illinois, Iowa, Missouri, Nebraska, Wyoming, Kansas, and Colorado, which afford the best markets for the lumber of the Pacific coast. They reach Denver, Kansas City, Omaha, and Aurora, where are located the principal smelters of silver-lead ores, such as are mined near the lines of the defendant railway companies.

They reach Omaha, Kansas City, and Chicago, where are the great packing houses and the great markets for the cattle

and sheep of the ranges of North Dakota, Montana, Wyoming, Idaho, Oregon, and Washington.

[232] They reach St. Louis and Kansas City, connecting there with lines traversing the cotton States, from which come raw and manufactured cotton required for shipment to China and Japan.

At Chicago and St. Louis they connect with the lines which reach the points of supply of manufactured iron, steel, machinery, and other manufactured articles that find a market in Japan and China.

The Burlington line southward from Minneapolis and St. Paul along the Mississippi River reaches the great coal deposits of southern Illinois, the largest west of Pennsylvania and West Virginia; and its light gradients and consequent low cost of transportation make it possible to supply such coal to points on the lines of each defendant railway company east of the Mississippi River, relieving the people and the railways of that territory from entire dependence upon the Pennsylvania and West Virginia mines, the supply from which is yearly becoming more costly and less certain.

The price paid for said Burlington stock was lower per mile of main track covered by the stock than that for which the stock of any other large and well established system in the same general territory could have been bought.

The purchase of the Burlington stock by the Northern Pacific and Great Northern companies in equal parts served each company as well as if it were the sole owner of such stock, while such purchase might have been beyond the financial means of either company by itself.

The Great Northern and Northern Pacific companies therefore each purchased an equal number of shares of the Burlington stock as the best means and for the sole purpose of reaching the best markets for the products of the territory along their lines, and of securing connections which would furnish the largest amount of traffic for their respective roads, increase the trade and interchange of commodities between the regions traversed by the Burlington lines and their connections and the regions traversed or reached by the Great Northern and Northern Pacific lines, and by their connecting lines of shipping on **[233]** the Pacific coast. These

connections and such interchange of traffic were deemed to be and are indispensable to the maintenance of their business, local as well as interstate, and to the development of the country served by their respective lines, and of like advantage to the Burlington lines and the country served by them, and strengthen each company in the competition with the more southerly lines to the Pacific coast, with the Canadian Pacific Railway, and with European carriers, for the trade and commerce of the Orient.

In such purchase there was no purpose to lessen any competition of the Burlington lines with those of either of the purchasers, for they are not competitive, or to lessen any competition between the purchasers. Such purchase was not intended to have, and it cannot have, any such effect.

The purchase of the Burlington stock was not made in view of the formation of this defendant, but solely from the motives and with the purposes already stated.

II. The project of forming a holding company of any kind was not the result, in any way, of the failure of the plan which was defeated by the decision of the Supreme Court in the *Pearsall* case. There was no connection whatever between the two.

The project of a holding company which finally developed into the formation of this defendant had its inception years before that date, among several gentlemen, not exceeding ten in number, who had been large shareholders in the Great Northern Company and its predecessor, the St. Paul, Minneapolis and Manitoba Railway Company; some of them from the original organization of the latter company in 1879, and others from dates not long after that time. They have never held a majority of the stock of the Great Northern Company, but have taken an active interest in its policy and administration; have aided it when necessary in financing its operations; have acted together in promoting its interests; have, with some exceptions, served from time to time as directors and officers (Mr. Hill having been president of the successive companies since 1882); and by reason of their active interest in the company and serv- **[234]** ices to it have influenced to a large degree its policy and management. As far back as 1893, most of these gen-

tlemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon the policy which under their influence the company had pursued with great benefit to its shareholders and the public, should their holdings by death or otherwise become scattered, and by what means their holdings could be kept together, so as to secure the continuance of such policy in the management of the company. It was considered that if a company should be formed to which they might transfer their individual holdings, their shares were likely to be held together, so long as the majority in the holding company should so wish, and this would tend to give stability to the policy of the Great Northern Company, be of aid to it in financial operations, and maintain the value of their investments. These conclusions were the result of various consultations among the persons mentioned, or some of them, but no definite agreement was made for forming such a company or binding anyone to transfer his shares to it if formed.

From time to time, beginning with the reorganization of the Northern Pacific Company in 1896, Mr. Hill and said other Great Northern shareholders who had discussed with him the plan of forming a holding company, had made large purchases of Northern Pacific shares, individually, each for himself, without any concerted action, and solely as investments. About May 1, 1901, their aggregate holdings of the common stock of the Northern Pacific Company amounted to nearly twenty million dollars ($20,000,000) of the eighty million dollars ($80,000,000) common stock of the company, which also had a preferred stock, amounting to seventy-five million dollars ($75,000,000), with the same voting power as the common stock. At this time the firm of J. P. Morgan & Co. held about six million dollars ($6,000,000) of the common stock. In the fall of 1900 Mr. Hill and said Great Northern shareholders discussed the question of putting their holdings of Northern **[235]** Pacific stock into the proposed holding company, as well as the suggestion that all the other stockholders of the Great Northern Company should be given the opportunity of selling and transferring their shares to the holding company,

and that its capital stock should be made large enough to enable it to buy such holdings, though it was not known that the holders of any considerable amount of Great Northern stock, other than those above named, would desire to make such transfer.

At the time of the purchase of the Burlington shares it was not contemplated by either purchasing company or its shareholders that any alliance between the purchasing companies, or among their shareholders, was needed to preserve to each company its fair share of the advantages secured by the purchase. It was thought that the manifest interest of each company rendered any further guaranty or security needless. But pending or just after the conclusion of the negotiations for the Burlington stock, parties acting in the interest of the Union Pacific Railway system did purchase Northern Pacific shares, both common and preferred, to the amount of about seventy-eight million dollars ($78,000,000), being a clear majority of the entire capital stock of that company. The apparent intent of such purchase was to defeat and, if successful, it would have defeated, the carrying out of the purposes for which the Burlington shares had been bought by the Great Northern and Northern Pacific companies, and the development of the interstate and international commerce of each of them, and would have subordinated the policy of each to an interest adverse to both the Great Northern and Northern Pacific companies, and to the public served by their lines.

To protect the interests of the shareholders of the Northern Pacific Company, J. P. Morgan & Co. made additional purchases of Northern Pacific common stock, which, with the holdings in said stock of Mr. Hill and other Great Northern shareholders who had discussed with him the plan of forming a holding company, constituted about forty-two million dollars ($42,000,000), being a majority of the common stock. In **[236]** view of the injury apprehended to both companies, and to their shareholders, and the better to protect their interests in the future, the Great Northern shareholders holding Northern Pacific shares, deemed it advisable that the projected holding company should have power to purchase not only their own Great Northern and Northern

Pacific shares, but also the shares of such other Great Northern and Northern Pacific shareholders as might wish to sell their stock to said holding company, and the shares of companies already formed, and others that might be formed, for the purpose of aiding the traffic or operations of the Great Northern and Northern Pacific companies, respectively. At this time it was not expected by any of the persons concerned that any Northern Pacific shares except the said forty-two million dollars ($42,000,000) would be acquired by the proposed holding company. The organization of such company was not dependent on any agreement that it should acquire a majority of the shares of either defendant railway company. It would have been organized if the Burlington purchase had not been made, and if its promoters had had no other shares to transfer to it than the thirty-four million dollars ($34,000,000) Great Northern stock and the twenty million dollars ($20,000,000) Northern Pacific stock held by them on May 1, 1901. It was not known that all or how many of the shareholders of either of the railway companies would be likely to transfer their shares to this defendant when formed. After its organization this defendant bought and still holds about one hundred and fifty million dollars ($150,000,000) of the stock of the Northern Pacific Company; and it has also purchased and negotiated for the purchase of the stock of the Great Northern Company, as hereinbefore stated. Neither the said persons who were concerned in the formation of this defendant, nor the said persons from whom it has acquired the stocks of said railway companies, nor this defendant itself since its formation, nor its stockholders, directors, or officers, have planned or intended that the stock of said railway companies acquired by this defendant, or any part thereof, should be held, used, or voted by **[237]** it, or by its officers, agents or proxies, for the purpose of combining, consolidating or placing under one common management or control the railways of the Great Northern and Northern Pacific companies, or the business thereof; or for the purpose of monopolizing or restraining competition between the said railway companies; or for any other purpose than the election by each of said railway companies of a competent and distinct board of directors, able and intending to manage

each of them independently of the other, and for the benefit of their shareholders and of the public. By the acts of the legislature of the State of Minnesota incorporating the Great Northern Railway Company, and by the acts of the legislature of the State of Wisconsin incorporating the Northern Pacific Railway Company, it is, in substance, provided that the business and affairs of each railway company shall be managed by a board of directors to be elected by the stockholders, and that all the powers of each corporation relating to said matters shall be vested in such board.

Every share of stock issued by this defendant has been issued to the persons and corporations receiving the same in good faith, for full value paid to it, either in cash or its equivalent, and in accordance with the provisions of its articles of incorporation and with the laws of the State of New Jersey. No agreement, promise, or understanding has been made between this defendant and any of its stockholders, or between its stockholders themselves or any of them, or between said stockholders or any other persons or corporations, that the stock of this defendant should be held, used, or voted other than by each stockholder, separately and individually, and in such way as he should see fit; and there has been no agreement, promise, or understanding between said stockholders themselves, or any of them, or between said stockholders and any other person or corporation, that they or any of them should use, hold, or vote their stock in this defendant in association or for any common purpose or object. The owners and holders of stock of this defendant are more than thirteen hundred (1,300) in number, and the owner- **[238]** ship of the stock is being changed from day to day by sales and transfers in the usual course of dealing. The said persons who formed or were otherwise concerned in the formation of this defendant have never, all together, held, owned or otherwise controlled an amount of stock of the said company equal to so much as one-third of the whole amount thereof now outstanding. This defendant has no contract or obligation to purchase or acquire any shares whatever in either railway company, in addition to those which it has purchased or negotiated to purchase, as above stated. Its authorized capital was fixed by per-

sons who planned its organization to enable it to give to each stockholder in each of the defendant railway companies an opportunity to sell his stock to it, should he see fit to do so, and should this defendant desire to acquire it. The sum fixed was deemed ample by those who planned the formation of this defendant to furnish the means to pay for all such shares as would likely be acquired by it, and to leave remaining a large amount to be used for the purchase of stock in other corporations, not common carriers, which this defendant might consider beneficial to acquire. This defendant was not formed as a scheme or a device to evade the act of Congress known as the "Anti-Trust Act," or any other law whatever, but solely for the purposes hereinbefore stated.

III. This defendant was not formed, nor did any of those concerned in its formation, nor any of those who sold their shares of stock to it, have any purpose or intention, to restrain trade or commerce, or to lessen competition between said railway companies, or to monopolize traffic in any manner whatever; nor can any such results follow from the formation or operation of this defendant. In point of fact, since the organization of this defendant rates on the defendant railway companies' lines, including rates to and from points common to both, have voluntarily been so reduced as to decrease their earnings by upwards of a million of dollars annually. For all interstate commerce on the lines of either the defendant railway companies, except traffic beginning and ending on their own lines **[239]** respectively, the rates are fixed by joint tariffs with connecting lines. In respect to all such traffic neither of the defendant companies has ever had, or can have, any independent rate-making power or control of traffic or rates. All joint tariffs with other companies to or from points common to the lines of the defendant railway companies have always been, and necessarily must be, the same, whether the traffic is carried by one or the other of said companies. The total amount of all other interstate traffic, that is, traffic between common points on the two roads, which is not competitive both as to rates and quality of service with other carriers having equal

rate-making power with them, is less than 2 per cent of the total interstate traffic of the two companies.

IV. The sale and transfer of property, whether in the form of shares of corporate stock or otherwise, has never been adjudged to be, and is not, in violation of the act of Congress of July 2, 1890, known as the "Anti-Trust Act."

This defendant is not a railroad company, and it has no power to operate or manage railways or make or control rates of transportation, nor to monopolize or restrain traffic of any kind. So far from intending to violate any provision of said act of Congress, the persons who were concerned in organizing this defendant and those who have sold their shares to it had every reason to believe and did believe that such sales were not in any way in contravention of that act. In common with the general public, they were aware that during the eleven years since the passage of that act in many instances the stock of a competing railway company has been acquired by its competitor or the shareholders thereof, such acquisition including many of the principal railways doing business throughout the country. This has been done without objection from any branch of the Government of the United States, and has invariably proven beneficial to the railway companies concerned and to the public, and those making sales of stocks to this defendant had no reason to believe that such sales were open to any legal objection or question whatever.

[240] V. This defendant was not organized for the purpose of acquiring a majority of the stock of either the Great Northern or the Northern Pacific Company, but merely to purchase the stock of those who wished to sell, as above stated, and was not organized for the purpose of controlling railway rates in the slightest degree, and has not had and cannot have any such effect. The transactions referred to in the petition have consisted in the organization of a lawful corporation and the purchase of property by it. All acts done in relation to the organization of this defendant and in the conduct of its business have been expressly authorized by law, and have had no effect whatever to restrain trade or commerce among the several States or with foreign nations. If these lawful transactions should hereafter have any effect to restrain trade or commerce among the several States or

with foreign nations (which is hereby denied), that effect would be merely indirect, remote, incidental, and collateral, and not intended, and as nothing compared with the great expansion of the volume of interstate and international commerce which was intended, and which this defendant believes is destined to result from the enterprise of the two railway companies, that culminated in the purchase of the Burlington stock.

And this defendant says:

1. The "Anti-Trust Act" was not intended to prevent or defeat an enterprise in aid of a great competitive interstate and international commerce merely because such enterprise may carry with it the possibility of incidental restraint upon some commerce, trifling both as respects territory and volume.

2. Nor was the act intended to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own, and sell their stock.

3. Otherwise construed, the act would be unconstitutional, because:

The power to regulate commerce with foreign nations and **[241]** among the States does not give Congress the power to regulate any of the matters above mentioned in respect to corporations created by the States; and because

Persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest.

VI. There is a defect of necessary parties defendant, because, as already set forth, the persons who made sales of stock of the said railway companies to this defendant were numerous, exceeding more than 1,300 in number, and few of them had any connection whatever in the planning or forming of this defendant, and in their absence from this litigation no decree can be made affecting their rights in the premises.

VII. And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained mate-

rial or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

Signed (no verification) for the Northern Securities Company, by John W. Griggs and Geo. B. Young, solicitors and counsel.

A separate answer was filed by the defendants James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, and George F. Baker, which was substantially the same as the answer of the defendant Northern Securities Company.

The answer of the Great Northern Railway Company was substantially the same as that of the Northern Securities Com- **[242]** pany with the omission of Paragraph II of the second statement of defence.

The answer of the defendant the Northern Pacific Railway Company was as follows:

I. This defendant admits the allegations of Paragraph I of the petition that this defendant and the Great Northern Railway Company were at the times mentioned in said petition and now are common carriers employed in the transportation of freight and passengers among the several States of the United States within which the railways operated by them are situated.

This defendant denies each and every other allegation of paragraph I of the petition.

II. This defendant admits the allegations of Paragraph II of the petition that prior to November 13, 1901, the stock of this defendant was owned and controlled by its shareholders, and that among them were the parties in that behalf alleged.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of Paragraph II of the petition.

III. This defendant admits the allegations of Paragraph III of the petition that this defendant at the times mentioned owned and operated a railway extending from Ashland in Wisconsin via Duluth, Minnesota, and from St. Paul, Minnesota, across Minnesota, North Dakota, Montana, Idaho, and Washington, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle, in Washington, and to Portland, in Oregon; that the Great Northern Company operated lines of railway extending from St. Paul aforesaid across Minnesota, North Dakota, Montana, Idaho, and Washington, passing through Spokane and extending to Everett and Seattle, in the State last aforesaid; that the said lines connected with other railway lines, and either directly or by means of such other railway lines connected with lines of steamships on the Great Lakes and the ocean, and that the mileage operated by said companies aggregated about five thousand five hundred miles for this defendant **[243]** and about four thousand one hundred and twenty-eight miles for the Great Northern Company.

This defendant denies each and every other allegation of Paragraph III of the petition.

IV. This defendant admits the allegations of Paragraph IV of the petition that, prior to the year 1893, a corporation known as the Northern Pacific Railroad Company, organized and existing under certain acts and resolutions of Congress, and which then operated some parts of the lines of this defendant, became insolvent and was placed in the hands of receivers appointed by various courts of the United States; that, while in this condition, a plan of reorganization was entered into by the bondholders of said company, and that an arrangement was proposed between the said bondholders and the Great Northern Company which was never carried out. This defendant admits that a case entitled Pearsall against the Great Northern Railway Company was decided by the Supreme Court of the United States on March 30, 1896, and is reported in volume 161 of the reports of said court, beginning on page 696.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of Paragraph IV of the petition. It is informed and believed

that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

V. This defendant admits the allegations in Paragraph V of the petition that early in the year 1901 this defendant and the Great Northern Company, acting for the purpose of promoting their several interests, each purchased shares of stock of the Chicago, Burlington and Quincy Railroad Company of Illinois, paying therefor with the joint bonds of the Great Northern Company and the Northern Pacific Company, payable in twenty years from date, with interest at 4 per cent per annum, at the rate of $200 in bonds for each $100 in stock, and in this manner the said companies severally purchased and acquired each about 49 per cent of said stock; that the lines operated by said **[244]** Burlington Company and its connections were geographically as stated in the petition, and that some of said lines compete with some lines of what is called in the petition the Union Pacific system.

This purchase was made by these defendants primarily in order to secure a terminus in Chicago and permanent connection with the eastern and southeastern markets, which are especially valuable to the agricultural and mineral products of the northwest, and also because the Burlington system serves a large and growing territory, and the purchase was deemed desirable and profitable in itself. It had no connection with the future formation of any company whatsoever and was not made with intent to violate the statute or common law of any State or of the United States, and was not in violation of any such law.

This defendant denies each and every other allegation of Paragraph V of the petition. It is informed and believes that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

VI. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph VI of the petition.

VII. This defendant admits the allegation of Paragraph VII of the petition, that the defendant Northern Securities Company was heretofore organized, as it is informed and believes, under the general laws of the State of New Jersey.

This defendant denies any knowledge or information suffi-

cient to form a belief of each and every other allegation of Paragraph VII of the petition.

VIII. This defendant admits the allegations of Paragraph VIII of the petition that the defendant, Northern Securities Company, has purchased and now holds and owns a large majority of the capital stock of this defendant, and that the Securities Company has received such dividends as have been paid on any shares held by it.

This defendant denies any knowledge or information suffi- **[245]** cient to form a belief of each and every other allegation of Paragraph VIII of the petition.

IX. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph IX of the petition.

X. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph X of the petition.

XI. This defendant denies each and every allegation of Paragraph XI of the petition.

XII. This defendant denies each and every allegation of Paragraph XII of the petition. It is informed and believes that said paragraph consists merely of expressions of opinion, and is, therefore, without weight in support of any cause of action.

XIII. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph XIII of the petition.

XIV. As this defendant is informed and believes, the purchase by the Northern Securities Company of shares of stock of this defendant and the sale thereof by the owners have been expressly authorized by law. They have had no effect whatever, in law or in fact, in restraint or monopoly of trade or commerce among the several States or with foreign nations. The petition does not allege that at any place within the jurisdiction of this court or elsewhere any such restraint or monopoly has been effected.

If these lawful transactions, consisting merely of the purchase and sale of property, should hereafter have any effect in restraint or monopoly of trade or commerce among the several States or with foreign nations, that would not be their

direct effect, but would be merely indirect, remote, incidental, and collateral, and would, therefore, not bring said transactions within said act of Congress above mentioned. Any other construction would render the statute unconstitutional, as beyond the power of Congress, and as depriving the sellers of the stock thus sold and also the stockholders of this defendant who have not sold **[246]** their shares to the Securities Company, of liberty and property without due process of law, because, thus construed, it would be an inhibition upon their right to sell their property. If complainant's contention be sustained, the right of the owner of property to sell the same will be dependent upon what the courts at any future time may hold to have been the intention of the purchaser in buying such property. This result would seriously impair the liberty of the owner and the value of his property, and is contrary to the constitutional guaranties thereof.

These transactions are, therefore, not within the act of Congress above mentioned; nor has Congress any constitutional power to annul or prohibit action thus expressly authorized by state statutes under which the same has been or may hereafter be taken.

XV. There is a defect of necessary parties defendant herein, because in this suit it is sought to annul all sales of shares made by shareholders of this defendant to the Northern Securities Company and to cancel all certificates of stock of the latter company issued in purchase of the same. The parties making such sales are numerous, and many of them had no connection with the matter save to sell their shares to the Securities Company after its organization. It is obvious that in their absence no adjudication can be made annulling such sales to the Securities Company. A decree to such effect as prayed for by the petition necessarily would deprive such original sellers of their property without due process of law. All persons who sold shares in this defendant to the Securities Company are, therefore, necessary parties, and the petition is bad by reason of their absence.

XVI. And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or

necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and **[247]** avoided or denied, the same is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

The first five paragraphs of the answer of the defendants, J. Pierpont Morgan and Robert Bacon, were substantially the same as the same paragraphs of the answer of the Northern Pacific Railway and the remainder of the answer of such defendants was as follows:

VI. These defendants admit that the defendant James J. Hill and certain other persons decided upon the formation of a securities company for the purposes set forth in the certificate of incorporation of the Northern Securities Company attached to the petition and in all respects as therein stated.

These defendants deny each and every other allegation of Paragraph VI of the petition.

VII. These defendants admit the allegations of Paragraph VII of the petition that on November 13, 1901, the defendant Northern Securities Company was organized under the general laws of the State of New Jersey, with its principal office in Hoboken, in said State, and with an authorized capital stock of $400,000,000, and that a copy of the articles of incorporation of said company correctly stating its powers is attached to the petition.

These defendants deny each and every other allegation of Paragraph VII of the petition.

VIII. These defendants admit the allegations of Paragraph VIII of the petition that on or about November 14, 1901, the defendant Northern Securities Company was organized by the election of directors and officers; that the defendant James J. Hill was chosen a director and president thereof; that thereupon the said James J. Hill and other stockholders of the Great Northern Company, each individu-

ally and separately [248] from the others, sold to the Securities Company a large amount of the capital stock of the Great Northern Company for the price of $180 par value of the capital stock of the Securities Company for each share of the capital stock of the Great Northern Company; that these defendants and other stockholders of the Northern Pacific Company, each individually and separately from the others, sold to the Securities Company a large amount of the capital stock of the Northern Pacific Company; that the Securities Company also offered, for a limited period, like terms of purchase to the other shareholders of the Great Northern Company; that the Securities Company now holds and owns a large majority of the capital stock of the Northern Pacific Railway Company, and a large amount, though less than a controlling interest, of the stock of the Great Northern Company, and has negotiated for the purchase of additional shares of that company, and that the Securities Company has received such dividends as have been paid on any shares held by it.

These defendants deny each and every other allegation of Paragraph VIII of the petition.

IX. These defendants deny each and every allegation of Paragraph IX of the petition.

X. These defendants deny any knowledge or information sufficient to form a belief of each and every allegation of Paragraph X of the petition.

XI. These defendants deny each and every allegation of Paragraph XI of the petition.

XII. These defendants deny each and every allegation of Paragraph XII of the petition. They are informed and believe that said paragraph consists merely of expressions of opinion, and is, therefore, without weight in support of any cause of action.

XIII. These defendants deny each and every allegation of Paragraph XIII of the petition.

XIV. In July, 1896, the capital stock of the Northern Pacific Railway Company was fixed at $155,000,000, of which [249] $75,000,000 were preferred and $80,000,000 common stock. The preferred stock of the company was issued in exchange for various obligations of the former Northern

Pacific Railroad Company because the holders thereof would not accept new common stock therefor. At the same time it was contemplated that the time would arrive when said preferred stock should properly be retired, and it was, accordingly, then provided that the preferred stock might be retired in whole or in part at par on any first day of January, up to and including January 1, 1917. Both classes of stock were made subject to a voting trust in this defendant Morgan and others, continuing until November 1, 1901, but terminable by the trustees in their discretion at an earlier date.

The Northern Pacific Company shared in the recent prosperity of the country, and its common stock appreciated in value until it was deemed practicable to carry out the original intention of retiring the preferred stock and also to terminate the voting trust. Accordingly said trust was terminated by the trustees upon January 1, 1901, and the preferred stock was retired. Although the latter action was in contemplation and was practically decided upon some time before the termination of the voting trust, it was not made the subject of formal action by the board of directors until November 13, 1901, and was completed upon January 1, 1902.

XV. As hereinbefore stated, early in 1901, the Northern Pacific Company, and the Great Northern Company, each purchased about 49 per cent of the capital stock of the Chicago, Burlington and Quincy Railroad Company. This purchase was made by the Northern Pacific Company primarily in order to secure a terminus at Chicago and permanent connection with the eastern and southeastern markets, which are especially valuable for the agricultural and mineral products of the northwest, but also because the Burlington system serves a large and growing territory. and the purchase was deemed desirable and profitable in itself.

These purchases were not made, as the petition alleges, "in [250] contemplation of the ultimate placing of the Great Northern and Northern Pacific system under a common source of control." They had no connection whatever with the future formation of the Northern Securities Company, or any other company whatsoever, and had no connection with the fact alleged in the petition that the Union Pacific Rail-

way system is to some extent a competing system with the Burlington system.

The said purchases were not made with intent to violate the statute or common law of any State or of the United States; were not in violation of any such law, and are not charged in the petition to have been in any respect unlawful.

XVI. During the reorganization of the Northern Pacific system the firm of J. P. Morgan & Co., of which these defendants are members, acted as reorganization managers, and ever since the reorganization of the Northern Pacific Company has been its fiscal agent. Said firm has accordingly at all times desired to further the best interests of the company and all its stockholders, and especially to aid in steadily developing the business of the company and the prosperity of the country which it serves. Said firm considered that these results were accomplished, so far as possible, by the policy of the company during the existence of the voting trust, as above stated. Not long after the termination of the voting trust, however, and very early in May, 1901, said firm became aware that unusually large purchases of both classes of stock were in progress in the stock market, apparently in a single interest. Said firm was apprehensive that these purchases were for the purpose of securing control of the direction of the Northern Pacific Company and thus managing it, not for what said firm conceived to be the best interest of the company, but for some ulterior purpose of which said firm was not informed.

Accordingly said firm, prior to May 7, 1901, purchased common stock of the Northern Pacific Company in considable amounts, and their holdings upon that day amounted to about two hundred thousand shares. In making these purchases said [251] firm acted on its own account and in behalf of no other person whomsoever, and was actuated by no motive save those above stated.

The said purchases were not made with intent to violate the statute or common law of any State or of the United States, and were not in violation of any such law.

XVII. For some years the defendant Hill and others who were interested in the Great Northern Company, but not including these defendants, had in contemplation the formation of a corporation for the purpose of purchasing their separate

interests in that company, with the general object that said interests should be held together and the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the territory served by it, and not subject to radical change and possible inconsistency from time to time. In or about August, 1901, as this plan was approaching maturity, said parties for similar reasons determined that they would also sell to the new company, when formed, their interests in the Northern Pacific Company, which were considerable in amount, and that the capital of the new company should be made sufficiently large to enable it to purchase all shares of the Great Northern and Northern Pacific companies which the holders might desire to sell and any other shares which the new company might deem it advisable to acquire.

By this time it had become known that the purchases in the market of shares of the Northern Pacific Company, to which reference is made above, had been made in behalf of a corporation known as the Oregon Short Line Railroad Company, controlled by the Union Pacific Railroad Company; that there were held in that interest shares of the Northern Pacific Company to about the amount of $41,000,000 of preferred stock, which, however, was to be retired on January 1, 1902, and $37,000,000 of common stock, together making 780,000 shares and constituting an absolute majority of the total capital stock of the Northern Pacific Company. Thereupon and therefore, [252] with the view and for the purpose of protecting the Northern Pacific Company and the holders of its common stock against the possible control of the direction of said company in an adverse interest, these defendants determined and also advised their friends to sell their Northern Pacific stock to the new company.

As set forth in the petition, the Northern Securities Company was duly organized pursuant to the laws of New Jersey upon November 13, 1901. It was organized according to law, and possesses all the powers set forth in its certificate of incorporation, and has full power to do every act which it has in fact done, and the petition does not allege the contrary.

It having become known that the Oregon Short Line Company was not disinclined upon satisfactory terms to sell its

holdings of the major part of the Northern Pacific stock, the firm of J. P. Morgan & Company, deeming such action for the best interest of the Northern Pacific Company, purchased from said Oregon Short Line Company all its holdings of the capital stock of the Northern Pacific Company.

After its organization the Northern Securities Company duly purchased all the shares of the Northern Pacific Company and of the Great Northern Company hereinbefore mentioned, including those purchased by the firm of J. P. Morgan & Company from the Oregon Short Line Company, for which it paid partly in cash and partly in its own shares. It also was willing to purchase the shares of any other shareholders of the Great Northern Company, who desired to sell the same, for the price of one hundred and eighty dollars for each share of the Great Northern Company, payable in its own shares, and did actually purchase and pay for considerable amounts of said stock at such price.

None of these purchases by the Northern Securities Company were made with intent to violate the statute or common law of any State or of the United States, or were in violation of any such law.

XVIII. The foregoing is a correct statement of all the mat- **[253]** ters mentioned in the petition, omitting its many irrelevant adjectives, adverbs, and conclusions, and of some other facts in addition thereto. The transactions prior to the formation of the Northern Securities Company had no connection whatever with the formation thereof, save as above stated. That company was organized, not for the purpose of acquiring a majority of the stock of either the Great Northern or the Northern Pacific Company, but as above set forth. It was not organized for the purpose of affecting railway rates or competition in the slightest degree, and has not had any such effect. In the transactions above stated these defendants and, so far as they are aware, the other parties who have been engaged therein have never sought or intended to violate the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, c. 647), or to enter into any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, or to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations.

The transactions have consisted merely in the organization of a lawful corporation of New Jersey and the sale to and purchase by it of property lawfully salable. All acts done in relation to the organization of the Securities Company and the purchase by it of shares of stock of the railway companies and the sale thereof by the owners have been expressly authorized by law. They have had no effect whatever, in law or in fact, in restraint or monopoly of trade or commerce among the several States or with foreign nations. The petition does not allege that at any place within the jurisdiction of this court or elsewhere any such restraint or monopoly has been effected.

If these lawful transactions, consisting merely of the purchase and sale of property, should hereafter have any effect in restraint or monopoly of trade or commerce among the several States or with foreign nations, such effect would not be their **[254]** direct effect, but would be merely indirect, remote, incidental, and collateral, and aside from any intention of the parties, and therefore would not bring said transactions within said act of Congress. Any other construction would render the statute unconstitutional as beyond the power of Congress, and as depriving these defendants and the sellers generally of the stock thus sold, of liberty and property without due process of law, because, thus construed, it would be an inhibition upon their right to sell their property. If complainant's contention be sustained, the right of the owner of property to sell the same will be dependent upon what the courts at any future time may hold to have been the intention of the purchaser in buying such property. Such a result would seriously impair the liberty of the owner and the value of his property, and is contrary to the constitutional guaranties thereof.

These transactions are, therefore, not within the act of Congress above mentioned; nor has Congress any constitutional power to annul or prohibit action thus expressly authorized by state statutes under which the same has been taken.

Decree of the Circuit Court.

XIX. There is a defect of necessary parties defendant herein because in this suit it is sought to annul all sales of shares made by shareholders of the Great Northern Company and the Northern Pacific Company to the Northern Securities Company, and to cancel all certificates of stock of the latter company issued in purchase of the same. As already set forth, the parties making such sales are numerous, and many of them had no connection with the matter save to sell their shares in the railway companies to the Securities Company after its organization. It is obvious that in their absence no adjudication can be made annulling such sales to the Securities Company. A decree to such effect as prayed for by the petition necessarily would deprive such original sellers of their property without due process of law. All persons who sold shares in the railway companies to the Securities Company are, therefore, necessary parties, and the petition is bad by reason of their absence.

XX. And these defendants deny all and all manner of [255] unlawful combination and confederacy wherewith they are by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

The answer of the defendant Daniel S. Lamont was substantially the same as that of defendants Morgan and Bacon except that certain allegations as to the actions of J. P. Morgan & Co. in Paragraphs XVI and XVII were omitted.

On April 9, 1903, after the case had been tried before a Circuit Court consisting of Circuit Judges Caldwell, Sanborn, Thayer and Vandevanter (for opinion of Judge Thayer, see 120 Fed. Rep. 720), the following decree was entered:

"Ordered, adjudged and decreed as follows, to wit:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' denounces as illegal.

"That all the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be owned and held by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States.

"That the Northern Securities Company, its officers, agents, servants and employés be and they are hereby enjoined from [256] acquiring, or attempting to acquire further stock of either the aforesaid railway companies.

"That the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein.

"That the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies.

"And that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold:

"And that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, The Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting [257] the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

"It is further ordered and adjudged that the United States recover from the defendants its costs herein expended, the same to be taxed by the clerk of this court, and have execution therefor."

Argument of Mr. Young for appellants.

Mr. George B. Young for appellants argued and presented in a brief the following summary of the facts:

1. For some years prior to 1901 the two railway com-

panies had been engaged in an enterprise of building up a great interstate and Oriental commerce.

2. In April, 1901, they purchased nearly all the Burlington shares at a cost of over $200,000,000, paying for them with their joint bonds, and not with the bonds of the Burlington as stated in the decision of the lower court. They made the purchase not with any view of placing the two companies, their shares or their commerce, under a single control.

3. Immediately after this purchase, persons interested in the Union Pacific attempted to obtain the stock control of the Northern Pacific, their object being to prevent the carrying out of the enterprise of the defendant railway companies, and especially to prevent the use of the Burlington road in carrying out that enterprise.

4. This "raid" (as it is called) on the Northern Pacific stock failed, the failure being largely due to an error of the raiders in buying common instead of preferred stock. But there was imminent danger that another like attempt might be made and be successful.

5. Such a raid, if successful, would destroy the commerce the railway companies were building up, and in aid of which they had bought the Burlington shares.

[258] 6. For some years prior to 1901, Mr. Hill and ten other shareholders in the Great Northern Co., holding less than 30 per cent of its stock had contemplated the formation of a company to which they should make absolute transfers of their shares in consideration of the shares of such new company. Their purpose was that the shares should be voted alike in the future as they had been in the past, and that they should fare alike in any sale of them that might be made.

7. In June, 1901, after the defeat of the raid, it was first suggested that the proposed company should be enlarged so as to include the Northern Pacific common stock (about $21,000,000) held by the same persons, and later the plan was still further widened so as to include the Northern Pacific common stock (about $20,000,000) held by J. P. Morgan & Co. should they desire to make such disposition of the stock held by them.

8. It had all along been the purpose of Mr. Hill and his ten associates that every shareholder in the Great Northern Co. should be given an opportunity to join the company as originally planned,—this not because they needed or desired the accession of such other shareholders, but to avoid any complaint of unfair treatment on their part.

9. This purpose was carried into the enlarged project, and at the instance of Mr. Morgan, the same opportunity was to be given to holders of Northern Pacific stock. And like the company originally projected, the enlarged company was to be authorized and was expected to acquire shares in coal mines and in industrial enterprises of utility to the railways, but whose stock the railway companies could not hold, and also to be a financial as well as an investment company, with power in that capacity to aid the operations of the railway companies, or of any other companies whose shares or securities it might hold.

10. The amount of Great Northern stock held by Mr. Hill and his ten associates was from 33 to 35 millions out of a total capital of $125,000,000. In 1896, they had severally **[259]** acquired $29,000,000 of Northern Pacific common stock, which amount had, on May 1, 1901, been reduced by sales to $20,000,000.

11. In forming the Northern Securities Co. it was the intention of its promoters that it should acquire, if it could, a majority of Northern Pacific stock, thereby protecting such stock from future raids, and protecting the commerce of the railways from the ruin that would result from a successful raid.

They did not desire or expect that the Securities Co. should acquire a majority of Great Northern shares. Such acquisition was not deemed necessary for the protection of the stock of that company or of the commerce of the roads.

12. While the capitalization of the Securities Co. is nearly, it is not (as stated in the opinion) the *exact* amount required to pay for all the shares of the two railway companies at the prices ($180 for Great Northern and $115 for Northern Pacific) fixed for such exchanges.

13. Mr. Hill and his ten associates who promoted the Securities Co. did not agree or bind themselves even to trans-

fer their own shares to the Securities Co. Each of them was left to decide for himself. Mr. Hill retained between two and three millions of his shares.

And neither they, nor any one concerned in promoting the Securities Co., nor J. P. Morgan & Co. ever agreed in any manner that upon the organization of the Securities Co. they would "use their influence to induce other stockholders in their respective companies to do likewise," as erroneously stated in the decision of the lower court.

14. The Securities Co. is not a railway company and has no power to build or operate railways. Its powers are limited to buying, selling and holding stocks, bonds and other securities, with power to aid in any manner any company whose stock or bonds it may hold, and to do all acts designed to aid any company whose shares or securities it may hold, and protect or enhance the value of its investment; also to hold any real or personal property required for the transaction of its business. **[260]** In short, it is at once an investment and a financial company.

15. Soon after its organization, and on November 18, 1901, the Securities Co. purchased the Northern Pacific shares that had been acquired by those concerned in the raid, known as the Harriman shares. Those had been purchased from them by J. P. Morgan & Co. The purchase comprised $37,023,000 of common stock and $41,085,000 of preferred stock, at a lump price of $91,407,500, payable (and paid) $8,915,629 in cash, and $82,491,871 in shares of the Securities Co. at par. About the same time it received from its promoters and J. P. Morgan & Co., the Northern Pacific common stock (about $42,000,000) held by them. It availed itself of its right as a common stockholder of the Northern Pacific to purchase at par for cash, the new common stock (issued to replace the $75,000,000 preferred stock retired) to the amount of 75–80 of the amount of common stock held by it. As a result of these purchases, the Securities Co., at the beginning of the year 1902, and before this suit was begun (in March, 1902) held about $152,000,000 of the total $155,000,000 stock of the Northern Pacific.

16. Soon after its organization, Mr. Hill and the other promoters of the Securities Co. transferred to it about 30

millions of Great Northern shares at $180 in exchange for Securities shares at par, and within three months from its organization, (and before the commencement of this suit,) the Securities Co. had acquired, on the same terms and from other holders, about 65 millions of Great Northern shares, making its total holdings 95 millions of the total capital of 125 millions.

17. It is not the fact, as stated in the decision that the Securities Co. was enabled to make the purchase of 65 millions of stock bought from non-promoters, or of any of it, by the advice, procurement or persuasion of the Great Northern shareholders who had been instrumental in organizing the Securities Co. There is not any evidence in support of this finding, and the evidence is conclusive against it.

The facts proved beyond question are that each purchase **[261]** was an independent transaction between the seller of stock, and the Securities Co., without solicitation, persuasion or other influence by the Securities Co., or any one else.

18. At the time of the formation of the Securities Co., the Great Northern shareholders were 1,800 in number. Of them about 1,200 transferred their shares to the Securities Co.

When this suit was begun, in April, 1902, the shareholders of the Securities Co. were more than 1,300; in October. 1902, they were about 1,800.

19. The Securities Co. is the absolute owner of the shares acquired by it and of the dividends thereon. The shares are not pooled or consolidated, nor are the earnings of the two roads pooled. It is in no sense a "trust."

20. The promoters of the Securities Co.—Mr. Hill and his ten associates—do not, all of them together hold, nor have they ever held more than one-third of the $360,000,000 stock of the Securities Co. that has been issued and is outstanding, and these gentlemen and J. P. Morgan & Co. have never held more than $140,000,000.

21. By the charter of each railway company, its commerce is controlled and directed wholly by a board of directors, the members of which are chosen for prescribed terms and cannot be removed during their terms. And by the laws of Minnesota and Wisconsin no person who is a director in one company can be a director in the other.

22. The Securities Co. has not attempted to control or meddle with the commerce or the management of either railway, nor is there any evidence that it purposes doing either. Ever since its formation such commerce has been conducted by the two boards of directors in complete independence of each other.

23. There has been no agreement to suppress and no suppression of competition between the two railway companies, which is as active as it was before the Securities Co. was formed.

24. The entire interstate commerce of the two railways, the rates on which can be controlled by those companies without other competition or consent of connecting lines, falls short **[262]** of three per cent of their total interstate commerce; and any restraint that could be in any event imposed by the Securities Co. on their interstate commerce could only affect this three per cent.

All the interstate commerce of each railroad (including the competitive three per cent) has been largely increased since the organization of the Securities Co., owing to the great advantages of the Burlington connection, and to the protection afforded to all the commerce of the roads by placing a majority of Northern Pacific shares beyond the reach of raids, in the ownership of the Securities Co. And during such period rates have been reduced to such an extent as to reduce net earnings by upwards of $1,000,000.

25. There has been no increase of capitalization of either railway company, nor any watering of that of the railway companies or of the Northern Securities Co. The capital of each railway remains unchanged. If the Securities Co. had issued its shares at par for cash, and used the money to buy the railway shares for cash in the market at their market value, its outstanding shares would be more than at present. It would have had to issue and sell at least 190 of its shares, to be able to buy for cash each 100 shares of Great Northern which it has obtained by exchange of only 180 of its own shares. And it would have had to pay more than $115 for Northern Pacific. The course pursued, instead of watering in any way the Securities Co.'s stock, has furnished that company with properties of a market and intrinsic value considerably in excess of the par value of the shares issued by it in payment for them.

Appellants contend as to the Anti-Trust Act and its meaning:

1. The act is wholly a criminal law, directed to the punishment and prevention of crime. The remedy by injunction, etc., given by the fourth section is not to protect property interests, but solely to prevent "violations of this Act" (i. e. crimes, for every violation of the act is a crime, and, without this section, would not be within the competence of a court of equity to restrain by injunction).

[263] 2. Being a criminal statute, the act is not to be enlarged by construction. The first section cannot be stretched so as to make criminal (and whatever the section declares unlawful, it makes criminal, and makes nothing criminal it has not declared unlawful) every agreement, combination or conspiracy that merely tends to restrain commerce among the States, or that confers on the parties to it or any one else the power to restrain trade.

3. The act makes unlawful and criminal every contract, combination or conspiracy in direct restraint of interstate trade or commerce.

The gist of the crime is the contract, combination or conspiracy, and the offense is complete on the making of such contract, or the formation of such combination or conspiracy, though nothing be done to carry it out, and though trade be not in fact restrained.

But to constitute a combination or conspiracy in restraint of interstate trade or commerce, the parties must combine or conspire to do acts, which, if performed, will of themselves restrain such trade or commerce, and will directly restrain it—that is, acts which operate directly on such commerce.

If the acts which the parties combine or conspire to do fall short of this, if they are not such as operate directly on the commerce, and by such operation directly restrain it, then the combination or conspiracy is not within the act.

4. The act makes criminal those contracts, combinations and conspiracies only which directly and immediately restrain interstate trade or commerce—that is by acting directly

and immediately upon such trade or commerce. 171 U. S. 568, 592; 175 U. S. 234, 245.

5. As the crime consists in contracting, combining or conspiring to do acts which by their own operation will directly and immediately restrain interstate commerce, it necessarily follows that if the acts which the parties contract or combine to do are of that description, they violate the law, though they had no conscious purpose or "specific intent" to restrain interstate **[264]** commerce by the means of such acts or at all. 156 U. S. 341.

On the other hand, if the acts to be done are not such as by their own operation on interstate commerce directly restrain it, the contract, combination or conspiracy to do those acts is not a crime under the Anti-Trust Act. 175 U. S. 234.

6. The act makes criminal every contract, etc., in direct restraint of commerce, without respect of persons.

A contract or combination or conspiracy that would be criminal as in restraint of interstate commerce or trade if made between two or more railway companies, is equally a crime if made between two or more interstate carriers by wagon or stagecoach or ferry, or between two or more interstate traders wholesale or retail. 166 U. S. 312.

7. Any restraint of interstate commerce, or power to restrain it, directly consequent upon the acquisition of property and incident to its ownership, is not, nor is the agreement for such acquisition made criminal by, this act. 156 U. S. 16.

Hence, where competitors in interstate trade or commerce agree to and do form a partnership or a corporation, or where one of them buys out the other, or a third person or association of persons buys out both, whatever suppression of competition or power to suppress competition may follow is not, nor is the agreement to form such corporation, partnership or association for such purchase, made criminal by the act. 171 U. S. 505, 567.

8. So where a combination is formed to acquire, and which does acquire, nearly all of an article in common use throughout the country and shipper in large quantities among the States, such ownership, though it gives the power to control the interstate trade and commerce in such article, and to suppress such trade and commerce altogether, is not, nor is such

combination, a restraint of commerce prohibited by the Anti-Trust Act, the power being an incident of ownership. 156 U. S. 1; 16.

9. By this act Congress regulates commerce by punishing **[265]** the making of certain contracts by fine and imprisonment. The regulation is and must be uniform throughout the United States, for an act made criminal when done in Minnesota cannot be innocent when done in Massachusetts. The matters embraced in the act, thus requiring a uniform regulation throughout the country, are matters within the *exclusive* jurisdiction of Congress, and no matters that are not within such exclusive jurisdiction are within the act. If it appears that the States have jurisdiction of any matter (e. g., the ownership of stock in or the consolidation of railway companies doing an interstate business) claimed to be within this act, the existence of jurisdiction in the States in conclusive that such matter is not within the act.

The appellants, therefore, maintain the following propositions:

1. The Government is not entitled to maintain this proceeding under sections 1 and 4 of the Anti-Trust Act, nor had the Circuit Court jurisdiction of it under those sections, for the conspiracy or combination charged in the petition and found by the Circuit Court, if it ever existed, had done all it was formed to do, and had come to an end, before the proceeding was instituted.

2. The only combination of which there is any evidence is a combination formed in aid of commerce, to liberate, protect and enlarge and not to restrain it, and which has liberated, protected, aided and enlarged it, and has not restrained and does not threaten to restrain it.

3. There is no evidence of the combination or conspiracy charged in the petition, or of the combination or conspiracy found by the Circuit Court.

4. The conspiracy or combination in question whether as alleged in the petition or as found by the Circuit Court, was not a combination or conspiracy in restraint of interstate commerce, for the only things which the parties thereto combined or conspired to do or procure to be done were (1) the

organization of the Securities Co., and (2) the acquisition by the Se- **[266]** curities Co., with their help, of a large majority of the shares of each of the defendant railway companies in exchange for its own shares.

The things so to be done or procured to be done (whether taken separately or together) are such as do not and cannot in any wise restrain interstate commerce, and hence a combination or conspiracy to do them or procure them to be done is not in restraint of interstate commerce.

The Circuit Court erred in holding (1) that the Securities Co., having acquired such majority of shares, has power to suppress competition between the railway companies. In fact, the Securities Co. is without power to suppress competition. It is a mere shareholder and not a director. The office of director is created by the State and not by the shareholder. As to power of directors being distinct from those of shareholders, see *Hoyt* v. *Thompson*, 19 N. Y. 207, 216; *Burrill* v. *Nahant Bank*, 2 Metc. 163; *Pullman Car Co.* v. *Missouri Pac. Ry. Co.*, 115 U. S. 587. The charter of each railway company gives to the board of directors all the powers attributed to it in the foregoing decisions. Rev. Stat. Wisconsin, 1878, c. 87, § 1804; Gen. Stat. Minnesota, 1894, § 2717; (2) that it obtained and holds such power by means of and as a party to the combination or conspiracy and not as an incident of its ownership of the shares; (3) that the possession of such power to suppress competition is of itself, and irrespective of its exercise, a restraint of interstate commerce; and therefore (4) the combination or conspiracy in question was in restraint of such commerce.

5. The petition does not allege nor do the proofs disclose any facts showing a monopoly or a conspiracy or attempt to monopolize any interstate or foreign commerce. For definition of monopoly, see *Texas Pacific* v. *Interstate Com. Com.*, 162 U. S. 197, 210; *United States* v. *Freight Association*, 166 U. S. 290; *Pearsall* v. *Great Northern*, 161 U. S. 646, 676; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 10; *In re Corning*, 51 Fed. Rep. 205, 211.

[267] 6. The case is not within the Anti-Trust Act, for in any view of the matters complained of, their effect upon commerce—whether much or little, for good or for ill—is

indirect and remote. The Anti-Trust Act and the regulative power of Congress under the commerce clause of the Constitution, are alike strictly limited to matters which directly and immediately affect interstate or foreign commerce.

In determining what is a combination in direct restraint of commerce the distinction between direct and indirect regulations of commerce becomes important, see *Fargo* v. *Michigan*, 121 U. S. 230; *Phila. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 328; *N. Y., L. Erie &c. R. Co.* v. *Pennsylvania*, 158 U. S. 431; *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18, 25. In the declarations of the limitations of the act and of the power of Congress, the court has merely repeated its settled doctrine. *Hooper* v. *California*, 155 U. S. 648, 655; *Williams* v. *Fears*, 179 U. S. 270, 278.

Where subjects for commercial regulation are of a nature to require or admit of one uniform system or plan of regulation, the power to regulate them is exclusively in Congress, and any attempted regulation by a State whether to enlarge or restrain, is simply *ultra vires*, for it is a usurpation of a power vested exclusively in Congress. *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557, 574; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492; *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336; *Bowman* v. *Chicago, etc., R. R. Co.*, 125 U. S. 465, 480. Anything, therefore, not exclusively within the jurisdiction of Congress is not within the act.

7. The very general language of the Anti-Trust Act was not intended to include combinations to purchase railways or railway shares, competing or non-competing, nor consolidations actual or "virtual" of railways or railway companies. Congress, when passing the act did so with full knowledge of the situation. *Ches. & O. Tel. Co.* v. *Manning*, 186 U. S. 238, 245. It knew that the railway systems of the country **[268]** rested on such combinations authorized by state laws, some of them having existed many years.

These are matters of public history and within the knowledge of the court. *Ohio L. & T. Co.* v. *Debold*, 16 How. 416, 435; *R. R. Co.* v. *Maryland*, 21 Wall. 456, 469; *Brown* v.

Piper, 91 U. S. 37, 42; *Phillips* v. *Detroit*, 111 U. S. 604, 606; *Lehigh Valley* v. *Pennsylvania*, 145 U. S. 192, 201; *Louisville & Nashville* v. *Kentucky*, 161 U. S. 677, 699; *Preston* v. *Browder*, 1 Wheat. 115, 121; *United States* v. *Union Pacific*, 91 U. S. 72, 79; *Platt* v. *Union Pacific*, 99 U. S. 48, 55.

If Congress had meant to declare such consolidations and stock purchases of competing companies to be illegal, the securities issued by them void and state legislation unconstitutional, it would have said so in plain, specific and apt language.

The construction put on the act by all branches of the government and by everybody down to the commencement of this proceeding, has been in full accord with our position that the act has nothing to do with combinations to own railways or railway shares. The following consolidations of competing railroad lines existed at the time of the passage of the act or have been effected since that time: Boston & Maine Railroad Company and competing lines; New York, New Haven & Hartford Railroad Co., and New England Railroad Co. and other roads; New York Central Railroad and the West Shore and Rome, Watertown and Ogdensburg and other railroad companies; Pennsylvania Railroad Company and Baltimore and Ohio and other companies; the Reading Company.

8. Even though the Government were entitled to any injunction, the decree goes far beyond what the Government was entitled to receive, or the Circuit Court authorized to grant.

Mr. John G. Johnson, for appellant, Northern Securities Company, argued:

The facts found by the court below cannot be deduced from the testimony and the substratum of the bill filed, of the ar- **[269]** guments below in its support, and of the decision of the lower court was the assertion of a conspiracy which never existed. It is conceded that the Securities Company did acquire a majority of stock of both railroad companies and such acquisition was because of its intent to acquire. The company is chargeable with all the legal consequences of an intentional acquisition of such shares. It is

denied, however, that any individuals or corporations conspired to do anything except to form a corporation and acquire shares of the Northern Pacific Railway Company belonging to them, and about twenty-seven per cent of the stock of the Great Northern Railway Company. The subsequent acquisition of an additional fifty per cent of the Great Northern stock was for third persons over whom the defendants had no control but who simply accepted an invitation to sell their stock issued by the Securities Company after its formation. The authorized capital of that company was made sufficiently large to enable it to acquire all the stock of both roads but this was not in pursuance of any combination, conspiracy or contract but of the policy of the appellants to let every co-shareholder of the railroad companies have the benefit of every advantage obtained for themselves.

Everything of which the Government complains was done with the intention of working out with permanent results the problem of interstate and international commerce. In order to effect permanent arrangements and to promote a great public end through a greatly increased commerce, at low rates, the two railway companies purchased the shares of the Burlington road for over $200,000,000, paid by their joint and several bonds, thus being able to give assurances of permanency of low rates and do such other things as were necessary in building up and enlarging this great commerce. This resulted in demands by the Union Pacific for a part of the traffic and on their being refused the Oregon Short Line acting for the Union Pacific acquired a large amount, almost a controlling interest, in the stock of the Northern Pacific. The situation was critical and the organization of the Securities Com- **[270]** pany and all that followed was for the purpose of preventing a raid on the stock similar to that which had so nearly succeeded and was done solely with the attempt to secure the maintenance of the benefit to commerce, which had resulted, and which, still more in the future, would result from the acquisition of the Burlington shares.

Such alliances as that of the Burlington with the Northern Pacific and Great Northern are valuable because they give an opportunity of securing a large number of markets in a great

and rich territory under a fairly permanent transportation policy. They are of enormous value to the people along the lines of the railroads, to the country generally and to the world. To transact business, large investments must be made and the condition prerequisite thereto is reasonable assurance of continuance. When the Government seeks to condemn an arrangement which promotes the interest of the whole nation by pretending that it was intended to restrain trade, it must establish convincingly the existence of the illegal intent alleged.

The sole question of law to be determined is whether or not the acquisition by a corporation of a controlling interest in the shares of two competitive railway companies, violates the Sherman Act. It is not illegal for an existing corporation to acquire such controlling interest; it is not illegal for persons holding a sufficient number of shares to enter into an agreement that will form a company to acquire such control. An agreement to do what is legal cannot be an illegal conspiracy, combination or contract.

The Sherman Act is a penal one, defining a criminal offense, for which it provides a punishment. It is an indispensable prerequisite to a conviction for a criminal misdemeanor, especially if there be no criminal intent, and such does not exist in the present case, that the offense condemned shall be clearly defined, and it is well settled that penal laws are to be strictly construed. *United States* v. *Willberger*, 5 Wheat. 76; *United States* v. *Whittier*, 5 Dillon, 35, citing *United States* v. *Morris*, 14 Pet. 464; *United States* v. *Sheldon*, 2 Wheat. 119; *United* [271] *States* v. *Clayton*, 2 Dillon, 219; Bishop on Statutory Crimes, sec. 41; *Andrews* v. *United States*, 2 Story, 213; *United States* v. *Hartwell*, 6 Wall. 385, 396; *Swearingen* v. *United States*, 161 U. S. 446, 451; *France* v. *United States*, 164 U. S. 676, 682; *Schooner Paulina's Cargo* v. *United States*, 7 Cr. 52, 61; *United States* v. *Reese*, 92 U. S. 214, 219; *United States* v. *Comerford*, 25 Fed. Rep. 902; *United States* v. *Chase*, 135 U. S. 255, 261; *United States* v. *Goldenberg*, 168 U. S. 95, 102; *Sarlls* v. *United States*, 152 U. S. 570, 575.

This court will not legislate but will merely discharge its

duty of construction. If the legislation is incomplete a crime cannot be fastened upon one who has done innocently something not defined as criminal. An act not made criminal cannot be condemned because it may seem equally, or even more, evil than the one made criminal. That Congress had no clearly defined understanding of the nature of the misdemeanor at which it struck, is evidenced by the final debates in the House of Representatives.

The purchase by a person or corporation, of a majority of the shares of two competing railway companies, is not "a contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." The Sherman Act prohibits, not a contract *tending* to restrain trade, but one actually in restraint thereof. The meaning of "restraint of trade" was well understood when the Sherman Act was passed. *United States* v. *Freight Association*, 166 U. S. 290, 328. In the *Addyston Case*, 175 U. S. 211, the contract was actually in restraint of trade.

The holding by a person or corporation as owner of a majority of the shares of two competing railway companies, is not "a contract or combination or conspiracy in restraint of trade" within the meaning of the act.

A corporation, though incorporated for the purpose of holding, and actually holding, a majority of the shares of two competing railway companies is not such a combination or conspiracy. See the *Pearsall Case*, 161 U. S. 646; *United States* [272] v. *Joint Traffic Association*, 171 U. S. 505, 567. A person or corporation, by purchasing a majority of the shares of two competing railway companies does not monopolize, or attempt to monopolize, "any part of the trade or commerce among the several States." As to what a monopoly is, see *In re Green*, 52 Fed. Rep. 104; dissenting opinion of Story, J., in *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 606; 20 Am. & Eng. Ency. of Law, 846; 2 Rawle's Bouvier's Dictionary, 435, and cases cited; Blackstone, Bk. IV, 159; Century Dictionary.

The purchase by one person, of the property of his rival, with the intention thereby to destroy his competition, is not illegal, although by the purchase he will acquire the power to

Argument of Mr. Johnson for Northern Securities Company.

prevent the same. *Oregon Coal Co.* v. *Winsor*, 20 Wall. 64. A person or corporation, by holding, as owner, the majority of the shares of two competing railway companies, does not monopolize, or attempt to monopolize "any part of the trade or commerce among the several States."

The power of Congress to regulate commerce does not confer upon it a right to prescribe the persons who may engage therein, or to regulate, or to control, the ownership of shares of stock of corporations engaging therein. *United States* v. *Knight*, 156 U. S. 1; *Louisville & Nashville* v. *Kentucky*, 161 U. S. 677, 693.

The States create railroad corporations and may prescribe the manner of issuance of their shares, and the method of transfer of title thereto. In the use and operation of railroads engaged in interstate commerce, the corporations owning the same must submit to Federal jurisdiction but this does not involve any right on the part of the United States to control the transfer of shares by the shareholders, even though as a result of said transfers the controlling interest may be transferred. It is not within the power of the Federal government to destroy the title to property created by the State.

Congress has unrestricted power to prevent restraint or monopolization of interstate commerce, as the authorities de- **[273]** fine those words, but not as the United States now claims. Properly interpreted, the Sherman Act is constitutional but the United States is now endeavoring to have its provisions interpreted so as to be violative of States' rights. Such a construction should not be adopted, if there is one which harmonizes with the Constitution. *Grenada County* v. *Brogden*, 112 U. S. 261; *Hawaii* v. *Mankichi*, 190 U. S. 197.

The mere ownership of property cannot be an illegal restraint of trade. As to the power of the State over railroad corporations, see *Railroad Co.* v. *Maryland*, 21 Wall. 456; *Ashley* v. *Ryan*, 153 U. S. 436.

The relief decreed by the lower court was improper under any aspect of the case. *United States* v. *Knight*, 156 U. S. 1, 17.

Argument of Mr. Bunn for Northern Pacific Railway.

Mr. Charles W. Bunn for appellant, Northern Pacific Railway Company, argued:

The Sherman Act only declares those contracts illegal which are in restraint of trade. The government cannot rest on proof of combination and conspiracy but must establish restraint of commerce and to do this must prove that the ownership by one person of the stocks of two competing roads is *per se* such restraint.

The statute must be interpreted so as to fall within the constitutional powers of Congress which do not extend to determine the ownership of stock in corporations or to the regulation of consolidations of railroad companies chartered by the States.

This power belongs to the States; Congress only has the power to regulate the use of such property in commerce between the States. See definition of commerce in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 196, as repeated by this court in *Passenger Cases*, 7 How. 283, 394, 462; *Henderson* v. *Mayor*, 92 U. S. 259, 270; *Lottery Case*, 188 U. S. 321, 346. Congress has power only under § 8, Art. I, of the Constitution, and by Amendment X all power not thus granted is reserved to the States. Under the guise of regulating commerce Congress **[274]** cannot prescribe general rules as to transfer of real or personal property or prohibit the purchase of stock and bonds because when bought they may be used in a business carried on with intent to monopolize or restrict interstate commerce. *In re Greene*, 52 Fed. Rep. 104, 113, citing *County of Mobile* v. *Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203; *United States* v. *E. C. Knight Co.*, 156 U. S. 1. The power of Congress extends only to those things that directly and immediately pertain to commerce; the powers of the States include many things which operate indirectly though importantly on commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1, 203. For cases involving this demarkation between national and state powers, see *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 228; *Hopkins* v. *United States*, 171 U. S. 578, 592; *Anderson* v. *United States*, 171 U. S. 604, 615; *Sherlock* v. *Alling*, 93 U. S. 99; *Louisville & Nashville* v. *Kentucky*, 161 U. S. 677, 701. In the

last case this court cites decisions in which state statutes prohibiting or permitting consolidation were enforced. This would have been erroneous if the things complained of fell within the power of Congress, for that power if it exists is exclusive of all state action, and must be so in order that it be uniform. As to matters in regard to which the States may act until Congress acts, see *Cooley* v. *Board of Port Wardens*, 12 How. 299; *The James Gray* v. *The John Fraser*, 21 How. 184; *Pound* v. *Turck*, 95 U. S. 459; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492; and cases cited *supra*. No rule of law is introduced by the Sherman Act; what was restraint of commerce is the same now; the only feature of the act is making the preliminary conspiracy a crime. The Constitution itself forbade restraint of interstate commerce. *In re Debs*, 158 U. S. 564. A combination that is restraint of trade now was restraint of trade before the act of leasing, buying and consolidation of competing railroads has gone on for fifty years both before and since the act of 1890.

[275] If a thing restrains interstate commerce it is immaterial how innocent the intent may be, and if it does not restrain it, it is immaterial how evil the intent may be. The question is does the agreement restrain trade or commerce. *United States* v. *Freight Association*, 166 U. S. 290, 341; *Addyston Case*, *supra*. If an action be lawful its purpose is immaterial. This is elementary. *Phelps* v. *Nowlen*, 72 N. Y. 39, 45; *Kiff* v. *Youmans*, 86 N. Y. 324, 329; *Wood* v. *Amory*, 105 N. Y. 278, 281; *Lough* v. *Outerbridge*, 143 N. Y. 271, 282; *Adler* v. *Fenton*, 24 How. 407, 410; *United States* v. *Greenhut*, 51 Fed. Rep. 205, 211; *In re Greene*, 52 Fed. Rep. 104, 111; *Randall* v. *Hazleton*, 12 Allen, 412, 418; *Brackett* v. *Griswold*, 112 N. Y. 454; *United States* v. *Isham*, 17 Wall. 496; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181; *Fahrney* v. *Kelly*, 102 Fed Rep. 403; *Mogul S. S. Co.* v. *McGregor*, App. Cas. (1892) 25, 41; *Allen* v. *Flood*, L. R. App. Cas. (1898) 1; *Bohn Mfg. Co.* v. *Hollis*, 54 Minnesota, 223, 234. The opinion of the court below proceeds upon the proposition that a combination of two competitors is a restraint of trade because it lessens competition. This is error. The *Trans-Missouri*, *Joint Traffic* and *Addyston* cases prove

only that a contract restraining rival companies from competing is a restraint of trade. No such agreement exists in this case. The law does not require competition. The business of a rival may be purchased for the purpose of being rid of his competition. *Gamble* v. *Queens County Water Co.*, 123 N. Y. 91, 104; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Rafferty* v. *Buffalo City Gas Co.*, 37 N. Y. App. Div. 618, 621; *Trenton Potteries Co.* v. *Olyphant*, 56 N. J. Eq. 680; *Oakdale Co.* v. *Garst*, 18 R. I. 484.

The Securities Company is neither alleged nor proved to have done or omitted anything which can be construed as a violation of the Anti-Trust Act. If it has the power to suppress or diminish competition it has not used it and if the act has been violated at all it must be due to the mere existence of the Securities Company, to its powers as applicable to railway com- **[276]** panies or to something illegal in its origin. The illegality can not be sustained under the decisions of this court.

Mr. John W. Griggs for appellant, Northern Securities Company, submitted a brief:

The acts of the defendants do not constitute a contract, combination, or conspiracy in restraint of interstate trade or commerce within the meaning and prohibition of the Sherman Act. The United States rests its case upon two allegations:

First. That the Northern Securities Company has been formed and has taken over a majority of the shares of the two railroad companies in the manner indicated by the pleadings and proofs.

Second. That the intended and the necessary effect of those acts is to destroy competition between the two railroad companies.

The answer of the defendants is:

First. That the formation of the Northern Securities Company and the acquirement by it of stock of the two railroad companies was a lawful transaction, governed solely by local state laws, and not in contravention of any provision of the Federal Constitution or statutes.

Second. That the acts of the defendants were all done in

good faith, without any purpose to destroy competition or restrain trade.

To put it more concisely: The defendants contend that what they have done is lawful, has no direct effect in restraint of competition, and was not intended to restrain competition.

The creation of railway corporations; the form of their corporate organization; the character and qualities of their corporate stock; the routes which their roads shall take, whether they may connect with other roads running in the same general direction, whether they may or may not consolidate with parallel lines, or operate parallel lines through different portions of a State—all these matters are, and always have been, subjects of state jurisdiction. *Louisville & Nashville R. Co.* v. **[277]** *Kentucky*, 161 U. S. 677, 702; *Pearsall* v. *Great Northern*, 161 U. S. 646; *Lake Shore & Mich. Southern* v. *Ohio*, 173 U. S. 285; *Missouri, Kansas & Texas* v. *Haber*, 169 U. S. 613; *Cleveland &c. Railway* v. *Illinois*, 177 U. S. 514.

The lower court did not find as matter of fact that the defendants had in any way restrained trade or commerce; or that they had attempted so to do; or that they had contracted or combined so to do. What the court did find and decide was, that the defendants had done certain things whereby they had obtained the power to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. This idea is repeated again and again throughout the opinion. It speaks of "a direct restraint of interstate commerce because it would have placed in the hands of a small coterie of men the power to suppress competition between two competing interstate carriers."

To say that one person, or several persons, cannot acquire or own a majority of the stock of two competing railroad corporations because they are thereby occupying a vantage ground from which they can, if they choose, effect an agreement or understanding between the two companies in restraint of competition, is to say that the power to commit a crime is equivalent to its actual commission.

The acts of the defendants being *prima facie* lawful, the burden of proof is upon the Government to show that they

were, as the Attorney General charges, not *bona fide*, but a mere formal device intended to defeat the provisions of the Sherman Act. *Joint Traffic, Trans-Missouri, Addyston Pipe Cases; United States* v. *Hopkins*, 171 U. S. 578; *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. Rep. 994; *State* v. *Shippers Compress & Warehouse Co.*, 67 S. W. Rep. (Texas) 1049; *S. C.*, affirmed, 69 S. W. Rep. 58.

Any restraint of trade or commerce which may result from the acts done by the defendants is indirect and incidental only, and not covered by the act. In every instance where this court has had occasion to pass upon the meaning of the act **[278]** it has carefully distinguished between acts which directly restrain commerce, and acts which only indirectly or incidentally have that effect. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 16; *Joint Traffic Case*, 171 U. S. 505, 566; *United States* v. *Ches. & Ohio Fuel Co.*, 105 Fed. Rep. 93; *S. C.*, affirmed, 115 Fed. Rep. 610.

If the Sherman Act can be so construed as to forbid the sale of stock in two competing railroad corporations to one purchaser, then that act is an attempted interference on the part of Congress with transactions which are wholly within the control of the States of the Union, and in that respect the act is unconstitutional.

As to the extent of state legislative power over the instrumentalities of interstate commerce, see *Louisville & Nashville Case*, 161 U. S. 677, 702; *C. & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204. Regulation of commerce, to be constitutional, must be confined to commerce itself, and cannot reach out to those things which not being designed as agencies of such commerce, or not being actually enjoined therein, may yet have an indirect or ultimate relation thereto.

Such a construction of the Constitution would vest in Congress the regulation of all branches of productive business from their first beginnings. *License Tax Cases*, 5 Wall. 462.

The fact that an article was manufactured for export to another State does not make it an article of interstate commerce. *Coe* v. *Errol*, 116 U. S. 517; *Kidd* v. *Pearson*, 128 U. S. 1.

The creation of state corporations and the regulation of the sales of corporation shares belong to the class of business

affairs over which the States have exclusive jurisdiction. *United States* v. *Boyer*, 82 Fed. Rep. 425; *Clark* v. *Central R. R. & Banking Co. of Georgia*, Jackson, J., June 30, 1893, U. S. Circuit Court, Savannah; *In re Greene*, 52 Fed. Rep. 104, 112; *Pearsall* v. *Great Northern*, 161 U. S. 646, 671; *Rogers* v. *Nashville &c. Ry. Co.*, 92 Fed. Rep. 312.

But assuming that Congress may, under the commerce clause of the Constitution and as a regulation of commerce, restrain [279] the States in the exercise of their prerogatives from permitting two or more corporations to which the States have given life from merging, yet such a purpose on the part of the Government ought to be clearly and distinctly expressed, and not be found in the judicial interpretation of doubtful language contained in a penal statute.

So that, if it be argued that Congress may forbid the sale of one railroad to another, it is enough to reply that it has never done so; that the Sherman Act does not expressly, or by any just interpretation, do so.

The Sherman Act is a penal statute; every act which may be prevented by injunctive order would, if committed and proven, subject the parties to criminal prosecution. The rule of strict construction must be therefore applied. *United States* v. *Whittier*, 5 Dillon, 35; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Shackford*, 5 Mason, 445; *United States* v. *Clayton*, 2 Dillon, 219; *United States* v. *Garretson*, 42 Fed. Rep. 22; Dwarris' Stat. 641; *Hubbard* v. *Johnstone*, 3 Taunt. 177.

Acquiescence by the Government for more than eleven years in the actual merger and consolidation of many important parallel and competing lines of railroads and steamships engaged in interstate and international commerce, has given a practical construction to the act of July 2, 1890, to the effect that it was not intended to forbid, and does not forbid, the natural processes of unification which are brought about under modern methods of lease, consolidation, merger, community of interest, or ownership of stock. As held in 1803, in *Stuart* v. *Laird*, 1 Cranch, 299, where the right of a justice of the Supreme Court to sit as a Circuit Judge was challenged, upon the ground that, not having been appointed as such, and not having been distinctly commissioned as such,

the act of Congress of 1789, under which the Circuit Court was originally instituted, was unconstitutional.

"Practice and acquiescence for a period of several years, commencing with the organization of the judicial system, [280] affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not to be disturbed."

This is a just principle of jurisprudence, founded upon the very highest considerations of public equity.

It has frequently been invoked and enforced in order to prevent the disturbance and unsettlement of important affairs which have been transacted in reliance upon a general public and private belief that the law did not include them in its terms of condemnation.

But we venture the assertion that no case has ever arisen in which a disregard of that salutary rule of construction would result in such widespread and irremediable injury to vested interests as this. Not that any decree which this court could make against these defendants would particularly or radically affect their property interests, but because the decision once made that the Sherman Act applies to such transactions as the purchase, lease, merger or consolidation of parallel lines of transportation, would render every such transaction for the last thirteen years unlawful, and require the Attorney General, in the due discharge of his duty, to bring suit for dissolution and injunction. Unnumbered millions of dollars of capital stock and bonds issued upon railroad mergers and consolidations would be tainted with illegality, or affected in value by the withdrawal of the property against which they were issued. Purchases of stock in underlying roads long ago made and paid for would be unsettled, and financial chaos would result.

Mr. M. D. Grover for appellant, Great Northern Railway Company, submitted a brief:

The findings of fact upon which the decree rests are contrary to the evidence. This is made clear by separating the findings and considering the evidence bearing on each

[281] separately. There was no desire or intent to evade the Anti-Trust Act, to restrain competition, to monopolize trade, to inflate securities, water stock, or create fictitious capital.

I. It is not denied that the Northern Securities Company is a corporation lawfully organized under the laws of the State of New Jersey, with charter power to purchase and sell securities of all kinds, and to purchase, hold, vote and sell all the shares of stock of any single corporation or of non-competing corporations. Its right to purchase, hold, vote and sell all the stock of the Great Northern Railway Company alone, or the Northern Pacific Railway Company alone, is not denied.

II. The organization of the Company was the result of a plan to form an investment or holding company, which had its inception years before its articles were filed, among not exceeding ten large holders of Great Northern stock, who had taken an active interest in the policy of the company and its administration, but who never had held in the aggregate to exceed one-fourth of its outstanding stock. It was thought that if a company were formed to which they might sell their individual holdings, their shares would be likely to be held together, so long as a majority of the holding company should wish, and that this would tend to give stability to the policy of the company, be of aid to it in its financial operations, and maintain the value of its investments.

III. The Burlington purchase was made to enlarge trade, not to restrain it; to increase competition, not to suppress it. At the time of the purchase it was not contemplated by either purchasing company or its shareholders that any alliance between the purchasing company or its shareholders was needed to preserve to each company its fair share of the advantages secured by the purchase.

IV. At the time of the organization of the Securities Company the Great Northern shareholders referred to owned about $30,000,000 of Great Northern stock, and $35,000,000 [282] of Northern Pacific common stock, having increased their holdings of the latter by purchases from J. P. Morgan & Co. They did not control a majority of the shares of either of the defendant railway companies. In view of the

injury apprehended to both companies, and their shareholders, and the better to protect their interests in the future, against raids of adverse interests, the Great Northern shareholders referred to deemed it advisable that the holding company which they had considered should be organized, should have power to purchase, not only their own Great Northern and Northern Pacific shares, but also the shares of such other Great Northern and Northern Pacific shareholders as might wish to sell their stock to it, and also the shares of compaines already formed, and others that might be formed, for the purpose of aiding the traffic operations of the Great Northern and Northern Pacific companies.

V. At this time it was not expected by any of the persons concerned, that any Northern Pacific shares, except the $42,000,000 owned by them and by J. P. Morgan & Co. would be acquired by the proposed holding company. The organization of the company was not dependent on any agreement that it should acquire, nor upon the question of, a majority of the shares of either of the defendant railway companies. There was no agreement or understanding between the Great Northern shareholders referred to, that they or either of them would undertake to influence any one of the other 1,800 Great Northern shareholders, or of the other 3,600 Northern Pacific shareholders, to sell their shares to the company.

VI. The Great Northern shareholders referred to, upon the organization of the Northern Securities Company and the sale of their shares to it, parted with such stock control as they had in the Great Northern and Northern Pacific companies. They do not own to exceed one-third of the outstanding capital stock of the Securities Company. At the time of the trial the stock of the Securities Company was held by 1,800 [283] separate owners. The stock control of the Securities Company is, therefore, not in the eight or ten Great Northern shareholders referred to, but in the 1,790 other shareholders of the Securities Company, owning at least two-thirds of its outstanding shares.

VII. Nothing has been done except the purchase by the

Securities Company of a majority of the stock of the Great Northern and Northern Pacific companies.

VIII. The Securities Company as owner of the stock so purchased may sell it or pledge it. It has made no agreement as to what it will do with it, or how it will vote it, or how it will dispose of the dividends received upon it. It is not a trustee of those from whom it received such shares, and owes them no duty or obligation respecting the shares, since they have no further interest in them.

IX. It is not claimed or pretended that the defendant railway companies have entered into any contract or combination in restraint of trade, or that either of them has done anything to restrain trade or in violation of law. It is not claimed that the Securities Company can restrain trade, except through the exercise of its right, as owner of the shares it purchased, to vote them at stockholders' meetings, in the election of a separate board of directors for each of the defendant railway companies; for the boards must be separate under the laws of the States of Minnesota and Wisconsin.

X. This suit was not brought to prevent or restrain the execution of a contract, or the forming of a combination, in restraint of trade, but to restrain the Securities Company from voting the stock it owns at stockholders' meetings, and from receiving dividends thereon, thereby preventing payment of dividends upon its own shares issued in payment for the shares it purchased, upon the ground that mere possession of the voting power of the shares, is an unlawful restraint and regulation of the interstate commerce of the defendant railway companies.

XI. The Government has no financial interest in this suit. **[284]** The only way in which the Securities Company could restrain the commerce of the two railway companies, is through the voting power of the shares it owns. If it had purchased the shares of only one of the companies, its right to vote such shares would not be questioned. Trade could not, within the contention of the Government, or the ruling of the court, be restrained by the Securities Company, should its voting powers be limited to the shares of one of the companies. The decree enjoins it from voting the shares of either company and from receiving dividends from either.

The effect of the decree is to deprive it of the means to pay dividends upon its own stock whether issued in payment for the stock it purchased, or issued for cash. Thus the decree destroys the earning power of the stock of the Securities Company, a large majority of which is now held by over eighteen hundred *bona fide* holders in the usual course of business not parties to the suit.

The important questions are: 1. Does the commerce clause of the Constitution of the United States confer upon Congress jurisdiction to regulate the issue, sale and ownership of the capital stock of corporations organized under the laws of any one of the several States, or to inquire into the motives of incorporators, or of the buyers or sellers of their shares?

2. Has Congress, under the commerce clause of the Constitution of the United States, power to forbid or regulate the purchase or lease, by one railway company engaged in interstate commerce, of the railway of its competitor, or the purchase or lease by the owner of one ferryboat, stage coach or river steamboat, engaged in interstate trade, of the ferryboat, stage coach or river steamboat, of a competitor, on the ground that through such purchase or lease competition may be restrained, and commerce regulated?

3. Is the unity of ownership through purchase, partnership, consolidation or lease, of a majority of the shares of competing corporations, engaged in interstate trade, a contract or combination in the form of trust or otherwise, forbidden by the Anti-Trust Act, as in restraint of trade?

[285] 4. Is there anything in connection with the organization of the Northern Securities Company, or its purchasers of stock, that in any way distinguishes its right to vote and receive dividends upon such stock from the right of any single interest, individual or corporate, to vote and receive dividends upon shares of competing corporations engaged in interstate trade, purchased in the ordinary course of business, or acquired by gift or inheritance?

5. This suit was brought under section 4 of the Anti-Trust Act, which gives the court jurisdiction to prevent and restrain violations of the act. Every violation of the act is criminal. The court is, therefore, given jurisdiction to prevent and restrain the commission of a crime. Months before

the suit was begun, the Securities Company had acquired a large majority of the shares of the defendant railway companies, from time to time, from hundreds of individual shareholders, who sold their holdings in good faith, and much of the stock so taken in payment therefor has since been sold and exchanged, and passed through many hands, in the usual course of business. Does the Anti-Trust Act give the court jurisdiction to annul the purchases made by the Northern Securities Company, and compel a return of the shares it purchased? Payment for the shares it bought was made in its own stock in part only. It paid cash to the amount of over $40,000,000. The owners of such shares are changing from day to day; they are not before the court. The decree does not restrain a contract or combination in restraint of trade. It destroys or impairs the value of millions of dollars worth of property, owned by many hundreds of people who acquired their title in good faith and who are not parties to this suit. *First.* The commerce clause of the Constitution of the United States does not take away from the several States the right to authorize the formation of corporations, define their business, fix the amount of their capital or purchasing power, and regulate the issue, sale and ownership of their capital stock.

As respects the purchase by one corporation of the shares **[286]** of another, the matter rests with the States which have created the corporations. Should unification of ownership of property in corporations proceed to such an extent as to be thought against public policy, it may be prevented by the several States, through limiting the power of corporations, and restraining their right to engage in business.

It has been the practice, since the infancy of railroads in this country, for one railroad company to purchase or lease the railroad of a competing company, or to acquire a majority of the shares of a competing company, or of two companies competing with each other, or to effect the consolidation of competing companies. This has been done without objection from any branch of the Federal Government, and has invariably proven beneficial to the railway companies concerned, to their shareholders, and to the public. The extent to which this has been done appears in the record, and is shown by

extracts from Poor's Manual and from the annual reports made by the Interstate Commerce Commission to Congress, from 1889 to 1900. And see the brief of Judge Young where this subject is discussed at length with proper reference to the record.

Second. Unity of ownership of shares of competing corporations, engaged in interstate trade, does not restrain such trade, and is not forbidden by the Anti-Trust Act, nor is such unity of ownership a regulation of interstate commerce, and thus subject to exclusive Federal jurisdiction under the commerce clause of the Constitution. *Joint Traffic*, *Trans-Missouri* and *Addyston Pipe Co.* cases.

There is a distinct difference between an agreement between the owners of competing concerns, to divide territory, to restrain output, or to maintain prices, and the unconditional sale of the property or business of one of them to the other, or of the property of business of both to another person. In the former case, the agreement in terms restrains competition in trade operations, between separate owners or establishments, or instrumentalities engaged in such operations. The agree- **[287]** ment relates to the manner in which competitors shall conduct their business. If one competing concern buys the plant or business of its competitor, competition is not thereby directly restrained. The restraint in such case, if any, is merely an incident to the ownership of property, and the fact that there may be such a restraint does not forbid the acquiring of such ownership. By unity of interest output is not necessarily limited, prices are not necessarily increased. On the contrary, the public may be benefited, prices may be less by reason of greatly increased volume of business and less cost per unit of production.

Third. The Anti-Trust Act is a penal statute and, as construed by the court below, it makes unity of ownership of a majority of the shares of competing corporations engaged in interstate trade, no matter how such ownership is acquired, criminal, because such ownership gives power to commit crime.

It is conceded that such ownership, so far as it may control the policy of the corporations, can be exercised for a lawful

purpose, for building up trade, increasing competition and reducing prices.

It is not claimed or pretended that in the case under review trade has been restrained, yet the court below held that unity of ownership of a majority of the stock of the defendant railway companies was unlawful, and, therefore, criminal, because such ownership has necessarily caused the doing of something that has not been done; has necessarily restrained trade, though trade has not been restrained.

Stated in another way, the court below decided that ownership by the Securities Company of a majority of stock of the defendant railway companies regulates the commerce of the companies, and though such commerce has in fact been so regulated as to build up trade, increase competition and reduce prices, in law it has necessarily been so regulated as to restrain trade, suppress competition and increase prices because through unity of ownerhip motive to compete has been destroyed. *Tozer* v. *United States*, 4 I. C. C. Rep. 246; *R. R. Co.* v. *Dey*, [288] 2 I. C. C. Rep. 325; *Schooner Paulina's Cargo* v. *United States*, 7 Cranch, 52, 61; *United States* v. *Reese*, 92 U. S. 214.

Fourth. Trade has not been restrained through the exercise of the voting power of these stocks. The ruling that trade has been restrained, is contrary to the facts, and charges the individuals engaged in this transaction with a crime, that has not been committed nor intended.

When this suit was begun, the shares of the Northern Securities Company were held by over eighteen hundred separate owners who had purchased them in good faith, in the usual course of business. The shareholders of the defendant railway companies, who were instrumental in organizing the Securities Company, have never owned to exceed one-third of its stock. The control of the Securities Company, so far as stock ownership can control it through the election of a board of directors, is not in the eight Great Northern shareholders who were concerned in the organization of the company, but in the seventeen hundred and ninety shareholders owners of more than two-thirds of its stock. The combination of which the court convicted the eight individual defendants, was not one by which they were to acquire control over the two railway companies, for themselves, but one through which such control would necessarily be conferred upon the seventeen hundred and ninety other stockholders of the Securities Company.

The ruling of the court that the possession of the voting power of a majority of the shares of the defendant railway companies by the Securities Company, necessarily restrains trade through suppressing competition, finds no support in facts. The boards of directors of both railway companies may be elected by the Securities Company. The executive officers of the two companies will be elected by these boards, and the ruling of the courts rests upon the proposition, that such boards and officers will be influenced, persuaded or coerced in such way, that they will lack their former incentive to compete for traffic, to obtain it from each other, and to underbid each other for the purpose of getting it; that they will enter [289] into contracts or in some way through concert of action, maintain higher rates than ought to be maintained; in other words, that they will charge unreasonable rates, will not provide adequate facilities, nor extend construction of lines.

The Northern Securities Company has no power or motive to restrain trade which any single owner of a majority of the shares of defendant railway companies would not have, and which the individual owners of the shares did not have, by lawful conference and concert of action, before they transferred their shares to it.

The defendant railway companies were hampered and placed at disadvantage with other transcontinental railways, as well as with ocean competitors by the want of sufficient direct connection with traffic centers offering the best markets for the products of the country along their lines, and with places of production and distribution from which their traffic must be supplied. Through the Burlington purchase they acquired permanent access to markets and sources of supply, instead of a temporary one resting upon joint rates subject to change at any time without regard to their interest. Having made the purchase and assumed the resulting joint and several obligations, it became a matter of the highest importance to each company that the burdens should be

equally borne and the advantages equally shared. Through placing the ownership of a majority of the shares of both companies in the hands of a single owner, the benefits of the Burlington purchase became better assured than would be the case if the shares were held in many hands, and liable at any time to be sold to an intersst adverse to the building up of the business of the defendant railway companies and the country which their lines traverse.

It has not been shown that the power of the defendant railway companies to restrain competition can affect more than three or four per cent of their interstate traffic, or that it has affected or can affect construction or extension of their lines, or the amount or quality of their equipment. Through their **[290]** ownership of Burlington shares, and by reason of the obligation assumed in paying for the shares, they have a common interest in building up the traffic of each in connection with the Burlington Company. This connection became necessary to their prosperity, to the welfare of their patrons, and to the successful meeting of a world-wide competition. What has been done was done, not to restrain competition, but to enlarge it.

The unity of ownership of their shares has not restrained the commerce of either, and the extent to which such unity can restrain it, is as nothing compared with the great increase in volume of interstate and international commerce which was intended, and which will result from the carrying out of the enterprise of the two companies in the purchase of the Burlington stock, and the preservation of the purchase, and its benefits, by placing the stock of the railroad companies where it is less likely to become scattered and to pass under control of adverse interests, than it would be if held by many owners.

Mr. Francis Lynde Stetson and *Mr. David Willcox* for appellants, Morgan, Bacon and Lamont, submitted a brief:

The transactions alleged are entirely lawful in their character. They consisted merely in the organization of a lawful corporation of New Jersey, and in the sale to, and purchase by, it of property lawfully salable. All the acts were expressly authorized by law. The legal effect of the transaction has been that the owner of stock in one of the railway companies

has sold the same to the Securities Company, and has received therefor stock of the Securities Company, which company owns the stock not merely of one of the railway companies, but the stock of both. So that each individual who has transferred his property to the Securities Company has obtained therefor something entirely different—namely, an interest in a company holding stock of the other railway company as well. It is manifest that in the fullest possible sense this constituted a sale of the property. *Berger* v. *U. S. Steel* **[291]** *Corp.*, 53 Atl. Rep. (N. J.) 68. The title passed for valuable consideration to a purchaser authorized to hold the property. Aside from the corporate form of the transaction, the effect, too, was that each stockholder in one of the railway companies transferred an interest in his holdings to every other such stockholder.

These transactions being lawful are not affected by allegations as to the motive which actuated them. As the means employed were lawful, the only question must be whether the result accomplished was unlawful. *Pettibone* v. *United States*, 148 U. S. 197, 203; *United States* v. *Isham*, 17 Wall. 496; *Adler* v. *Fenton*, 24 How. 407, 410; *Kiff* v. *Youmans*, 86 N. Y. 324, 329; cited with approval in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 546; *Randall* v. *Hazleton*, 12 Allen, 412, 418; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 190; *Strait* v. *National Harrow Co.*, 51 Fed. Rep. 819; *Phelps* v. *Nowlen*, 72 N. Y. 39, 45; *Wood* v. *Amory*, 105 N. Y. 278, 281; *Lough* v. *Outerbridge*, 143 N. Y. 271, 282; *National Assn.* v. *Cumming*, 170 N. Y. 315, 326, 340; *Mogul Steamship Co.* v. *McGregor*, App. Cas. 1892, pp. 25, 41, 42; *Allen* v. *Flood*, L. R. App. Cas. 1898, p. 1; *Pender* v. *Lushington*, L. R. 6 Ch. Div. 70, 75.

An intent to violate the Anti-Trust Act, and therefore to commit a crime, could not in any case be inferred, but must be actually proved.

No indirect or remote effect of these lawful transactions upon competition between the railway companies could bring them within the Federal Anti-Trust Act.

The mere fact that a contract has the effect of restraining trade or suppressing competition in some degree does not render it injurious to the public welfare and thus bring it

within the police power. *Oregon Co.* v. *Winsor*, 20 Wall. 64; *Gibbs* v. *Gas Co.*, 130 U. S. 396; *Hyer* v. *Richmond Co.*, 168 U. S. 471, 477, affirming, 80 Fed. Rep. 839; *Continental Ins. Co.* v. *Board*, 67 Fed. Rep. 310; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Hodge* v. *Sloan*, 107 N. Y. 244; *Leslie* v. *Lorillard*, 110 N. Y. 519; *Tode* v. *Gross*, 127 N. Y. 480; *Matthews* v. *Associated Press*, 136 **[292]** N. Y. 333; *Lough* v. *Outerbridge*, 143 N. Y. 271, 145 N. Y. 601; *Oakes* v. *Cattaraugus Co.*, 143 N. Y. 430; *Curran* v. *Galen*, 152 N. Y. 33, 36; *Watertown Co.* v. *Pool*, 51 Hun, 157, affirmed 127 N. Y. 485; *Central Shade Roller Co.* v. *Cushman*, 143 Massachusetts, 353.

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604, and *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 246, the Anti-Trust Act concerns only those agreements of which the direct and immediate effect is to restrain commerce. The transaction now under review was lawful, and, however considered, was not prohibited by the Anti-Trust Act, because such restraint upon interstate trade or commerce, if any, as it might impose, would be indirect, collateral and remote.

This act *is a criminal statute pure and simple* and its meaning and effect as now determined must also be its meaning and effect when made the basis of a criminal proceeding. Conversely, the act should not receive such construction only as it would receive upon the trial of those indicted for violating its provision. Criminal intent is essential to constitute a crime, and the testimony bearing thereon is always a question for the jury. *People* v. *Wiman*, 148 N. Y. 29, 33; *People* v. *Flack*, 125 N. Y. 324, 334.

Regardless of all other considerations presented on this argument, the judgment under review must be reversed unless it is to be established *as matter of law* that the mere possession of the power to control all the means of transportation of two competing interstate commerce carriers operates as the effectual exercise of such power and directly affects interstate commerce, notwithstanding the fact that such power has never been exercised by its possessors, and the further fact that it is perfectly practicable for them to exercise it in a perfectly proper way. Support for the proposition now under review was sought below in the *Pearsall case*, 161 U. S. 646, 674, the *Joint Traffic case*, the *Trans-Missouri case* and the *Addyston* **[293]** *Pipe case*. The proposition, however, can be deduced from these cases only by what to us seems violent distortion. As to the case first cited, see *Minnesota* v. *Northern Securities Co.*, 123 Fed. Rep. 692, 705.

In the other cases and also in cases decided by the Circuit Court and Court of Appeals, the combinations had been formed by corporations or individuals engaged in business independently of one another and they had agreed to regulate their prices or mode of carrying on their business by the rules of the combination. *United States* v. *Jellico Coal Co.*, 46 Fed. Rep. 432; *United States* v. *California Coal Dealers Association*, 85 Fed. Rep. 252; *Chesapeake Fuel Co.* v. *United States*, 115 Fed. Rep. 610; *Gibbs* v. *McNeeler*, 118 Fed. Rep. 120.

It has been held repeatedly that such restraints as result from the sale or the purchase of property are not within the provisions of anti-trust statutes. Indeed, it is the settled law that the transfer of a business is not illegal because it restrains trade, even by an express covenant. *Oregon Co.* v. *Winson*, 20 Wall. 64; *Union Co.* v. *Connolly*. 99 Fed. Rep. 354, aff'd 184 U. S. 540; *Fisheries Co.* v. *Lennen*, 116 Fed. Rep. 217; *Harrison* v. *Glucose Co.*, 116 Fed. Rep. 304; *Hodge* v. *Sloan*, 107 N. Y. 244; *Leslie* v. *Lorillard*, 110 N. Y. 519; *Tode* v. *Gross*, 127 N. Y. 480; *Oakes* v. *Cattaraugus Co.*, 143 N. Y. 430; *Watertown Co.* v. *Pool*, 51 Hun, 157, approved 127 N. Y. 485; *Wood* v. *Whitehead Co.*, 165 N. Y. 545; *Walsh* v. *Dwight*, 40 App. Div. (N. Y.) 513; *Park & Sons Co.* v. *Druggists' Association*, 54 App. Div. (N. Y) 223; *S. C.*, 175 N. Y. 1; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473.

So, too, it has been ruled precisely that the formation of associations or corporations is not illegal, because the result will be to restrain competition. *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604; *United States Vinegar Co.* v. *Foehrenbach*, 148 N. Y. 58; *Rafferty* v. *Buffalo City Gas Co.*, 37 App. Div. (N. Y.) 618; *Gamble* v. *Queens County Water Co.*, 123 N. Y. 91, 104; *In*

re Greene, 52 Fed. Rep. 104; *United States* v. *Greenhut*, 51 Fed. Rep. 205; *In re Terrell*, 51 Fed. [294] Rep. 213; *Trenton Potteries Co.* v. *Olyphant*, 58 N. J. Eq. 507; *Mogul S. S. Co.* v. *McGregor*, App. Cas. (1892) 25; *Lough* v. *Outerbridge*, 143 N. Y. 283; *State* v. *Continental Tobacco Co.*, 75 S. W. Rep. (Mo.) 737.

It is very doubtful whether in any case the second section of the act applies to railroads. Prof. Langdell, 16 Harvard Law Review, 545, June, 1903; Mr. Thorndike, Pamphlet, 1903, *The Merger Case*, p. 32.

In the *Joint Traffic* cases the court did not specifically define "monopoly," but said that it had the meaning given to it in the body of the Anti-Trust Act, which was not involved in the *Pearsall* case, and the decision there cannot now be urged upon this court as a limitation upon its freedom of construction of the statute. See *Laredo* v. *International Bridge Co.*, 66 Fed. Rep. 246.

Obviously, a consolidation of two railroads authorized by the laws of every State which they enter would not be condemned as constituting a monopoly; nor would a purchase of all the stock of one road by a competing road similarly authorized be so condemned; nor would a combination to induce the legislatures of the several States to authorise such a consolidation or such a purchase. It cannot be that, in prohibiting monopolies, the Congress intended to forbid these familiar processes of railroad amalgamation, and if, when authorized by state law, the consummated act is not a monopoly, it would not be such merely because it has not been so authorized.

The construction claimed would make the statute unconstitutional because it would deprive the Securities Company of its property without due process of law. Corporations are entitled to the same constitutional protection of their property rights as natural persons. *Minneapolis Railway Co.* v. *Beckwith*, 129 U. S. 26; *Carrington Turnpike Co.* v. *Sanford* 164 U. S. 578, 592; *Gulf Co.* v. *Ellis*, 165 U. S. 150, 154; *Lake Shore Co.* v. *Smith*, 173 U. S. 684, 690; *County of Santa Clara* v. *Southern Pacific R. R. Co.*, 18 Fed. Rep. 385, 404; *County* [295] *of San Mateo* v. *Southern Pacific R. R. Co.*, 13 Fed. Rep. 722, 745, 760.

This constitutional provision protects the right to acquire property—equally with the right—to hold the same after it has been acquired. *Holden* v. *Hardy*, 169 U. S. 366, 391; *State* v. *Goodwill*, 33 W. Va. 179; *State* v. *Julow*, 129 Missouri, 163, 173; *Knight Case*, 156 U. S. 1.

The *Pearsall Case*, 161 U. S. 646, distinctly recognizes that a natural person would be entirely at liberty to buy all the shares which his means permitted of the stock of the Northern Pacific Railway Company and the Great Northern Railway Company. The State creating a corporation might limit its power in this respect, but Congress had no such general authority to cut down the powers granted by the States to their corporations, merely because they are artificial instead of natural persons. Therefore, it is obvious that a corporation having authority by its charter to make such purchases cannot, merely because it is a corporation, be prevented from so doing without depriving it of that right without due process of law.

As construed and applied by the Circuit Court the Anti-Trust Act is unconstitutional, in that it discriminates between persons in the matter of property rights and privileges on grounds that are purely arbitrary and are without justification in reason.

The power to suppress competition between two competing interstate railroad companies being always existent and under the theory of the Circuit Court always attaching to a majority of the shares of both, whether owned by one person or by several, the Anti-Trust Act, if understood as intended to do away with such power, should be enforced so as to prevent any one person, as much as any two or more persons, from acquiring stock in both of such competing companies.

If as construed by the court below, the Anti-Trust Act arbitrarily and without reason discriminates between persons in the matter of their property, rights and privileges, the act [296] is beyond the power of Congress as clearly as it would be beyond the power of any state legislature.

"Liberty," as used in the Fifth Amendment to the Constitution means not merely bodily liberty—freedom from physical duress, but in effect comprehends substantially all those personal and civil rights of the citizen which it is meant to

place beyond the power of the general government to destroy or impair. *Slaughter House Cases*, 16 Wall. 36, 122, 127; *Munn* v. *Illinois*, 94 U. S. 113, 142; *People* v. *Walsh*, 117 N. Y. 60; *Butchers' Union Co.* v. *Crescent Co.* 111 U. S. 746; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 572; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 228; *Bertholf* v. *O'Reilly*, 74 N. Y. 509; *In re Jacobs*, 98 N. Y. 98; *People* v. *Gillson*, 109 N. Y. 389; *People* v. *King*, 110 N. Y. 418; *Godcharles* v. *Wigeman*, 113 Pa. St. 431. And see *Regina* v. *Druitt*, 10 Cox C. C. 592, 600.

It follows that, as used in the Fifth Constitutional Amendment, "liberty" includes equality of rights under the law and secures citizens similarly situated against discriminations between them which are arbitrary and without foundation in reason. *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Gulf, Colorado & Santa Fé Ry. Co.* v. *Ellis*, 165 U. S. 150, 160.

Hence, the principles affirmed and acted upon by this court in applying the Fourteenth Amendment to state legislation, are equally applicable to legislation by Congress, and, as construed by the court below, the Anti-Trust Act is invalid as trespassing upon the "liberty" of citizens, by denying them equality of rights and discriminating between them in the matter of their property rights, arbitrarily and without reason. *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 106; *Connolly* v. *Union Sewer Co.*, 184 U. S. 540; *Barbier* v. *Connolly*, 113 U. S. 27, 31.

As construed and applied by the Circuit Court, the statute is unconstitutional because without due process of law, it [297] would deprive these defendants and all others who sold to the Securities Company of their property. If there were any prohibitions on the companies it would not apply to their stockholders. A corporation and its stockholders are different entities. *Pullman Co.* v. *Missouri Pacific*, 115 U. S. 587; *Watson* v. *Bonfils*, 116 Fed. Rep. 157; *American Preserves Co.* v. *Norris*, 43 Fed. Rep. 711; *Electric Co.* v. *Jamaica Co.* 61 Fed. Rep. 655, 678.

Any effort to limit the right to sell necessarily would deprive these defendants of their property without due process

of law. *Cleveland Co.* v. *Backus*, 154 U. S. 439, 445; *People ex rel. Manhattan Co.* v. *Barker*, 146 N. Y. 304, 312; *People ex rel. Manhattan Institution* v. *Otis*, 90 N. Y. 48, 52; *Holden* v. *Hardy*, 169 U. S. 366, 391; *People* v. *Marx*, 99 N. Y. 377, 386; *People* v. *Gillson*, 109 N. Y. 389; *Forster* v. *Scott*, 136 N. Y. 577; *Ingersoll* v. *Nassau Co.*, 157 N. Y. 453, 463; *Purdy* v. *Erie R. R. Co.*, 162 N. Y. 42, 49; *City* v. *Collins Baking Co.*, 39 App. Div. (N. Y.) 432; *Rochester Turnpike Co.* v. *Joel*, 41 App. Div. (N. Y.) 43; *People* v. *Meyer*, 44 App. Div. (N. Y.) 1; *Ingraham* v. *National Salt Co.*, 72 App. Div. (N. Y.) 582; *Janesville* v. *Carpenter*, 77 Wisconsin, 288, 301.

If complainant's contention should be sustained, the right of an owner of property to sell the same would be dependent upon what the courts at any future time might hold to be the intention of the purchaser in buying the property. Such a result would seriously impair the liberty of the owner, and the value of his property.

Whatever view be taken of the character of the transaction the decree of the Circuit Court transcended the authority of the court under the statute, which was the sole ground and source of its jurisdiction.

Mr. Attorney General Knox, with whom *Mr. William A. Day*, Assistant to the Attorney General, was on the brief, for the United States, appellee:

The bill was filed by the United States to restrain a violation [298] of the Anti-Trust Act of July 2, 1890, 26 Stat. 209; the defendant, Northern Securities Company, is a corporation organized under the general laws of New Jersey; the two railway companies are common carriers engaged in freight and passenger traffic among the several States and with foreign nations; the Great Northern was chartered by the State of Minnesota and the Northern Pacific Railway Company operates under a Federal franchise originally granted to the Northern Pacific Railroad Company, and in taking over that franchise it not only became invested with the rights and privileges incident thereto, but also became charged with the duties, obligations and conditions which Congress attached to the granting thereof. The Northern Pacific Railroad Company was the constant concern of Con-

gress. See Act of July 2, 1864, Res. May 7, 1866, extending time for completion; Act of June 25, 1868, relative to filing reports; Joint Resolution, July 1, 1868, extending time for completion; Joint resolution of March 1, 1869, allowing issue of bonds; Joint Resolution, April 10, 1869, granting right of way; Resolution of May 31, 1870, authorizing issue of bonds; act of September 29, 1890, forfeiting certain granted lands; act of February 26, 1895, providing for classification of mineral lands; act of July 1, 1898, granting lands in lieu of those taken by settlers.

The individual defendants were, prior to November 13, 1901, large and influential holders of the stock, some of one railway company and some of both companies. The two railroads are practically parallel for their entire length; each system runs east and west through Minnesota, North Dakota, Montana, Idaho and Washington; each connects with steamers on Lake Superior running to Buffalo and other eastern points and at Seattle with lines of the steamships engaged in trade with the Orient. The lower court found that the roads "are, and in public estimation have ever been regarded as, parallel and competing." The testimony in this case establishes that fact which is also *res judicata*, *Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 646, and even if the roads only competed for **[299]** three per cent of their interstate business they would be competing lines.

It has been the ever present aim of those dominating the policy of the Great Northern and the Northern Pacific, during the past few years, to bring about a community of interest or some closer form of union to the end that the motive from which competition springs might be extinguished. On at least three prior occasions Mr. Hill and Mr. Morgan and their associates acted in concert in transactions affecting both roads: the attempted transfer of half the stock of the Northern Pacific to the Great Northern in exchange for a guarantee of the bonds of the Northern Pacific which was held to be violative of the laws of Minnesota, *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646; the joint purchase of the Burlington in 1901; in the events leading up to the panic of May, 1901. After the refusal to admit the Union Pacific to an interest in the

Burlington purchase, those in control of the Union Pacific attempted to acquire control of the Northern Pacific and as soon as Mr. Hill and Mr. Morgan heard of this attempt they reached an understanding to oppose it in concert, and this resulted in the threat to retire the preferred stock of the Northern Pacific, and the subsequent conference at which the plan announced in the statement of June 1, in the Wall Street Summary, was arranged. The testimony of defendants shows that the incorporation of the Securities Company, and its acquisition of a large majority of the stock of both railway companies were the designed results of a plan or understanding between the defendants Hill and Morgan and their associates, which was carried out to the letter by the parties thereto. The facts, as the Government asserts them, are recapitulated in the opinion of the Circuit Court.

On the facts as proved the Government maintains that a combination has been accomplished by means of the Securities Company which is in violation of § 1 of the act of July 2, 1890; that the defendants have monopolized or attempted to monopolize a part of the interstate or foreign commerce of the United **[300]** States and that if either result has been accomplished, the relief granted by the Circuit Court was authorized by law. The contention as to whether the Anti-Trust Act is or is not a crimainl statute is not material. Nor was it in the *Joint Traffic Case*, 171 U. S. 505. The primary aim of Congress in passing the act was not to create new offenses but to pronounce and declare a rule of public policy to cover a field wherein the Federal government has supreme and exclusive jurisdiction. As the United States has no common law, contracts in restraint of trade would not be repugnant to any law or rule of policy of the United States in the absence of a statute, and the controlling purpose of the act was to declare that the public policy of the nation forbade contracts, combinations, conspiracies, and monopolies in restraint of interstate and international trade and commerce, and the jurisdiction conferred upon courts of equity to restrain violations of the act was intended as a means to uphold

and enforce the principle of public policy therein asserted, not as a means to prevent the commission of crimes. *United States* v. *Trans-Mo. Freight Assn.*, 166 U. S. 290, 342.

If the Anti-Trust Act is a criminal statute, it is also in the highest degree a remedial statute; as such it is invoked in the case at bar, and as such it ought to be construed liberally and given the widest effect consistent with the language employed. It ought not to be frittered away by the refinements of criticism. Broom's Legal Maxims, 5th Am. ed., 3d London ed., 80; Potter's Dwarris on Stat. and Const. 231, 234; Pierce and Hopper, Str. 253. It makes no difference in the application of these rules that the statutes have a penal as well as a remedial side. Ch. Prac. 215.

A statute may be penal in one part and remedial in another part. But in the same act a strict construction may be put on a penal clause and a liberal construction on a remedial clause. Sedgwick on Construction of Statutory and Constitutional Law, (2d ed.) 309, 310; Dwarris on Statutes, 653, 655; *Hyde* v. *Cogan*, 2 Doug. 702.

[301] The Anti-Trust Act was purposely framed in broad and general language in order to defeat subterfuges designed to evade it. It is framed in sweeping and comprehensive language which includes every combination, regardless of its form or structure, in restraint of trade or commerce among the several States or with foreign nations, and every person, natural or artificial, monopolizing, attempting to monopolize, or combining with any other person to monopolize any part of such trade or commerce.

The form or framework is immaterial. Congress, no doubt, anticipated that attempts would be made to defeat its will through the "contrivances of powerful and ingenious minds," and to meet these it used the broad and all-embracing language found in the act; and it is in this light that that language is to be construed. And the device of a holding corporation for the purpose of circumventing the law can be no more effectual than any other means. Noyes on Intercorporate Relations, § 393.

This court has decided that this act applies to common carriers by railroad, as well as all other persons, natural or

artificial. *Trans-Missouri Case*, 166 U. S. 290. The words in restraint of trade as used in the act extend to any and all restraints whether reasonable or unreasonable, partial or total, and there are peculiar reasons why this applies to railroad corporations.

In exercising its powers over commerce Congress may to some extent limit the right of private contract, the right to buy and sell property, without violating the Fifth Amendment. It may declare that no contract, combination, or monopoly which restrains trade or commerce by shutting out the operation of the general law of competition shall be legal. *Trans-Missouri Case*, *supra; Joint Traffic Case*, *supra; Addyston Pipe Co. Case*, 175 U. S. 211.

When its natural effect is to stifle, smother, destroy, prevent, or shut out competition, the agreement or combination is in restraint of trade or commerce and illegal under section 1 of **[302]** the act if in interstate or international trade or commerce. *Trans-Missouri Case*, *supra*.

"To prevent or suppress competition" and "to restrain trade" are, in fact, often used by judges as convertible terms to express one and the same thought.

Mogul S. S. Co. v. *McGregor*, L. R. App. Cas. (1892), 25, was decided upon common law principles, there being no statute, such as the Federal Anti-Trust Act, making it unlawful and criminal to enter into agreements or combinations in restraint of trade.

Both the Court of Appeal and House of Lords held that the action could not be maintained because, even if it were in restraint of trade, an agreement in restraint of trade was not unlawful at common law in the sense that it furnished cause for a civil action by one damaged by it, but only in the sense that it was void and unenforceable if sued on.

The Government does not claim that ordinary corporations and partnerships formed in good faith in ordinary course of business come within the prohibitions of the act because incidentally they may to some extent restrict competition, but those where the corporation or partnership is formed for the purpose of combining competing businesses. The act embraces not only monopolies but attempts to monopolize. The term monopoly as used by modern legislators and judges

signifies the combining or bringing together in the hands of one person or set of persons the control, or the *power* of control, over a particular business or employment, so that competition therein may be suppressed. *People* v. *Chicago Gas Trust Company*, 130 Illinois, 294; *People* v. *North River Sugar Refining Co.*, 54 Hun (N. Y.), 377; *United States* v. *E. C. Knight Co.*, 156 U. S. 1. And as to railroads, see *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 677; *Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S. 677.

A combination or monopoly exists within the meaning of the act even if the immediate effect of the acts complained of is not to suppress competition or to create a complete monopoly. **[303]** It is sufficient to show that they *tend* to bring about those results. Cases cited *supra*, and *Salt Co.* v. *Guthrie*, 35 Ohio St. 672.

It is not essential to show that the person or persons charged with monopolizing or combining have actually raised prices or suppressed competition, or restrained or monopolized trade or commerce in order to bring them within the condemnation of the act. It is enough that the necessary effect of the combination or monopoly is to give them the power to do those things. The decisive question is whether the power exists, not whether it has been exercised. In the *Trans-Missouri*, *Joint Traffic*, *Pearsall* and *Addyston Cases*, *supra*, this court held that it was immaterial that trade or commerce had not actually been restrained—that it made no difference, even, that rates and prices had been lowered, it being enough to bring the combination within the condemnation of the act that it had the *power* to restrain trade or commerce. The very existence of the *power*, under these rulings, constitutes a restraint.

It is not necessary in order to bring a combination or conspiracy within the operation of the act that the members *bind* themselves each with the other to do the acts alleged to be in restraint of trade. It is enough that they act together in pursuance of a common object, and while, of course, this presupposes agreement between them in a broad sense, an agreement or contract in the technical sense is not at all essential. *Reg.* v. *Murphy*, 8 C. & P. 397.

A combination or a monopoly, the necessary effect of which

is to restrain trade or commerce, is a violation of the act, and the aim, motive, intention, or design with which the combination is entered into or the monopoly created is wholly immaterial and outside the question. It may have been to aid and further commerce rather than to restrain it; but if in point of law the effect or the tendency of the combination is to restrain trade or commerce the combination is unlawful, and the motive behind it, however beneficent, does not alter that fact in the **[304]** slightest degree. *Trans-Missouri Case*, 166 U. S. 290, 341; *C. & O. Fuel Co.* v. *United States*, 115 Fed. Rep. 623.

A combination or monopoly of competing lines of interstate railway—of competing instrumentalities of interstate commerce—is a combination or monopoly in restraint of interstate commerce within the prohibition of the act. The transportation of persons and things is commerce and if a combination or monopoly of such transportation is a combination or monopoly in restraint of commerce within the act, and hence illegal, it follows as a corollary that a combination or monopoly of the means or instrumentalities of transportation is likewise a combination or monopoly in restraint of commerce, because a monopoly of the means of transportation leads directly and inevitably to a monopoly of transportation itself.

Again, a monopoly of the *means* of transportation puts it in the *power* of the monopolist to stifle competition in the *business* of transportation, and a combination or monopoly which had the *power* to stifle competition in the *business* of transportation among the States is in restraint of interstate commerce and therefore illegal.

From still another standpoint, Congress may prohibit, and has prohibited, combinations and monopolies in the *business* of interstate and international transportation. But what does this power amount to if Congress may not also prohibit monopolies of the *means and instrumentalities* of such transportation—of the roads themselves? Virtually nothing; for he who has a monopoly of the means of transportation has a monopoly of transportation itself. See the *Trans-Missouri Case*, *Joint Traffic Case* and *Pearsall Case*, *supra*.

The Anti-Trust Act prohibiting combinations and monopolies in restraint of interstate and foreign commerce is an exercise of the power granted to Congress to regulate commerce, *Champion* v. *Ames*, 188 U. S. 321, and the term "commerce" as used in that grant embraces the instrumentalities by which commerce is or may be carried on. *Railroad Co.* v. *Fuller*, **[305]** 17 Wall. 560, 568; *Welton* v. *Missouri*, 91 U. S. 275, 280; *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203.

But put the proposition as it is put by appellants: Can Congress regulate the ownership of interstate railroads under its power to regulate commerce among the States, and has it done so by this act of 1890? Most certainly, yes. Congress can regulate anything and everything in the sense that it can prohibit and prevent its use in a way that will defeat a law that Congress may constitutionally enact. For this purpose, the supreme power operates upon everything, upon every one.

No device of State or individual creation can be interposed as a shield between the Federal authority and those who attempt to subvert it. No rules of law which govern the relations which individuals have created *inter sese*, or which have been assumed between themselves and a State, are to be considered in an issue between them and the United States to defeat the ends of a constitutional law. The Federal power would not be supreme if the operation of its laws could be defeated, embarrassed, or impeded by any means whatsoever.

It is no violation of the reserved rights of the States, but, on the contrary, is clearly within the Federal power for Congress to enact that no persons, natural or artificial, shall form a combination of the instrumentalities of any part of interstate commerce the effect or tendency of which would be to restrain interstate trade or commerce, and that no person or persons, natural or artificial, shall acquire a monopoly of such instrumentalities. This is a natural and logical deduction from the supreme, plenary, and exclusive nature of the power of the Federal Government over foreign and interstate commerce, in the exercise of which Congress may descend to the most minute directions.

The "penetrating and all-embracing" nature of this power

has often been stated, explained, and emphasized by this court. *Gibbons* v. *Ogden*, 9 Wheat. 1, 197, and see concurring opinion of Johnson, J., also. The principles announced in **[306]** this case have never been departed from, but have been reaffirmed time and again by this court, notably in *Brown* v. *Maryland*, 12 Wheat. 419; *Passenger Cases*, 7 How. 283; *In re Debs*, 158 U. S. 564; *Champion* v. *Ames*, 188 U. S. 321; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 11, 16.

The fact that in recent years interstate commerce has come to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Of course, it makes no difference whether the obstruction be physical or economic—whether it be a sand bar, a mob, or a monopoly—whether it result from the sinking of a vessel or the stifling of competition—the power of Congress to remove it is the same in each case. *Gilman* v. *Philadelphia*, 3 Wall. 713, 724.

On these subjects the state legislatures have no jurisdiction. *Addyston Pipe Co. Case*, 175 U. S. 211, 232; *Boardman* v. *Lake Shore &c. Ry. Co.*, 84 N. Y. 157, 185.

Congress has the power to legislate upon the subject of consolidations of railroad corporations when the consolidations form interstate lines; in the absence of legislation by Congress, the power exists in the States to legislate upon the subject, but in the presence of legislation by Congress the power of the States over the subject is excluded. Noyes on Intercorporate Relations, § 19, citing *Louisville & Nashville* v. *Kentucky*, *supra*.

This exclusive jurisdiction of the Federal Government over commerce with foreign nations and among the States, and over the instrumentalities of such commerce, includes the power of police, or, that which is its equivalent, over those subjects in all its undefined breadth and fullness and which is just as full, complete, and far-reaching as is the police power of the state legislatures with reference to subjects

within the [307] exclusive jurisdiction of the States. In either case there are no limitations to its exercise, except the constitutional guaranties in favor of life, liberty, and property. Thayer's Cases on Const. Law, 742, note; Cooley's Const. Lim. 723; Noyes on Intercorp. Rel. § 409.

Anti-trust statutes are enacted in the exercise of the police, or an analogous, power. *State* v. *Firemen's Fund Ins. Co.*, 152 Missouri, 46; *State* v. *Schlitz Brewing Co.*, 104 Tennessee, 715; *Waters-Pierce Co.* v. *State*, 19 Tex. Civ. App. 1.

Congress having the police power, or its equivalent, over foreign and interstate commerce and the instrumentalities thereof, may in exercising it, strike down restraints upon such commerce, whether they result from combinations and monopolies of the agencies of transportation or otherwise, just as a State could prohibit similar restraints upon interstate commerce. To contend otherwise is to contend that the Federal power over interstate and foreign commerce is not supreme, but is in some respects subordinate to state authority; that the police powers or the reserved powers of the States are, for some purposes, paramount to the powers of Congress in fields wherein the Federal Government has been invested by the Constitution with complete and supreme authority. This, of course, is not so. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661.

The *Louisville & Nashville Case*, *supra*, does not hold that Congress has no power to prohibit the consolidation of competing interstate railroads. Congress has created "the instruments of such commerce," and it has passed regulations concerning them, and the power to do these things is now unquestioned. *California* v. *Pacific Railway Co.*, 127 U. S. 1. What the court meant in the *Louisville Case* was that in respect of matters of a local nature, which did not admit or require uniform regulation, the States may "regulate the instruments of such commerce" until Congress legislates on the same subjects, while in respect of matters of national importance, or which admit of uniform regulation, the power [308] of the States is wholly excluded. The distinction was stated in *Welton* v. *Missouri*, 91 U. S. 275.

Ownership of a majority of its stock constitutes the control of a corporation when the inquiry is whether a combination or monopoly has been formed to stifle competition between two or more rival and competing railroads. Noyes on Intercorp. Rel. § 294; *Farmers' L. & T. Co.* v. *N. Y. &c. R. R. Co*, 150 N. Y. 410, 424; *People* v. *Chicago & Gas Trust Co.*, 130 Illinois, 268, 291; Greenhood on Public Policy, 5; *Richardson* v. *Crandall*, 48 N. Y. 343; *Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Milbank* v. *N. Y., L. E. & W.*, 64 How. (N. Y.) 29; *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 671; *Pullman Co.* v. *Mo. Pac. R. Co.*, 115 U. S. 587; *Pa. R. Co.* v. *Commonwealth*, 7 Atl. Rep. 368, 371.

The Great Northern and Northern Pacific Railway companies, competing interstate carriers, have been combined in violation of section 1 of the Anti-Trust Act, that is to say, a majority of the stock of each road has been transferred to a common trustee, the Securities Company, which is thus vested with the power to control and direct both roads for the common benefit of the stockholders of each.

The Anti-Trust Act condemns in express terms every "combination in the form of trust," and if those companies have been combined "in the form of trust," a violation of the very letter of the statute has been proved.

There is no great difficulty in getting at what Congress meant by a "trust." The meaning of the term was well understood in the economic and industrial world at the time of the passage of the Anti-Trust Act, and is now. The word was first used to describe an arrangement whereby the business of several competing corporations is centralized and combined by causing at least a majority of the stock of the constituent corporations to be transferred to a trustee, who, in return, issues to the stockholders "trust certificates." The trustee holds the legal title to the shares and has the right to vote them, and in this way exercises complete control over the [309] business of the combination. The trustee also receives the dividends on the shares, and out of these pays the former stockholders of the constituent corporations dividends on the "trust certificates." See Century Dictionary; Am. & Eng. Ency. Law, 2d ed., title Monopolies & Trusts; *State* v. *Standard Oil Co.*, 49 Ohio St. 137; Eddy on Combinations, § 582; Noyes on Intercorp. Rel. § 304; Dodd's Pamphlet on Combinations: Their Uses and Abuses. The facts show that the

Northern Securities Company constitutes a trust—it has all the essential elements of one. It is a trustee, and as such holds the stock of two competing companies; it has the legal title, its stockholders have the equitable title, to the property. Morawetz, § 237, and cases cited. There is a trust agreement, the terms whereof are in the charter; it is sufficient to show an agreement if the stockholders acted in pursuance of *any* understanding plan or scheme, verbal or otherwise. *Harding* v. *Am. Glucose Co.*, 182 Illinois, 551. The certificates of stock of the company represent and fill the same office as trust certificates; the company has the power to vote the stock of both railways and thus elect the directors of both. As trustee, it collects the dividends on the stock of both companies and thereout pays dividends on its own stock exactly as a trustee of a trust collects and pays on the trust certificates.

It constitutes a trust in another light also. As the courts throughout the country held with practical unanimity that the class of "trusts" just described is illegal, a second class was invented of corporations that have acquired control of other corporations by purchasing their stock. This organization is of the same general character as the preceding, but the form is changed in order to escape the force of the decisions of the courts relating to corporate partnerships. Beach on Monopolies and Industrial Trusts, § 159. The Securities Company clearly comes within this second classification of "trusts." Noyes on Intercorp. Rel. §§ 310, 285, 393; *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 292, 302, citing *Chicago Gas* **[310]** *Light Co.* v. *People's Gas Light Co.*, 121 Illinois, 530; *Am. Glucose Case*, *supra*.

It is not essential, however, to show that the Great Northern and Northern Pacific Railway companies have been combined in the technical form of "trust," or "corporate combination," as some writers call it when the trustee is a holding corporation. Section 1 of the Anti-Trust Act covers any and every form of combination. A violation of that section will have been established, therefore, if it is shown that—

Mr. Hill, Mr. Morgan, and the other individual defendants, acting in concert or in pursuance of a previous understanding, have caused the title to a majority of the shares of the

Great Northern and Northern Pacific companies to be vested in a single person—the Securities Company—thereby centering the *control* of the two roads in a single head and in that way effecting a *combination* of them, the effect or tendency of which is to suppress competition between them.

When analyzed the disguise by which the defendants sought to hide the fact of the combination, and their connection therewith, appears so thin and transparent that it is a cause of wonder that they should ever have adopted such a flimsy device.

It may succeed for a time in baffling persons who may have an interest in preventing its being done and has succeeded, but it was a mere crafty contrivance to evade the requisition of the law. *Attorney-General* v. *The Great Northern Railway Company*, 6 Jur. (N. S.) 1006; *S. C.*, 1 Drew. & Smale, 159.

The defendants seem to have thought that they could procure the organization of a corporation and have it do what they could not lawfully do themselves or through the agency of natural persons, as if that which would have been illegal if done through the agency of a natural person would lose the stamp of illegality if done through the agency of a corporate organization; but see *Attorney General* v. *Central R. Co.*, 50 N. J. Eq. 52; *Ford* v. *Chicago Milk Shippers' Assn.*, 155 Illi- **[311]** nois, 166, 178, 180, citing Morawetz, § 227; 1 Kyd on Corp. 13; *State ex rel.* v. *Standard Oil Co.*, 49 Ohio St. 137; *Distilling and Cattle Feeding Co.* v. *People*, 156 Illinois. 448, 490.

Defendants insist that it is immaterial that a combination can be discovered by going behind the fiction that the Securities Company is a private person with an existence separate and apart from its members, because, as they say, the law will not allow that fiction to be disregarded or contradicted—will not allow the acts of the corporate entity to be treated as the acts of the natural persons who compose it. The defendants thus seek to defeat the ends of the law by a fiction invented to promote them. This proposition cannot be sustained. *People* v. *North River Sugar Rfg. Co.*, 121 N. Y. 582, 615.

It can never be a question as to whether parties to a com-

bination in restraint of trade are individuals or corporations; it is always a question as to the nature, effect, and operation of the combination.

Of course a State has certain powers over the instrumentalities of commerce which it creates, as it has over the individuals by whom commerce is conducted. But a State has no power over either instrumentalities or individuals that can be interposed between them and the obligations imposed by a Federal statute regulating interstate commerce.

Where the subject is national in its character the Federal power is exclusive of the state power. *Welton* v. *Missouri*, 91 U. S. 280.

Congress has power to regulate commerce among the States, and when in the exercise of that power it becomes necessary to legislate respecting the instrumentalities of commerce, it may do so, irrespective of the question as to how or by what authority those instrumentalities were created.

And if regulation of the control of these instrumentalities is essential to prevent the subversion of a policy of Congress it may regulate that control.

[312] The power to regulate commerce among the several States includes the power to prevent restraint upon such commerce.

To restrain commerce is to regulate it.

Therefore any law of any State which restrains interstate commerce is invalid; and any contract between individuals or corporations, or any combination in any form which restrains such commerce is invalid.

The supreme power extends to the whole subject. Under this plenary power Congress has supervised interstate commerce from the granting of franchises to engage therein, to the most minute directions as to its operation. For this purpose it possesses all powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament of England. *In re Debs*, 158 U. S. 586; *Gilman* v. *Philadelphia*, 3 Wall. 725.

If the arrangement accomplishes that which the law prohibits, through the means which the law prohibits, it is certainly within the prohibition of the law, and if this *were* a consolidation under state *authority instead* of being a combination which effects that which defies the law of every foot of land which these railroads occupy, there should be no hesitation in saying that it violated the Federal statute, if it accomplished a restraint upon interstate commerce. To hold otherwise would be to read into the law a proviso to the effect that the act should not apply when the combination took the form of a railroad consolidation under authority of state legislation.

Fictions of law, invented to promote justice, can never be invoked to accomplish its defeat. "*In fictione juris semper æquitas exístit.*" *Mostyn* v. *Fabriges*, Cowper, 177; *Morris* v. *Pugh*, 3 Burr. 1243; Morawetz, §§ 1, 227; Taylor on Corporations, § 50; Clark and Marshall on Private Corporations, 17, 22; *State* v. *Standard Oil Co.*, 49 Ohio St. 137; *Ford* v. *Milk Shippers*, *supra*, and other cases cited *supra*.

The Northern Securities Company, in violation of section 2 of the Anti-Trust Act, has monopolized a part of interstate commerce by acquiring a large majority of the shares of the **[313]** capital stock of the Great Northern and Northern Pacific Railway companies—two parallel and competing lines engaged in interstate commerce; and the Northern Securities Company and the individual defendants, or two or more of them, have combined, each with the other, so to monopolize a part of interstate commerce.

From the facts and the argument already made it appears that by acquiring a majority of the shares of the Great Northern and Northern Pacific the Securities Company has obtained the control of, and, therefore, the power to suppress competition between, two rival and competing lines of railway engaged in interstate commerce, and in that way has monopolized a part of interstate commerce. This conclusion is sustained by the judgment of this court in the case of *Pearsall* v. *Great Northern Railway*, *supra*, which is conclusive of the case at bar, since it establishes the principle that to vest, designedly, in one person or set of persons, a majority of stock of two competing lines of interstate railway is to monopolize a part of interstate railroad traffic.

Even if a natural person could lawfully have done what the Securities Company has done, that would be no argument to prove that the Securities Company, in so doing, has

not violated the law against monopolies. *People* v. *North River Sugar Refining Company*, *supra*, p. 625.

It is not denied that the very spirited contention that the construction the Government puts upon the law in question interferes with the power of people to do what they will with their property.

That was the very object of the law, and it was certainly contemplated that the rights of purchase, sale, and contract would be controlled, so far as necessary, to prevent those rights from being exercised to defeat the law.

A combination cannot be imagined coming into existence without more or less redistribution of property between individuals through purchases, sales, or contracts. Combinations are never bestowed upon us ready made.

[314] It must be remembered that the monopoly complained of is a monopoly of railway traffic resulting from centering in a single body controlling stock interests in two competing railways, and whatever may be the power of Congress or state legislatures over monopolies in general, they may unquestionably, in the exercise of their broad regulative powers over *quasi*-public corporations, prohibit any monopoly of railway transportation within their respective spheres of action.

As to the contention that the transaction is simply a sale of stock to an investor and to stamp it as illegal would be an unwarranted infringement upon the right of contract, and that the Securities Company never intended to take any active part in the controlling of the two companies, the argument is not sincere and it is demonstrated by the testimony of the individual defendants that the Securities Company was the designed instrument for directing and controlling the policies of the competing lines.

As to the circular of Mr. Hill to the stockholders, it is well settled that because a person has the right to purchase stock it does not follow that stockholders of two or more competing corporations can combine among themselves and with such person to sell him their stock and induce others to do the same, so as to center the controlling stock interests of the several corporations in a single head, in violation of statutes against combinations, consolidations, and monopolies. Noyes on Intercorp. Rel. § 36; *Penna. R. Co.* v. *Com.*, 7 Atl. Rep. 373.

This distinction between an actual *bona fide* sale, and one which is merely nominal and really a cloak under which to accomplish a combination sometimes leads to confusion of language or thought. See *Trenton Potteries Co.* v. *Olyphant*, 58 N. J. Eq. 507; Noyes on Intercorp. Rel. § 354.

As to the argument of the appellants that the "acquiescence by the Government for more than eleven years in the merger and consolidation of many important parallel and competing **[315]** lines of railroad and steamships engaged in interstate commerce and foreign commerce has given a practical construction to the Anti-Trust Act of July 2, 1890, to the effect that it was not intended to forbid and does not forbid the natural processes of unification which are brought about under modern methods of lease, consolidation, merger, community of interest, or ownership of stock," there is no force whatever to the contention which the court below evidently deemed too flimsy even to refer to. But the answer to it is threefold—the case of a company formed for the purpose of holding stocks of two competing lines of interstate railways is a new one and arose for the first time in this case; the constitutionality of the act and its application to railroads was not settled until 1898 by the decision of *Trans-Missouri* and *Joint Traffic Cases*, *supra;* even if there had been acquiescence as to certain combinations it would not amount to an estoppel against the Government for prosecuting this action. *Louisville & Nashville* v. *Kentucky*, 161 U. S. 677, 689.

The combination and monopoly charged by the United States operate directly on interstate commerce, and do not affect it only indirectly, incidentally, or remotely. Noyes on Intercorp. Rel. § 392, and authorities there cited.

The question in this case is not whether the means by which the power of the combination is brought into play are direct or indirect, but whether the combination itself, whenever its power has been brought into play—it matters not how indirect may have been the means employed in bringing it into play—operates directly on interstate or international commerce. The failure of the defendants' counsel to bear this in

mind has led them to make very elaborate arguments to show that the combination charged by the Government affects interstate commerce only indirectly and remotely. In reply to the contention on this point, see opinion of the court below, after citing *United States* v. *E. C. Knight Company*, 156 U. S. 1; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604, on which counsel for defendants rely, **[316]** properly held that no combination could more immediately affect such commerce.

The relief granted by the Circuit Court was authorized by section 4 of the Anti-Trust Act.

The gist of the Government's charge being that a combination of the two railway companies has been formed by centering the title to a majority of their respective shares in the Securities Company, which by obtaining such majority of both stocks has acquired a monopoly—all in violation of the Anti-Trust Act and as unlawful combination and monopoly exists solely by virtue of the Securities Company's ownership of such majorities the logical and most direct way to destroy the combination and monopoly and prevent the continued violation of the statute is to strip such ownership, which was acquired in pursuance of an illegal object, of its powers and incidents—to disarm it of its power to violate the law. And this is what the Circuit Court did. Clearly this decree violates no rights of property which the Securities Company or any of the other defendants is entitled to claim.

It is proper to grant this relief even though the purpose of the company had already been accomplished. The combination charged by the Government is a combination of the two railways, formed by concentrating in the Securities Company the power to control both roads. This combination did not "come to an end," did not "accomplish its purpose," with the organization of the Securities Company, and therefore the violation of the Anti-Trust Act did not "come to an end" there, but continued on without interruption, and under the act the Circuit Courts can prevent, restrain, enjoin or otherwise prohibit violations thereof, and are left free to frame their remedial process to meet the exigencies of the case, and as courts of equity they enjoy the same wide latitude in formulating relief in cases of this class that they enjoy in any

other class of cases within the jurisdiction of equity. *Taylor* v. *Simon*, 4 Mylne & Craig, 141; *Chicago, R. I. & P. Ry. Co.* v. *Union Pacific Ry. Co.*, 47 Fed. Rep. 15, 26.

[317] There is no defect of parties; all interests materially affected by the decree of the Circuit Court are represented by the parties before the court.

There were 1,300 persons who exchanged stock of the railway companies for stock of the Securities Company, and in a court of equity the interests of absent parties are represented when there are parties having similar interests before the court. *Smith* v. *Swornstedt*, 16 How. 288, 302.

Any question as to a defect of parties which might have existed has been removed from the case by the form of the decree entered by the Circuit Court, which simply adjudges that the parties defendant have entered into an unlawful combination and conspiracy in restraint of interstate commerce, and then proceeds to enjoin the defendants, the Securities Company, and the railway companies from doing the things which alone give life and force to the combination. The decree thus operates only on the parties to the bill and materially affects only their interests. The defendant corporations stand for the interests of their respective stockholders. *Sanger* v. *Upton*, 91 U. S. 59; *Hawkins* v. *Glenn*, 131 U. S. 329; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.

Mr. Justice Harlan announced the affirmance of the decree of the Circuit Court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the statute of July 2, 1890, commonly

known as the Anti-Trust Act, and entitled "An act to protect trade [318] and commerce against unlawful restraints and monopolies." 26 Stat. 209. By the decree below the United States was given substantially the relief asked by it in the bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require a consideration of the scope and meaning of most of its provisions, it is here given in full:

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, [319] or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the

district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the dis- [320] trict in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"SEC. 8. That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the States, or with foreign states? Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce? Let us see what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled and operated separate lines of railway—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter, extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9,000 miles in length, were and are parallel and competing lines across the continent through the northern tier of States between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its

road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and **[321]** sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems, and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646, to be illegal under the statutes of Minnesota which forbade any railroad corporation or the purchasers or managers of any corporation, to consolidate the stock, property or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. Gen. Laws, Minn. 1874, c. 29; ch. 1881.

Early in 1901 the Great Northern and Northern Pacific Railway companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago, Burlington and Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway companies, payable in twenty years from date, with interest at 4 per cent per annum. In this manner the two purchasing companies became the owners of $107,000,000 of the $112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, whose lines aggregated about 8,000 miles, and extended from St. Paul to Chicago and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington and Quincy main line and branches.

Prior to November 13, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, **[322]** under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with

a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, as stated in Article VI of the bill, "by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination and to effect its objects, the defendant, the Northern Securities Company, was organized November 13, 1901, under the laws of New Jersey.

Its certificate of incorporation stated that the objects for which the company was formed were: "1. To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the **[323]** State of New Jersey, or of any other State, Territory or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State,

Territory or country, and while owner thereof to exercise all the rights, powers and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon. 4. To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

It was declared in the certificate that the business or purpose of the corporation was from time to time to do any one or more of such acts and things, and that the corporation should have power to conduct its business in other States and in foreign countries, and to have one or more offices, and hold, purchase, mortgage and convey real and personal property, out of New Jersey.

The total authorized capital stock of the corporation was fixed at $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation should commence business was fixed at $30,000. The duration of the corporation was to be perpetual.

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and **[324]** Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depositary, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to represent **[325]** and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway companies, upon the basis and at the rate agreed upon, which was about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par; and that, unless prevented, the Securities Company would acquire as owner and proprietor substantially all the capital stock of the Great Northern and Northern Pacific Railway companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have re-

ceived or would receive and hold about fifty-five per cent, the balance going to the former stockholders of the Northern Pacific Railway Company.

The Government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the National Government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the States or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this **[326]** record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of

the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership*. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original **[327]** combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interest, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise

* * * in restraint of commerce among the several States or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust;" but if not, it is a *combination in restraint of interstate and international commerce;* and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding cor- **[328]** poration, organized in a State distant from the people of that territory.

The Circuit Court was undoubtedly right when it said—all the Judges of that court concurring—that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 Fed. Rep. 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the Government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the

defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the States or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the States? Does the act of Congress prescribe, as a *rule* for *interstate* or *international* commerce, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination or **[329]** conspiracy? How far may Congress go in regulating the affairs or conduct of state corporations engaged as carriers in commerce among the States or of state corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If state corporations, or their stockholders, are found to be parties to a combination, in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress?

These questions were earnestly discussed at the bar by able counsel, and have received the full consideration which their importance demands.

The first case in this court arising under the Anti-Trust Act was *United States* v. *E. C. Knight Co.*, 156 U. S. 1. The next case was that of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. That was followed by *United States* v. *Joint Traffic Association*, 171 U. S. 505, *Hopkins* v. *United States*, 171 U. S. 578, *Anderson* v. *United States*, 171 U. S. 604, *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, and *Montague & Co.* v. *Lowry*, 193 U. S. 38. To these may be added *Pearsall* v. *Great North-*

ern Railway, 161 U. S. 646, which, although not arising under the Anti-Trust Act, involved an agreement under which the Great Northern and Northern Pacific Railway companies should be consolidated and by which competition between those companies was to cease. In *United States* v. *E. C. Knight Co.*, it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust Act and would have been illegal; in *United States* v. *Trans-Missouri Freight Association*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect **[330]** of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in *United States* v. *Joint Traffic Association*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subject to competition among themselves, was also forbidden by the act; in *Hopkins* v. *United States* and *Anderson* v. *United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addyston Pipe & Steel Co.* v. *United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale and transportation of iron pipe, whereby competition among them was avoided, was covered by the Anti-Trust Act; and in *Montague* v. *Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private

manufacturers and dealers in tiles, grates and mantels, in different States, whereby they controlled or sought to control the price of such articles in those States, was condemned by the act of Congress. In *Pearsall* v. *Great Northern Railway*, which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of 1874 and 1881 undoubtedly **[331]** reflected the general sentiment of the public, that their best security is in competition."

We will not incumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations even among *private* manufacturers or dealers whereby *interstate or international commerce* is restrained are equally embraced by the act;

That Congress has the power to establish *rules* by which

interstate and international commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce;

[332] That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that as the Northern Securities Company is a state corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose **[333]** to interfere with the internal affairs of the States, nor, in our opinion, is there any ground whatever for the contention that the Anti-Trust Act regulates their domestic commerce. By its very terms the act regulates only commerce among the States and with foreign states. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions, are the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding"—supreme over the States, over the courts, and even over the people of the United States, the source of all power under our governmental system in respect of the objects for which the National Government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligation of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the Government and its laws might be prostrated at the feet of local authority. *Cohens* v. *Virginia*, 6 Wheat. 264, 385, 414. These views have been often expressed by this court.

It is said that whatever may be the power of a State over such subjects Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by a state corporation, or the purchase by individuals, of the stock of another corpo-

ration, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens or state corporations may dispose of their property and invest their money in any way they choose; and that in regard to all **[334]** such matters, citizens and state corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside, or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

In this connection, it is suggested that the contention of the Government is that the acquisition and *ownership* of stock in a state railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other state corporations. Still further, it is asked, generally, whether the organization or ownership of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate

commerce by any means that are appropriate and that are lawful and not prohibited **[335]** by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the Government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act? May not Congress declare that *combination* to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs when effected by a powerful combination are more dangerous and require more stringent supervision than when they are to be effected by a single person? *Callan* v. *Wilson*, 127 U. S. 540, 556. How far may the courts go in order to give effect to the act of Congress, and remedy the evils it was designed by that act to suppress? These are confessedly questions of great moment, and they will now be considered.

By the express words of the Constitution, Congress has power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes." In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *In re Rahrer*, 140 U. S. 545; *Lottery Case* 188 U. S. 321, 355, and authorities there cited. Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice Marshall for the court in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 197, that the power of Congress to regulate commerce among the States and with foreign nations is the power "to prescribe the *rule* by which commerce *is to be governed;*" that such power "is complete **[336]** in itself,

may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" that "if, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States, is vested in Congress *as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States;*" that a sound construction of the Constitution allows to Congress a large discretion, "with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional." *Brown* v. *Maryland*, 12 Wheat. 419; *Sinnot* v. *Davenport*, 22 How. 227, 238; *Henderson* v. *The Mayor*, 92 U. S. 259; *Railroad Company* v. *Husen*, 95 U. S. 465, 472; *County of Mobile* v. *Kimball*, 102 U. S. 691; *M., K. & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 626; *The Lottery Case*, 188 U. S. 321, 348. In *Cohens* v. *Virginia*, 6 Wheat. 264, 413, this court said that the United States were for many important purposes "a single nation," and that "in all commercial regulations we are one and the same people;" and it has since frequently declared that commerce among the several States was a *unit*, and subject to national control. Previously, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, the court had said that the Government ordained and established by the Constitution was, within the limits of the powers granted to it, "the Government of all; its powers are delegated by all; it represents all, and acts for all," and was "supreme within its sphere of action." As late as the case of *In re Debs*, 158 U. S. 564, 582, this court, every member of it concurring, said: "The entire strength of the Nation may be used to enforce in any part of the land the **[337]** full and free exercise of all National powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be

put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws."

The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce, (not for domestic commerce,) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare **[338]** will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that

must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

It is said that railroad corporations created under the laws of a State can only be consolidated with the authority of the State. Why that suggestion is made in this case we cannot understand, for there is no pretense that the combination here in question was under the authority of the States under whose laws these railroad corporations were created. But even if the State allowed consolidation it would not follow that the stockholders of two or more state railroad corporations, having *competing lines and engaged in interstate commerce*, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the States and with foreign nations.

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States* v. *Joint Traffic Association*: "Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. . . . It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting *as one body* in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce*, Congress has power to legislate and to prohibit." (pp. 569, 571.) That such a rule was applied to interstate commerce **[339]** should not have surprised any one. Indeed, when Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with

combinations that were in restraint of their domestic commerce. The decisions in state courts upon this general subject are not only numerous and instructive but they show the circumstances under which the Anti-Trust Act was passed. It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare.

In *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173, 186, the Supreme Court of Pennsylvania dealt with a combination of coal companies seeking the control within a large territory of the entire market for bituminous coal. The court, observing that the combination was wide in its scope, general in its influence, and injurious in its effects, said:

"When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the prices fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master and the fires of the manufacturer all feel the restraint, while many dependent hands are **[340]** paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. * * * In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the *combination* of many what severally no one could accomplish, and even what when done by one would be innocent. * * * *There is a potency in numbers when combined*, which the law cannot overlook, where injury is the consequence."

The same principles were applied in *Arnot* v. *Pittston & Elmira Coal Co.*, 68 N. Y. 558, 565, which was the case of a combination of two coal companies, in order to give one of them a monopoly of coal in a particular region, the Court of Appeals of New York holding that "A combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal."

They were also applied by the Supreme Court in Ohio in *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio St. 666, 672, which was the case of a combination among manufacturers of salt in a large salt-producing territory, the court saying:

"It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. *Courts will not stop to enquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

So, in *Craft* v. *McConoughy*, 79 Illinois, 346, 350, which was the case of a combination among grain dealers by which competition was stifled, the court saying:

"So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly [341] against which the public interest had no protection."

Again, in *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 297, which involved the validity of the organization of a gas corporation which obtained a monopoly in the business of furnishing illuminating gas in the city of Chicago by buying the stock of four other gas companies, it was said:

"Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?"

To the same effect are cases almost too numerous to be cited. But among them we refer to *Richardson* v. *Buhl*, 77 Michigan, 632, which was the case of the organization of a corporation in Connecticut to unite in one corporation all the match manufacturers in the United States, and thus to obtain control of the business of manufacturing matches; *Santa Clara Mill & Lumber Co.* v. *Hayes*, 76 California, 387, 390, which was the case of a combination among manufacturers of lumber, by which it could control the business in certain localities; and *India Bagging Association* v. *Kock*, 14 La. Ann. 168, which was the case of a combination among various commercial firms to control the prices of bagging used by cotton planters.

The cases, just cited, it is true, relate to the domestic commerce of the States. But they serve to show the authority

which the States possess to guard the public against *combinations* that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within their limits. They serve also to give point to the declaration of this court in *Gibbons* v. *Ogden*, 9 Wheat. 1, 197—a principle never modified by any subsequent decision—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument," the power over commerce with foreign nations and among the several States is vested in Congress as absolutely [342] as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States." Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce? If a State may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it?

Now, the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust Act is repugnant to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the Anti-Trust Act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the States in iron pipe (as in *Addyston Pipe & Steel Co.* v. *United States*), or in tiles, grates and mantels (as in *Montague* v. *Lowry*), surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains commerce among the States, and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises, and engaged in such commerce. We cannot agree that Con-

gress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates and mantles that restrain commerce among the States in such articles, but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several States. If private parties may not, by combination among themselves, restrain interstate [343] and international commerce in violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound why may not *all* the railway companies in the United States, that are engaged, under state charters, in interstate and international commerce, enter into a combination such as the one here in question, and by the device of a holding corporation obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the people of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the States and with foreign states by declaring illegal all contracts, combinations, conspiracies or monopolies in restraint of such commerce, and make it a public offence to violate the rule thus prescribed. How much further it may go, we do not now say. We need only

at this time consider whether it has exceeded its powers in enacting the statute here in question.

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question, how far may the courts go in reaching and suppressing the combination [344] described in the bill? All will agree that if the Anti-Trust Act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any State to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the Tenth Amendment of the Constitution which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the People;" and we are confronted with the suggestion that any order or decree of the Federal court which will prevent the Northern Securities Company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and Northern Pacific Railway companies will be an invasion of the rights of the State under which the Securities Company was chartered, as well as of the rights of the States creating the other companies. In other words, if the State of New Jersey gives a charter to a corporation, and even if the obtaining of such charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other States, whereby competition between the respective

roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow [345] such restraint to continue to the detriment of the public because, forsooth, the corporations concerned or some of them are state corporations. We cannot conceive how it is possible for any one to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment.

It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purposes of those who brought about the organization of the Securities Company. If the certificate of the incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

We reject any such view of the relations of the National Government and the States composing the Union, as that for which the defendants contend. Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the National Government over matters committed to it. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for

such com- [346] merce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from coöperating with the Securities Company in restraining commerce among the States. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States. The affirmance of the judgment below will only mean that no combination, however powerful, is stronger than the law or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved rights of the States. It [347] would mean that the Government which represents all, can, when acting within the limits of its powers, compel obedience to its authority. It would mean

that no device in evasion of its provisions, however skillfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination by its operation directly restrains commerce among the States or with foreign nations in violation of the act of Congress.

The defendants rely, with some confidence, upon the case of *Railroad Company* v. *Maryland*, 21 Wall. 456, 473. But nothing we have said is inconsistent with any principle announced in that case. The court there recognized the principle that a State has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the States, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." Of course, every State has, in a general sense, plenary power over its corporations. But is it conceivable that a State, when exerting power over a corporation of its creation, may prevent or embarrass the exercise by Congress of any power with which it is invested by the Constitution? In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists in a State to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the States, that a state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the Gov- **[348]** ernment as from the words of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *In re Debs*, 158 U. S. 564; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 626, 627. In *Texas* v. *White*, 7 Wall. 700, 725, the court remarked "that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' *County of Lane* v. *Oregon*, 7 Wall. 76. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." These doctrines are at the basis of our Constitutional Government, and cannot be disregarded with safety.

The defendants also rely on *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, 702. In that case it was contended by the railroad company that the assumption of the State to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce. The court observed that but little need be said in answer to such a proposition, for "it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." But that case distinctly recognized that there was a division of power between Congress and the States in respect to interstate railways, and that Congress had the superior right to control that commerce and forbid interference therewith, while to the States remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If there is anything in that case which **[349]** even intimates that a State or a state corporation may in any way directly restrain interstate commerce, over which Congress has, by the Constitution, complete control, we have been unable to find it.

The question of the relations of the General Government with the States is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine

who may buy, own and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind; domestic, interstate and international. The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade. But neither a state corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitu- **[350]** tion of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations, or any combination of its citizens, with

authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm and only harm can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business, is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says but what interested parties wish it to mean at a particular time and under particular circumstances. The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States* v. *Lee*, 106 U. S. 196, 220, is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it **[351]** did not so declare. But if nothing more can be said than that Congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this

country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the States and even behind the constitutional guarantee of liberty of contract. But this court has heretofore adjudged that the act of Congress did not touch the rights of the States, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense, the general inherent right of every one to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law.

But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin **[352]** in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy or monopoly that will restrain such commerce, by preventing the free operation of competi-

tion among interstate carriers engaged in the transportation of passengers and freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument.

The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original States was subject to vexatious and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the States and with foreign **[353]** nations. In *Brown* v. *Maryland*, 12 Wheat. 419, 446, it was said:

> "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress."

Railroad companies, we said in the *Trans-Missouri Freight Association* case, "are instruments of commerce, and their business is commerce itself." And such companies, it must be remembered, operate "public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 657; *Chicago &c. R. R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 90; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 475; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 332; *Smyth* v. *Ames*, 169 U. S. 466, 544; *Lake Shore &c. Ry. Co.* v. *Ohio*, 173 U. S. 285, 301. When such

carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the States they become—even if they be state corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce.

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent com- **[354]** panies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, "Why put the stocks of *both* these [constituent companies] into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of *custodian*, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States* v.

Joint Traffic Association) "smothering" competition between the lines of two railway carriers.

We will now inquire as to the nature and extent of the relief granted to the Government by the decree below.

By the decree in the Circuit Court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several States, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such com- **[355]** bination or conspiracy, in restraint of trade and commerce among the several States. It was therefore decreed as follows:

"That the Northern Securities Company, its officers, agents, servants and employés, he and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies, which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, The Northern Securities Company, may have heretofore received from such stock- **[356]** holders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Subsequently, and before the appeal to this court was perfected, an order was made in the Circuit Court to this effect:

"That upon the giving of an approved bond to the United States by or on behalf of the defendants in the sum of fifty thousand dollars conditioned to prosecute their appeal with effect and to pay all damages which may result to the United States from this order, that portion of the injunction contained in the final decree herein which forbids the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, from paying dividends to the Northern Securities Company on account of stock in either of the railway companies which the Securities Company claims to own and hold, is suspended during the pendency of the appeal allowed herein this day. All other portions of the decree and of the injunction it contains remain in force and are unaffected by this order."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the Great Northern and the Northern Pacific Railway companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which being done would affect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and powerless **[357]** to protect the rights of the public as against that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized, and had actually received a majority of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted to the Government. This same view was pressed upon the Circuit Court, and was rejected. It was completely answered by that court when it said:

"Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the Government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it."

The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but **[358]** the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used.

As early as the case of *King* v. *Inhabitants of Hodnett*, 1 T. R. 96, 101, Mr. Justice Buller said:

"It is not true that the courts in the exposition of penal statutes are to narrow the construction."

In *United States* v. *Wiltberger*, 5 Wheat. 76, 95, Chief Justice Marshall, delivering the judgment of this court and referring to the rule that penal statutes are to be construed strictly, said:

"It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be

construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

In *United States* v. *Morris*, 14 Pet. 464, 475, this court, speaking by Chief Justice Taney, said:

"In expounding a penal statute the court certainly will not extend it beyond **[359]** the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 Wheat. 95."

So, in *The Schooner Industry*, 1 Gall. 114, 117, Mr. Justice Story said:

"We are undoubtedly bound to construe penal statutes strictly; and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute."

In another case the same eminent jurist said:

"I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. * * * In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes the best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States* v. *Wiltberger*, 3 Sumner, 209, 211, 212.

In *People* v. *Bartow*, 6 Cowen, 290, the highest court of New York said:

"Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. Among other things, it is well settled that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction."

So, in *Commonwealth* v. *Martin*, 17 Massachusetts, 359, 362, the highest court of Massachusetts said:

"If a statute, creating or increasing a penalty, be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this, any more than in any other case, to imagine ambiguities, merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms, as to **[360]** preclude the exercise of ingenuity in raising doubts about its construction."

There are cases almost without number in this country and in England to the same effect.

Guided by these long-established rules of construction, it is manifest that if the Anti-Trust Act is held not to embrace a case such as is now before us, the plain intention of the legislative branch of the Government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act," § 4; and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demand. The defendants have no just cause to complain of the decree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.

Affirmed.

Mr. Justice Brewer, concurring.

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States* v. *Freight Association*, 166 U. S. 290, followed by the cases of *United States* v. *Joint Traffic Association*, 171 U. S. 505, *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, and *Montague & Co.* v. *Lowry*, 193 U. S. 38, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, **[361]** I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were un-

reasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the **[362]** Northern Pacific Railway Company:

"Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control: but the companies would still remain separate corporations with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could **[363]** the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of $201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation holding the majority of the stock in the Northern Securities Company and acting in obedience to the wishes of a majority of its stockholders would control the action of the Securities Company and through it the action of the two railroad companies, and this process might be extended until a single cor-

poration whose stock was owned by three or four parties would be in practical control of both roads, or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade.

Again, there is by this suit no interference with state control. It is a recognition rather than a disregard of its action. This merging of control and destruction of competition was not authorized, but specifically prohibited by the State which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of their business transacted. The purpose and policy of the State are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce—one in conflict with state law and within the letter and spirit of the statute and the power of Congress. Therefore I concur in the judgment of affirmance.

[364] I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation.

Mr. Justice White, with whom concurred Mr. Chief Justice Fuller, Mr. Justice Peckham, and Mr. Justice Holmes, dissenting.

The Northern Securities Company is a New Jersey corporation; the Great Northern Railway Company, a Minnesota one; and the Northern Pacific Railway Company,

a Wisconsin corporation. Whilst in the argument at bar the Government referred to the subject, nevertheless it expressly disclaimed predicating any claim for relief upon the fact that the predecessor in title of the Northern Pacific Railway Company was a corporation created by act of Congress. That fact, therefore, may be eliminated.

The facts essential to be borne in mind to understand my point of view, without going into details, are as follows: The lines of the Northern Pacific and the Great Northern Railway companies are both transcontinental, that is, trunk lines to the Pacific Ocean, and in some aspects are conceded to be competing. Mr. Morgan and Mr. Hill and a few persons immediately associated with them separately acquired and owned capital stock of the Northern Pacific Railway Company, aggregating a majority thereof. Mr. Hill and others associated with him owned, in the same manner, about one-third of the capital stock of the Great Northern Railway Company, the balance of the stock being distributed among about eighteen hundred stockholders. Although Mr. Hill and his immediate associates owned only one-third of the stock, the confidence reposed in Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company. **[365]** Under these circumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. Whilst the purpose of the promoters was mainly to exchange the stock held by them in the two railroads for the Northern Securities Company stock, nevertheless the right of stockholders generally in the two railroads to make a similar exchange or to sell their stock to the Securities Company was provided for. Under the arrangement the Northern Securities Company came to be the registered holder of a majority of the stock of both the railroads. It is not denied that the charter, and the acts done under it, of the Northern Securities Company, were authorized by the laws of New Jersey, and, therefore, in so far as those laws were com-

petent to sanction the transaction, the corporation held the stock in the two railroads secured by the law of the State of its domicil.

The government by its bill challenges the right of the Northern Securities Company to hold and own the stock in the two railroads. The grounds upon which the relief sought was based were, generally speaking, as follows: That as the two railroads were competing lines engaged in part in interstate commerce, the creation of the Northern Securities Company and the acquisition by it of a majority of the stock of both roads was contrary to the act of Congress known as the Anti-Trust Act. 26 Stat. 209. The clauses of the act which it was charged were violated were the first section, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations;" and the provisions of the second section making it a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several **[366]** States or with foreign nations." The court below sustained the contentions of the government. It, therefore, enjoined the two railroad companies from allowing the Northern Securities Company to vote the stock standing in its name or to pay to that company any dividends upon the stock by it held. On the giving, however, of a bond fixed by the court below the decree relating to the payment of dividends was suspended pending the appeal to this court.

The court recognized, however, the right of the Northern Securities Company to retransfer the stock in both railroads to the persons from whom it had been acquired. The correctness of the decree below is the question presented for decision.

Two questions arise. Does the Anti-Trust Act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership? As the question of power lies at the root of the case,

I come at once to consider that subject. Before doing so, however, in order to avoid being misled by false or irrelevant issues, it is essential to briefly consider two questions of fact. It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads; second, that as the two railroads were both over-capitalized, stock in them furnished no sufficient consideration for the issue of the stock of the Northern Securities Company. It would suffice to point out, *a*, that the proof shows that nearly nine million dollars were paid by the Securities Company for a portion of the stock acquired by it, and that, moreover, nearly thirty-five million dollars were expended by the Securities Company in the purchase of bonds of the Northern Pacific Company, which have been converted by the Securities Company into the stock of that railroad, **[367]** which the Securities Company now holds; and, *b*, that the market value of the railroad stocks is, moreover, indisputably shown by the proof to have been equal to the value fixed on them for the purpose of the exchange or purchase of such stock by the Northern Securities Company. Be this as it may, it is manifest that these considerations can have no possible influence on the question of the power of Congress in the premises; and therefore the suggestions can serve only to obscure the controversy. If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and ownership, even if real, violated the act of Congress. If on the contrary the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress.

In testing the power of Congress I shall proceed upon the assumption that the act of Congress forbids the acquisition of

a majority of the stock of two competing railroads engaged in part in interstate commerce by a corporation or any combination of persons.

The authority of Congress, it is conceded by all, must rest upon the power delegated by the eighth section of the first article of the Constitution, "to regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." The proposition upon which the case for the government depends then is that the ownership of stock in railroad corporations created by a State is interstate commerce, wherever the railroads engage in interstate commerce.

At the outset, the absolute correctness is admitted of the declaration of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, that the power of Congress to regulate commerce among the **[368]** States and with foreign nations "is complete in itself and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional."

The plenary authority of Congres over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus conceded. But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all. The confusion which results from failing to observe this distinction will appear from an accurate analysis of *Gibbons* v. *Ogden*, for in that case the great Chief Justice was careful to define the commerce, the power to regulate which was conferred upon Congress, and in the passages which I have previously quoted, simply pointed out the rule by which it was to be determined in any case whether Con-

gress, in acting upon the subject, had gone beyond the limits of the power to regulate commerce as it was defined in the opinion. Accepting the test announced in *Gibbons* v. *Ogden* for determining whether a given exercise of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case and approved so many times since, and hence to test the question for decision by that definition. The definition is this: "Commerce undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated* **[369]** *by prescribing rules for carrying on that intercourse.*" (Italics mine.)

Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in state corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such question is to be governed by the definition of commerce just quoted from *Gibbons* v. *Ogden*. Let me analyze the definition. "Commerce undoubtedly is traffic, but it is something more, it is intercourse;" that is, traffic between the States and intercourse between the States. I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the States or intercourse between them. The definition continues: "It describes the commercial intercourse between nations and parts of nations." Can the ownership of stock in a state corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and parts of nations?" And to remove all doubt, the definition points out the meaning of the delegation of power to regulate, since it says that it is to be "regulated by prescribing rules for carrying on that intercourse." Can it in reason be maintained that to prescribe rules governing the ownership of stock within a State in a corporation created by it is within the power to prescribe rules for the regulation of intercourse between citizens of different States?

But if the question be looked at with reference to the powers of the Federal and state governments, the general nature

of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate, it seems to me evident that the contention that the authority of the National Government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by state authority, is absolutely destructive of the Tenth Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Consti- **[370]** tution, nor prohibited by it to the States, are reserved to the States respectively or to the people." This must follow, since the authority of Congress to regulate on the subject can in reason alone rest upon the proposition that its power over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the States from the beginning if Congress deemed that the rights conferred by such state charters tended to restrain commerce between the States or to create a monopoly concerning the same.

Besides, if the principle be acceded to, it must in reason be held to embrace every consolidation of state railroads which may do in part an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the States creating the corporations.

It would likewise overthrow every state law forbidding such consolidations, for if the ownership of stock in state corporations be within the regulating power of Congress under the commerce clause and can be prohibited by Congress, it would be within the power of that body to permit that which it had the right to prohibit.

But the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the States or create a monopoly thereof, is in my opinion in conflict with the most elementary conceptions of rights of property. For it would follow if Congress deemed

that the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated.

[371] In the argument at bar many of the consequences above indicated as necessarily resulting from the contention made were frankly admitted, since it was conceded that, even although the holding of the stock in the two railroads by the Northern Securities Company which is here assailed, was expressly authorized by the laws of both the States by which the railroad corporations were created, as it was by the law of the State of New Jersey, nevertheless as such authority, if exerted by the States, would be a regulation of interstate commerce, it would be repugnant to the Constitution as an attempt on the part of the States to interfere with the paramount authority of Congress on that subject. True, this assertion, made in the oral argument, in the printed argument is qualified by an intimation that the rule would not apply to state action taken before the adoption of the Anti-Trust Act, since up to that time, in consequence of the inaction of Congress on the subject, the States were free to legislate as they pleased regarding the matter. But this suggestion is without foundation to rest on. It has long since been determined by this court that where a particular subject matter is national in its character and requires uniform regulation, the absence of legislation by Congress on the subject indicates the will of Congress that the subject should be free from state control. *County of Mobile* v. *Kimball*, 102 U. S. 691; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493; *United States* v. *E. C. Knight Company*, 156 U. S. 1.

It is said, moreover, that the decision of this case does not involve the consequences above pointed out, since the only issue in this case is the right of the Northern Securities Company to acquire and own the stock. The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. My mind fails to seize

the distinction. The only premise by which the power of Congress can be extended to the subject matter of the right of the Securities Company to own the stock must be the proposition that such **[372]** ownership is within the legislative power of Congress, and if that proposition be admitted it is not perceived by what process of reasoning the power of Congress over the subject matter of ownership is to be limited to ownership by particular classes of corporations or persons. If the power embraces ownership, then the authority of Congress over all ownership which in its judgment may affect interstate commerce necessarily exists. In other words the logical result of the asserted distinction amounts to one of two things. Either that nothing is decided or that a decree is to be entered having no foundation upon which to rest. This is said because if the control of the ownership of stock in competing roads by one and the same corporation is within the power of Congress, and creates a restraint of trade or monopoly forbidden by Congress, it is not conceivable to me how exactly similar ownership by one or more individuals would not create the same restraint or monopoly, and be equally within the prohibition which it is decided Congress has imposed. Besides the incongruity of the conclusion resulting from the alleged distinction, to admit it would do violence to both the letter and spirit of the Constitution, since it would in effect hold that, although a particular act was a burden upon interstate commerce or a monopoly thereof, individuals could lawfully do the act, provided only they did not use the instrumentality of a corporation. But this court long since declared that the power to regulate commerce, conferred upon Congress, was "general and includes alike commerce by individuals, partnerships, associations and corporations." *Paul* v. *Virginia*, 8 Wall. 168, 183.

Indeed, the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous principle, is an admonition that the principle itself is wrong. That admonition, I submit, is conclusively afforded by the decree which is now affirmed. Without stopping to point out what seems to me to be the conclusion, contradiction and denial of rights of property which the decree exemplifies,

let me see **[373]** if in effect it is not at war with itself and in conflict with the principle upon which it is assumed to be based.

Fundamentally considered, the evil sought to be remedied is the restraint of interstate commerce and the monopoly thereof, alleged to have been brought about, through the acquisition by Mr. Morgan and Mr. Hill and their friends and associates, of a controlling interest in the stock of both the roads. And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, authorizes its return to the alleged conspirators, and does not restrain them from exercising the control resulting from the ownership. If the conspiracy and combination existed and was illegal, my mind fails to perceive why it should be left to produce its full force and effect in the hands of the individuals by whom it was charged the conspiracy was entered into.

It may, however, be said that even if the results which I have indicated be held necessarily to arise from the principles contended for by the government, it does not follow that such power would ever be exerted by Congress, or, if exerted, would be enforced to the detriment of charters granted by the States to railroads or consolidations thereof, effected under state authority, or the ownership of stock in such railroads by individuals, or the rights of individuals to acquire property by purchase, lease or otherwise, and to make any and all contracts concerning property which may thereafter become the subject matter of interstate commerce. The first suggestion is at once met by the consideration that it has been decided by this court that, as the Anti-Trust Act forbids any restraint, it therefore embraces even reasonable contracts or agreements. If, then, the ownership of the stock of the two railroads by the Northern Securities Company is repugnant to the act it follows that ownership, whether by the individual or another corporation, would be equally within the prohibitions of the act. As to the second, true it is that by the terms of the Anti-Trust Act the power to put its provisions in motion is, as to many particulars, confided to the highest law officer of the govern- **[374]** ment, and if that officer did not invoke the aid of the courts to

restrain the rights of the railroads previously chartered by the States to enjoy the benefits conferred upon them by state legislation, or to prevent individuals from exercising their right of ownership and contract, the law in these respects would remain a dead letter. But to indulge in this assumption would be but to say that the law would not be enforced by the highest law officer of the government, a conclusion which, of course, could not be indulged in for a moment. In any view, such suggestion but involves the proposition that vast rights of property, instead of resting upon constitutional and legal sanction, must alone depend upon whether an executive officer might elect to enforce the law—a conclusion repugnant to every principle of liberty and justice.

Having thus by the light of reason sought to show the unsoundness of the proposition that the power of Congress to regulate commerce extends to controlling the acquisition and ownership of stock in state corporations, railroad or otherwise, because they may be doing an interstate commerce business, or to the consolidation of such companies under the sanction of state legislation, or to the right of the citizen to enjoy his freedom of contract and ownership, let me now endeavor to show, by a review of the practices of the governments, both state and national, from the beginning and the adjudications of this court, how wanting in merit is the proposition contended for. It may not be doubted that from the foundation of the government, at all events to the time of the adoption of the Anti-Trust Act of 1890, there was an entire absence of any legislation by Congress even suggesting that it was deemed by any one that power was possessed by Congress to control the ownership of stock in railroad or other corporations, because such corporations engaged in interstate commerce. On the contrary, when Congress came to exert its authority to regulate interstate commerce as carried on by railroads, manifested by the adoption of the interstate commerce act, 24 Stat. 379, it sedulously confined the provisions of that act to the **[375]** carrying on of interstate commerce itself, including the reasonableness of the rates to be charged for carrying on such commerce and other matters undeniably concerning the fact of interstate commerce. The same conception was manifested subsequently

in legislation concerning safety appliances to be used by railroads, since the provisions of the act were confined to such appliances when actually employed in the business of interstate commerce. 27 Stat. 531. It also may not be doubted that from the beginning the various States of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases and consolidations under the sanction of state laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under state authority, sometimes by such leases made where there was no prohibition against them, and by stock aquisitions made by persons or corporations in order to acquire a controlling interest in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston and Maine system, the New York, New Haven and Hartford, the New York Central, the Reading, and the Pennsylvania systems. **[376]** One of the illustrations—as to the New York Central system—is the case of the Hudson River Railroad on one side of the Hudson River and the West Shore Railroad on the other, both parallel roads and directly competitive, and both united in one management by authority of a legislative act. It is indeed remarkable, if the whole subject was within the paramount power of Congress and not within the authority of the States, that

there should have been a universal understanding to the contrary from the beginning. When it is borne in mind that such universal action related to interests of the most vital character, involving property of enormous amount concerning the welfare of the whole people, it is impossible in reason to deny the soundness of the assumption that it was the universal conviction that the States, and not Congress, had control of the subject matter of the organization and ownership of railroads created by the States. And the same inference is applicable to the condition of things which has existed since the adoption of the Anti-Trust Act in 1890. Who can deny that from that date to this consolidations and unification of management, by means of leases, stock ownership by individuals or corporations, have been carried on, when not prohibited by state laws, to a vast extent, and that during all this time, despite the energy of the government in invoking the Anti-Trust Law, that no assertion of power in Congress under that act to control the ownership of stock was ever knowingly made until first asserted in this cause. Quite recently Congress has amended the interstate commerce act by provisions deemed essential to make its prohibitions more practically operative, and yet no one of such provisions lends itself even to the inference that it was deemed by any one that the power of Congress extended to the control of stock ownership. Certainly the States have not so considered it. As a matter of public history it is to be observed that not long since, by authority of the legislature of the State of Massachusetts, a controlling interest by lease of the Boston and Albany road passed to the New York Central system.

[377] The decisions of this court to my mind leave no room for doubt on the subject. As I have already shown, the very definition of the power to regulate commerce, as announced in *Gibbons* v. *Ogden*, excludes the conception that it extends to stock ownership. I shall not stop to review a multitude of decisions of this court concerning interstate commerce, which, whilst upholding the paramount authority of Congress over that subject, at the same time treated it as elementary, that the effect of the power over commerce between the States was not to deprive the States of their right to legislate con-

cerning the ownership of property of every character or to create railroad corporations and to endow them with such powers as were deemed appropriate, or to deprive the individual of his freedom to acquire, own and enjoy property by descent, contract or otherwise, because railroads or other property might become the subject of interstate commerce.

In *Paul* v. *Virginia*, 8 Wall. 168, the question was as to the power of the State of Virginia to license a foreign insurance company, and one of the contentions considered was whether the contract of insurance, since it was related to commerce, was within the regulating power of Congress and not of the State of Virginia. The proposition was disposed of in the following language (p. 183):

"Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled **[378]** in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

In other words, the court plainly pointed out the distinction between interstate commerce as such and the contracts concerning, or the ownership of property which might become the subjects of interstate commerce. And the authority of *Paul* v. *Virginia* has been repeatedly approved in subsequent cases, which are so familiar as not to require citation.

In *Railroad Co.* v. *Maryland*, 21 Wall. 456, the question was this: The State of Maryland had chartered the Baltimore and Ohio Railroad Company, and in the charter had imposed upon it the duty of paying to the State a certain proportion of all its receipts from freight, which applied as well to interstate as domestic freight. The argument was that these provisions were repugnant to the commerce clause, because they necessarily increased the sum which the railroad would have

to charge, and thereby constituted a regulation of commerce. The court held the law not to be repugnant to the Constitution, and in the course of the opinion said (p. 473):

"In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts."

True it is that some of the expressions used in the opinion in the case just cited, giving rise to the inference that there was power in the State to regulate the rates of freight on interstate commerce, may be considered as having been overruled by *Wabash Railroad Company* v. *Illinois*, 118 U. S. 557. But that case also in the fullest manner pointed out the fact that the power to regulate commerce, conferred on Congress by the **[379]** Constitution, related not to the mere ownership of property or to contracts concerning property, because such property might subsequently be used in interstate commerce or become the subject of it. For instance, the definition given of interstate commerce in *Gibbons* v. *Ogden*, previously referred to, was reiterated and in addition the definition expounded in *County of Mobile* v. *Kimball*, 102 U. S. 691, was approvingly quoted. That definition was as follows (p. 574):

"'Commerce with foreign countries and among the States, strictly construed, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce *as thus defined* may not be inaccurate, when it would be so *if applied to legislation upon subjects which are merely auxiliary to commerce.*'"

In *Ashley* v. *Ryan*, 153 U. S. 436, this was the question: The property of various railroad corporations operating in the States of Ohio, Michigan, Indiana, Illinois and Missouri had been sold under decrees of foreclosure. The purchasers of the respective lines availed themselves of the Ohio statutes, and consolidated all the corporations into one so as to form a single system, the Wabash. On presenting the articles of consolidation to the Secretary of State of Ohio, that officer demanded a fee imposed by the Ohio statutes, predicated upon the sum total of the capital stock of the consolidated

company. This was refused on the ground that the State of Ohio had no right to make the charge, and that its doing so was repugnant to the commerce clause of the Constitution of the United States and to the Fourteenth Amendment. This court decided against this contention. It held that, as the right to consolidate could **[380]** alone arise from the Ohio law, the corporation could not avail of that law and avoid the condition which the law imposed. Speaking of the consolidation, the court said (p. 440):

"The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured."

And, after a copious review of the authorities concerning the power of the State over the consolidation, the case was summed up by the court in the following passage (p. 446):

"Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, *the right to which depended solely on the will of that State*," (italics mine,) "and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

How a right which was thus decided to depend *solely* upon the authority of the States can now be said to depend solely upon the will of Congress, I do not perceive.

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, the facts and the relief based on them were thus stated by Mr. Chief Justice Fuller, delivering the opinion of the court (p. 9):

"By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890."

[381] After referring, in a general way, to what constituted a monopoly or restraint of trade at common law, the question for decision was thus stated (p. 11):

"The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill."

Examining this question as to the power of Congress, it was observed (p. 11):

"It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

Next, pointing out that the power of Congress over interstate commerce and the fact that its failure to legislate over subjects requiring uniform legislation expressed the will of Congress that the State should be without power to act on that subject, the court came to consider whether the power of Congress to regulate commerce embraced the authority to regulate and control the ownership of stock in the state sugar refining companies, because the products of such companies when manufactured might become the subject of interstate commerce. Elaborately passing upon that question and reaffirming the definition of Chief Justice Marshall of commerce, in the constitutional sense, it was held that, whilst the power of Congress extended to commerce as thus defined, it did not embrace the ownership of stock in state corporations, because the products of such manufacture might subsequently become the subject of interstate commerce.

The parallel between the two cases is complete. The one corporation acquired the stock of other and competing corporations by exchange for its own. It was conceded, for the [382] purposes of the case, that in doing so monopoly had been brought about in the refining of sugar, that the sugar to be produced was likely to become the subject of interstate commerce, and indeed that part of it would certainly become so. But the power of Congress was decided not to extend to the subject, because the ownership of the stock in the corporations was not itself commerce.

In *Pearsall* v. *The Great Northern Railway Company*, 161 U. S. 646, the question was whether the acquisition by the Great Northern road of a controlling interest in the stock of the Northern Pacific Railway Company was a violation of a Minnesota statute prohibiting the consolidation of competing lines. It is at once evident that if the subject of consolidation

was within the authority of Congress, as Congress had not expressed its will upon the subject, the act of the legislature of Minnesota was void because repugnant to the Constitution of the United States. But the possibility of such a contention was not thought of by either party to the cause or by the court itself. Treating the power of the State as undoubted, the court, speaking through Mr. Justice Brown, decided that the Minnesota law should be enforced. It was pointed out in the opinion that, as the charter was one granted by the State, the railroad company and the ownership of stock therein was subject to the state law, and this was made the basis of the decision. Whilst, however, resting its conclusion upon the power of the State over the corporation by it created, the court was careful to recognize that the authority in the State was so complete, as the company was a state corporation, that the State had the right, *if it chose to do so, to authorize the consolidation, even although the lines were competing.*

In *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, the power of the State to pass a law forbidding the consolidation of competing state railroad corporations doing in part an interstate commerce business was again considered, and a state statute in which the power was exercised was upheld. Here, again, it is to be observed that if the consolidation of [383] state railroad corporations, because they did in part an interstate commerce business, was within the paramount authority of Congress, that authority was exclusive and the state regulation which the court upheld was void. And this question, vital to the consideration of the case, and without passing upon which it could not have been decided did not escape observation, since it was explicitly pressed upon the court and was directly determined. The court, speaking through Mr. Justice Brown, said (pp. 701, 702):

"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways.

* * * * *

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority,

and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

How one case could be more completely decisive of another than the ruling in the case just quoted is of this, I am unable to perceive.

[384] The subject was considered at circuit in *In re Greene*, 52 Fed. Rep. 104. The case was this: A person was indicated in one State for creating a monopoly in violation of the Anti-Trust Act of Congress and was held in another State for extradition. The writ of *habeas corpus* was invoked, upon the contention that the face of the indictment did not state an offense against the United States, since the matters charged did not involve interstate commerce. The case is referred to, although it arose at circuit and was determined before the decisions of this court in the *Pearsall* and *Louisville and Nashville* cases, because it was decided by Mr. Justice Jackson, then a Circuit Judge, who subsequently, became a member of this court. The opinion manifests that the case was considered by Judge Jackson with that care which was his conceded characteristic and was stated by him with that lucidity which was his wont. In discharging the accused on the grounds stated in the application for the writ, Judge Jackson said (p. 112):

"Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the **[385]** subject of trade or commerce among the several States or

with foreign nations. Commerce among the States, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' *County of Mobile* v. *Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203. In the application of this comprehensive definition, it is settled by the decision of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the States, but also the instrumentalities and processes of such transportation.

* * * * * * * *

"That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution and consumption thereof in the latter State forms no part of interstate commerce."

If this opinion had been written in the case now considered it could not more completely than its reasoning does have disposed of the contention that the ownership of stock by a corporation in competing railroads was commerce.

United States v. *Freight Association*, 166 U. S. 290, was this: A large number of railway companies, who were made defendants in the cause, had formed themselves into an association, known as the Trans-Missouri Freight Association, and the companies had bound themselves by the provisions contained in the articles of agreement. Many stipulations relating to **[386]** the carrying on of interstate commerce over the roads which were parties to the agreement were contained in it, and section 3 provided as follows:

"A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree it shall be arbitrated in the manner provided in article VII."

The government sought to dissolve the association on the ground that the agreement restrained commerce between the States, and therefore was in violation of the Anti-Trust Act. On the hearing in this court, as the agreement directly related in many particulars to interstate transportation and the charge, to be made therefor, it was conceded on all hands that

it embraced subjects which came within the power of Congress to regulate commerce. The contentions on behalf of the association were these: First. That the movement of interstate commerce by railroads was not within the Anti-Trust Act, since Congress had regulated that subject by the interstate commerce act, and did not intend to amplify its provisions in any respect by the subsequent enactment of the Anti-Trust Law. Second. That even if this were not the case, and the movement of interstate commerce by railroads was affected by the Anti-Trust Statute, the particular agreement in question did not violate the act, because the agreement did not unreasonably restrain interstate commerce. Both these contentions were decided against the association, the court holding that the Anti-Trust Act did embrace interstate carriage by railroad corporations, and as that act prohibited any contract in restraint of interstate commerce, it hence embraced all contracts of that character, whether they were reasonable or unreasonable.

The same subject was considered in a subsequent case, [387] *United States* v. *Joint Traffic Association*, 171 U. S. 505. In that case also there was no question that the agreement between the railroads related to the movement of interstate commerce, but it was insisted that the particular agreement there involved did not seek to fix rates, but only to secure the continuation of just rates which had already been fixed, and hence was not within the Anti-Trust Law. If this were held not to be true, a reconsideration of the questions decided in the *Freight Association* case was invoked. The court reviewed and reiterated the rulings made in the *Freight Association* case and held that the particular agreement in question came within them.

I mention these two last cases not because they are apposite to the case in hand, for they are not, since the contracts which were involved in them confessedly concerned interstate commerce, whilst in this case the sole question is whether the ownership of stock in competing railroads does involve interstate commerce. The cases are referred to in connection with the decisions previously cited, because, taken together, they illustrate the distinction which this court has always maintained between the power of Congress over interstate commerce and its want of authority to regulate subjects not embraced within that grant. The same distinction is aptly shown in subsequent cases.

Hopkins v. *United States*, 171 U. S. 578, involved whether a particular agreement entered into between persons carrying on the business of selling cattle on commission, exclusively at the Kansas City stock yards was valid. At those yards cattle were received in vast numbers through the channels of interstate commerce, and from thence were distributed through such channels. For these reasons the business of those engaged exclusively in the sale of cattle on the stock yards was asserted to be interstate commerce and within the power of Congress to regulate. In the opinion of the court, delivered by Mr. Justice Peckham, it was at the outset said (p. 586):

"The relief sought in this case is based exclusively on the [388] act of Congress approved July 2, 1890, c. 647, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' commonly spoken of as the Anti-Trust Act. 26 Stat. 209.

"The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce.

"The question meeting us at the threshold, therefore, in this case is, what is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several States or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several States or with foreign nations?"

Proceeding, then, to consider the agreement, it was pointed out that the contention that the sale of cattle on the stock yards constituted interstate commerce was without merit. The distinction between interstate commerce as such and the power to make contracts and to buy and sell property was clearly stated, and because of that distinction the agreement was held not to be within the act of Congress, because that act could and did only relate to interstate commerce.

And on the day the decision just referred to was announced another case under the Anti-Trust Act was decided. *Anderson* v. *United States*, 171 U. S. 604. The difference between that case and the *Hopkins* case was thus stated by Mr. Justice Peckham, in delivering the opinion of the court (p. 612):

"This case differs from that of *Hopkins* v. *United States*, *supra*, in the fact that these defendants are themselves purchasers of cattle

on the market, while the defendants in the *Hopkins* case were only commission merchants who sold the cattle upon commission as a compensation for their services.

[389] "Counsel for the Government assert that any agreement or combination among buyers of cattle coming from other States, of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce."

The court, however, said it did not deem it necessary to decide whether the fact that the merchants who entered into the agreement bought cattle in other States and shipped them to other States, caused their business to be interstate commerce, because in any event the court was of opinion that the agreement which was assailed, even if it involved interstate commerce, was not in violation of any of the provisions of the Anti-Trust Act.

The *Anderson* case was followed by *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211. The case involved deciding whether a particluar combination of pipe manufacturers, looking to the control of the sale and transportation of such pipe over a large territory, embracing many States and a division of the territory between the members of the combination, was within the prohibitions of the Anti-Trust Act. Coming to consider the subject, the court, through Mr. Justice Peckham, analyzed the contract and pointed out its monopolistic features. In answer to the argument that the matter complained of was not commerce, because it related only to a sale of pipe, and therefore was within the rule announced in the *Knight* and *Hopkins* cases, the *Knight* case was approvingly reviewed, and its doctrine in effect was reaffirmed, the court observing (p. 240):

"The direct purpose of the combination in the *Knight* case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured articles; nothing looking to a transaction in the nature of interstate commerce.

* * * * * * * *

"We think the case now before us involves contracts of the nature last before mentioned, not incidentally or collaterally, **[390]** but as a direct and immediate result of the combination engaged in by defendants. * * * *The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination.* As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?" (Italics mine.)

Having thus found that the agreement concerned interstate commerce, because it directly purported to control the

movement of goods from one State to the other, and besides sought to prohibit that movement or restrict the same to particular individuals, it was held that the contract was, for these reasons, within the prohibitions of the Act of Congress, and was therefore void. I do not pause to consider the case of *Montague & Co.* v. *Lowry*, 193 U. S. 38, decided at this term, since on the face of the opinion it is patent that the contract directly concerned the shipment of goods from one State to another, and this was the sole and exclusive basis of the decision.

Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under state law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. It is, indeed, suggested that the cases establish a contrary doctrine. This is sought to be demonstrated by quoting passages from the opinions separated from their context apart from the questions which the cases involved. But as the issues which were decided in the *Knight*, in the *Pearsall*, in the *Louisville and Nashville* case and in the *Hopkins* case directly exclude the significance attributed to the passages from the opinions in those cases relied upon, it must follow that if such passages could, when separated from their context, have the meaning attributed to them the expressions would be mere *obiter*. And this consideration renders it unnecessary for me to analyze the passages to show that when they are read in connection with their con- **[391]** text they have not the meaning now sought to be attached to them. But other considerations equally render it unnecessary to particularly review the sentences relied upon. There can be no doubt that it was expressly decided in the *Knight* case that the acquisition of stock by one corporation in other corporations so as to control them all was not interstate commerce, *although the goods of the manufacturing companies whose stock was acquired might become the subject of interstate commerce.* If then the passage from the *Knight* case could be given the meaning sought to be affixed to it, the result would be but to say that that case overruled itself. And

this would be the result in the *Pearsall* case, since in that case it was decided that the States had the power to forbid the consolidation of competing railroads, even by means of the acquisition of stock. Besides, as in the *Louisville and Nashville* case, immediately following the *Pearsall*, it was expressly decided that the interstate commerce power of Congress did not embrace such consolidation, and Congress, therefore, could not restrain a State from either forbidding or permitting it to take place, it would follow that if the sentences in the *Pearsall* case had the import now applied to them, that that case not only overruled itself, but was besides overruled by the *Louisville and Nashville* case, and this although the two cases were decided on the same day, the opinions in both cases having been delivered by the same Justice.

The same confusion and contradiction arises from separating from their context and citing as applicable to this case passages from the opinions in the *Freight Association* and *Joint Traffic* cases. Those cases, as I have previously stated, related exclusively to a contract admittedly involving interstate commerce, and it was decided that any restraint of such commerce was forbidden by the Anti-Trust Act. Now in the *Hopkins* case, decided subsequent to the *Freight Association* and *Joint Traffic* cases, the contract considered unquestionably involved a restraint, but, as such restraint did not concern interstate commerce, it was held not to come within the power of Congress. **[392]** It would follow then, if the sentence quoted from the opinions in the *Freight Association* and *Joint Traffic* cases, which cases concerned only that which was completely interstate commerce, applied to that which was not such commerce, that the *Hopkins* case overruled both these cases, although the opinions in all of the cases were delivered by the same Justice, and no intimation was suggested of such overruling. It would also result that, after having overruled those cases in the *Hopkins* case, the court, in expressing its opinion through the same Justice, proceeded in the *Addyston Pipe* case, which related only to interstate commerce, to overrule the *Hopkins* case and reaffirm the prior cases.

Of course, in my opinion, there is no ground for holding

that the decided cases embody such extreme contradictions or produce such utter confusion. The cases are all consistent, if only the elementary distinction upon which they proceeded be not obscured, that is, the difference which arises from the power of Congress to regulate interstate commerce on the one hand, and its want of authority on the other, to regulate that which is not interstate commerce. Indeed, the confounding and treating as one, things which are wholly different, is the error permeating all the contentions for the Government.

What has been previously said suffices to show the reasons which control my judgment, and I might well say nothing more. There were, however, three propositions so earnestly pressed by the Government at bar upon the theory that they demonstrate that common ownership of a majority of the stock of competing railroads is subject to the regulating power of Congress that I propose to briefly give the reasons which cause me to conclude that the contentions relied upon are without merit.

1. This court, it is urged, has frequently declared that the power of Congress over interstate commerce includes the authority to regulate the instrumentalities of such commerce, and the following cases are cited: *Railroad Co.* v. *Fuller*, 17 Wall. 560; *Welton* v. *Missouri*, 91 U. S. 275; *Pensacola Tele-* **[393]** *graph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196. To these cases might be added many others, including some of those which have been previously referred to by me. The argument now made is, as the power extends to instrumentalities, and railroads are such instrumentalities, therefore the acquisition and ownership of railroads, by persons or corporations, is commerce and subject to the power of Congress to regulate. But this involves a *non sequitur*, and a confusion of thought arising from again confounding as one, things which are wholly different. True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and

ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and ownership of the same property. This difference was pointed out in the cases which have been referred to, and the distinction between the two has been from the beginning the dividing line, demarking the power of the national government on the one hand and of the States on the other. All the rights of ownership in railroads belonging to corporations organized under state law, the power to acquire the same, to mortgage, to foreclose mortgages, to lease, and the contract relations concerning them, have from the foundation had their sanction in the legislation of the several States. One may search in vain in the acts of Congress for any legislation even suggesting that the power over these subjects was deemed to be in Congress. On the contrary, the legislation of Congress concerning the instrumentalities of railroads under the interstate commerce power clearly refutes the contention, since that legislation relates only to such instrumentalities [394] during their actual use in interstate commerce and not otherwise. How, consistently with the proposition, can the great number of cases be explained which in both the Federal and state courts have dealt with the ownership of railroads and their instrumentalities by foreclosure and otherwise, under the assumption that the rights of the parties were controlled by state laws governing the subject? And here again it would follow, if the proposition was adopted, that all the vast body of state legislation on the subject would be void from the beginning and the enormous sum of property rights depending upon such legislation would be impaired and lost, since if the subject were within the power of Congress it was one requiring a uniform regulation, and therefore the inaction of Congress would signify an entire want of power in the States over the subjects.

2. The court, it is urged, has in a number of cases declared that the several States were without power to directly burden interstate commerce. The acquiring and ownership by one

person or corporation of a majority of the stock in competing railroads engaged in interstate commerce, it is argued, being a direct burden, therefore power to regulate the subject is in Congress and not in the States. Undoubtedly not only in the decisions referred to but in many others, including most of those which have been by me quoted, the absolute want of power in the States to legislate concerning interstate commerce or to burden it directly has been declared, and the doctrine in its fullest scope is too elementary to require citation of authority. But to decide this case upon the assumption that the acquisition and ownership of stock in competing railroads engaged in interstate commerce is a regulation of commerce, or, what is the same thing, a direct burden on it, would be but to assume the question arising for decision.

Where an authority is exerted by a State which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by reason of the reflex and remote results [395] of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a direct burden upon commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the States if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power some effect may be produced upon commerce. In other words, where the power is lawful but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity between the manifestation of the power and the resulting burden.* The distinction is well illustrated

by the cases which have been referred to, and was very lucidly pointed out by Judge Jackson in the Greene case. Take the Knight case. There as the contract merely concerned the purchase of stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership. On the contrary, in the Addyston Pipe case, after stating in the fullest way the paramount authority of Congress concerning commerce, the court approached the terms of the contract in order to determine whether it related to interstate commerce, and if it did, whether it created a direct burden. In doing so, as it **[396]** found that the contract both related to interstate commerce and directly burdened the same, the contract was held to be void. This case comes within the Knight case. It concerns the acquisition and ownership of stock. No contract is in question made by the owners of the stock controlling the railroads in the performance of their duties as carriers of interstate commerce. The sole contention is that as the result of the ownership of the stock there may arise, in the operation of the roads, a burden on interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership. To maintain the contention, therefore, it must be decided that because ownership of property if acquired may be so used as to burden commerce, therefore to acquire and own is to burden. This, however, would be but to declare that that which was in its very nature and essence indirect is direct.

3. But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. This power, it is insisted, is within the regulating authority of Congress over interstate commerce. In other words, the contention broadly is that Congress has

not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce, and therefore was within the authority of Congress, and is refuted by the reasons and authorities already advanced. That the proposition, if adopted, would extend the power of Congress to all subjects essentially local, as already stated in considering the previous proposition, is to my mind manifest. So clearly is this the result of the particular proposition now being considered, that, **[397]** at the risk of repetition, I again illustrate the subject. Under this doctrine the sum of property to be acquired by individuals or by corporations, the contracts which they may make, would be within the regulating power of Congress. If it were judged by Congress that the farmer in sowing his crops should be limited to a certain production because overproduction would give power to affect commerce, Congress could regulate that subject. If the acquisition of a large amount of property by an individual was deemed by Congress to confer upon him the power to affect interstate commerce if he engaged in it, Congress could regulate that subject. If the wage-earner organized to better his condition and Congress believed that the existence of such organization would give power, if it were exerted, to affect interstate commerce, Congress could forbid the organization of all labor associations. Indeed, the doctrine must in reason lead to a concession of the right in Congress to regulate concerning the aptitude, the character and capacity of persons. If individuals were deemed by Congress to be possessed of such ability that participation in the management of two great competing railroad enterprises would endow them with the power to injuriously affect interstate commerce, Congress could forbid such participation. If the principle were adopted, and the power which would arise from so doing were exercised, the result would be not only to destroy the state and Federal governments, but by the implication of authority, from which the destruction would be brought

about, there would be erected upon the ruins of both a government endowed with the arbitrary power to disregard the great guaranty of life, liberty and property and every other safeguard upon which organized civil society depends. I say the guaranty, because in my opinion the three are indissolubly united, and one cannot be destroyed without the other. Of course, to push propositions to the extreme to which they naturally lead is often an unsafe guide. But at the same time the conviction cannot be escaped by me that principles and conduct bear a relation one to the other, especially in matters of public concern. The fathers [398] founded our government upon an enduring basis of right, principle and of limitation of power. Destroy the principles and the limitations which they impose, and I am unable to say that conduct may not, when unrestrained, give rise to action doing violence to the great truths which the destroyed principles embodied.

The fallacy of all the contentions of the Government is, to my mind, illustrated by the summing up of the case for the Government made in the argument at bar. The right to acquire and own the stock of competing railroads involves, says that summing up, the power of an individual "*to do*" (italics mine) absolutely as he pleases with his own, whilst the claim of the Government is that the right of the owner of property "*to do*" (italics mine) as he pleases with his own may be controlled in the public interest by legitimate legislation. But the case involves the right to *acquire and own*, not the right "*to do*" (italics mine). Confusing the two gives rise to the errors which it has been my endeavor to point out. Undoubtedly the States possess power over corporations, created by them, to permit or forbid consolidation, whether accomplished by stock ownership or otherwise, to forbid one corporation from holding stock in another, and to impose on this or other subjects such regulations as may be deemed best. Generally speaking, however, the right to do these things springs alone from the fact that the corporation is created by the States, and holds its rights subject to the conditions attached to the grant, or to such regulations as the creator, the State, may lawfully impose upon its creature, the corporation. Moreover, irrespective of the relation of creator and crea-

ture, it is, of course, true in a general sense that government possesses the authority to regulate, within certain just limits, what an owner *may do* with his property. But the first power which arises from the authority of a grantor to exact conditions in making a grant or to regulate the conduct of the grantee gives no sanction to the proposition that a government, irrespective of its power to grant, has the general authority to [399] limit the character and quantity of property which may be acquired and owned. And the second power, the general governmental one, to reasonably control the *use* of property, affords no foundation for the proposition that there exists in government a power to limit the quantity and character of property which may be acquired and owned. The difference between the two is that which exists between a free and constitutional government restrained by law and an absolute government unrestrained by any of the principles which are necessary for the perpetuation of society and the protection of life, liberty and property.

It cannot be denied that the sum of all just governmental power was enjoyed by the States and the people before the Constitution of the United States was formed. None of that power was abridged by that instrument except as restrained by constitutional safeguards, and hence none was lost by the adoption of the Constitution. The Constitution, whilst distributing the preëxisting authority, preserved it all. With the full power of the States over corporations created by them and with their authority in respect to local legislation, and with power in Congress over interstate commerce carried to its fullest degree, I cannot conceive that if these powers, admittedly possessed by both, be fully exerted a remedy cannot be provided fully adequate to suppress evils which may arise from combinations deemed to be injurious. This must be true unless it be concluded that by the effect of the mere distribution of power made by the Constitution partial impotency of governmental authority has resulted. But if this be conceded, *arguendo*, the Constitution itself has pointed out the method by which, if changes are needed, they may be brought about. No remedy, in my opinion, for any supposed or real infirmity can be afforded by disregarding the Con-

stitution, by destroying the lines which separate state and Federal authority, and by implying the existence of a power which is repugnant to all those fundamental rights of life, liberty and property, upon which just government must rest.

[400] If, however, the question of the power of Congress be conceded, and the assumption as to the meaning of the Anti-Trust Act which has been indulged in for the purpose of considering that power be put out of view, it would yet remain to be determined whether the Anti-Trust Act embraced the acquisition and ownership of the stock in question by the Northern Securities Company. It is unnecessary for me, however, to state the reasons which have led me to the conclusion that the act, when properly interpreted, does not embrace the acquisition and ownership of such stock, since that subject is considered in an opinion of Mr. Justice Holmes, which explains the true interpretation of the statute, as it is understood by me, more clearly that I would be able to do.

Being of the opinion, for the reasons heretofore given, that Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company, and because I think even if there were such power in Congress, it has not been exercised by the Anti-Trust Act, as is shown in the opinion of Mr. Justice Holmes, I dissent.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE PECKHAM and MR. JUSTICE HOLMES, concur in this dissent.

MR. JUSTICE HOLMES, with whom concurred the CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE PECKHAM, dissenting.

I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feel-

ings and distorts the judgment. These immediate interests **[401]** exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

The question to be decided is whether, under the act of July 2, 1890, c. 647, 26 Stat. 209, it is unlawful, at any stage of the process, if several men unite to form a corporation for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock. I will suppose further that every step is taken, from the beginning, with the single intent of ending competition between the companies. I make this addition not because it may not be and is not disputed but because, as I shall try to show, it is totally unimportant under any part of the statute with which we have to deal

The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one **[402]** of the other sort. I am no friend of artificial interpretations because a statute is of one

kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Again the statute is of a very sweeping and general character. It hits "every" contract or combination of the prohibited sort, great or small, and "every" person who shall monopolize or attempt to monopolize, in the sense of the act, "any part" of the trade or commerce among the several States. There is a natural inclination to assume that it was directed against certain great combinations and to read it in that light. It does not say so. On the contrary, it says "every," and "any part." Still less was it directed specially against railroads. There even was a reasonable doubt whether it included railroads until the point was decided by this court.

Finally, the statute must be construed in such a way as not merely to save its constitutionality but, so far as is consistent with a fair interpretation, not to raise grave doubts on that score. I assume, for the purposes of discussion, although it would be a great and serious step to take, that in some case that seemed to it to need heroic measures, Congress might regulate not only commerce, but instruments of commerce or contracts the bearing of which upon commerce would be only indirect. But it is clear that the mere fact of an indirect effect upon commerce not shown to be certain and very great, would not justify such a law. The point decided in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 17, was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do **[403]** not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.

This act is construed by the Government to affect the purchasers of shares in two railroad companies because of the

effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the States that may not be made a crime by the finding of a jury or a court. The personal ascendency of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders' meetings might be certain to prevent competition, and thus his advice, if not his mere existence, become a crime.

I state these general considerations as matters which I should have to take into account before I could agree to affirm the decree appealed from, but I do not need them for my own opinion, because when I read the act I cannot feel sufficient doubt as to the meaning of the words to need to fortify my conclusion by any generalities. Their meaning seems to me plain on their face.

The first section makes "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations" a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two—Contracts in restraint of trade and combinations or conspiracies in restraint of trade, and we have to consider what **[404]** these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business, (although in some cases carrying on a similar one,) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did

not come in unless the contract covered the whole of England. *Mitchel* v. *Reynolds*, 1 P. Wms. 181. Of course this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade, or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm. See *United States* v. *E. C. Knight Co.*, 156 U. S. 1. All that is added to the first section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation **[405]** of the words of § 1 is shown by the words "in the form of trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof

is to be found in § 7, giving an action to any person injured in his business or property by the forbidden conduct. This cannot refer to the parties to the agreement and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *Montague & Co.* v. *Lowry*, 193 U. S. 38. How effective the section may be or how far it goes, is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An Act to protect Trade and Commerce against unlawful Restraints and Monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come, and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United States* v. *Joint Traffic Association*, 171 U. S. 505, following and affirming *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge. But the provision has not been decided, and, it seems to me, could not be decided without perversion of plain language, to apply to an arrangement by which competition is ended through com- **[406]** munity of interest—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the States shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say that the words "every contract in restraint of trade is a crime punishable with imprisonment," would send the mem-

bers of a partnership between, or a consolidation of, two trading corporations to prison—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of § 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind—a consideration which was the turning point of the Trans-Missouri Freight Association's case.

If the statute applies to this case it must be because the parties, or some of them, have formed, or because the Northern Securities Company is, a combination in restraint of trade among the States, or, what comes to the same thing in my opinion, because the defendants, or some or one of them, are monopolizing or attempting to monopolize some part of the commerce between the States. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two States it monopolizes a part of the trade among the States. Of course the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that [407] the statute forbids a combination of men into a corporation to build and run such a railroad between the States.

I assume that the Minnesota charter of the Great Northern and the Wisconsin charter of the Northern Pacific both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the States, had created a railroad company authorized singly to build all the lines in the States now actually built, owned or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly the present charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the States is unlawful. The supposed company would have owned lines that might have been competing—probably the present one does. But the act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part. But my answer has been indicated already. In the first place size in the case of railroads is an inevitable incident and if it were an [408] objection under the act, the Great Northern and the Northern Pacific already were too great and encountered the law. In the next place in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from a greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case and it has not been attempted in express terms.

If the charter which I have imagined above would have

been good notwithstanding the monopoly, in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677, 701, that since the statute, as before, the States have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a State at the present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete—and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a State for charters; one for each of two new and possibly competing lines respectively, and one for both of these lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests **[409]** on a popular instead of an accurate and legal conception of what the word "monopolize" in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a "combination in restraint of trade" means, then the same monopoly may be attempted and effected by an individual, and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them

both at the same time and got more than half the stock of each road.

There is much that was mentioned in argument which I pass by. But in view of the great importance attached by both sides to the supposed attempt to suppress competition, I must say a word more about that. I said at the outset that I should assume, and I do assume, that one purpose of the purchase was to suppress competition between the two roads. I appreciate the force of the argument that there are independent stockholders in each; that it cannot be presumed that the respective boards of directors will propose any illegal act; that if they should they could be restrained, and that all that has been done as yet is too remote from the illegal result to be classed even as an attempt. Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There must be a certain nearness to the result. It is a question of proximity and degree. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. So, as I have said, is the amenability of acts in furtherance of interference with commerce among the States to legislation by Congress. So, according to the intimation of this court, is the question of liability under the present stat- **[410]** ute. *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171, U. S. 604. But I assume further, for the purposes of discussion, that what has been done is near enough to the result to fall under the law, if the law prohibits that result, although that assumption very nearly if not quite contradicts the decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1. But I say that the law does not prohibit the result. If it does it must be because there is some further meaning than I have yet discovered in the words "combinations in restraint of trade." I think that I have exhausted the meaning of those words in what I already have said. But they certainly do not require all existing competitions to be kept on foot, and, on the principle of the Trans-Missouri Freight Association's case, invalidate the continuance of old contracts by which former competitors united in the past.

A partnership is not a contract or combination in restraint of trade between the partners unless the well known words

are to be given a new meaning invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, but, as I have said, that was in connection with a contract with a stranger to the defendant's business—a true contract in restraint of trade. To suppress competition in that way is one thing, to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. To see whether I am wrong, the illustrations put in the argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the States whether made after or before the act, if now continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination caused by their entering into partnership is a restraint of [411] trade, every such combination, as well the small as the great, is within the act.

In view of my interpretation of the statute I do not go further into the question of the power of Congress. That has been dealt with by my brother White and I concur in the main with his views. I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in this dissent.

Syllabus.

[48] MINNESOTA *v.* NORTHERN SECURITIES COMPANY.[a]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 433. Argued January 7, 8, 1904.—Decided April 11, 1904.

[194 U. S., 48.]

Consent of parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, this court must, upon its own motion, so declare, and make such order as will prevent the Circuit Court from exercising an authority not conferred upon it by statute.[b]

A State is not a citizen within the meaning of the provisions of the Constitution or acts of Congress regulating the jurisdiction of the Federal courts.

Under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a state court, as one arising under the Constitution or laws of the United States unless the plaintiff's complaint, bill or declaration shows it to be a case of that character.

While an allegation in a complaint filed in a Circuit Court of the United States may confer jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits, if, notwithstanding such allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction then, by the express command of the act of 1875, its duty is to proceed no further. And if the suit, as disclosed by the complaint could not have been brought by plaintiff originally in the Circuit Court, then, under the act of 1887-1888 it should not have been removed from the state court and should be remanded.

The intention of the Anti-Trust Act of July 2, 1890, 26 Stat. 209, was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States, under § 4 of the act, by District Attorneys of the United States, acting under the direction of the Attorney General; thus securing the enforcement of the act, so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country.

[a] Decree in the Circuit Court (123 Fed., 692). See p. 246.

[b] Syllabus and abstracts of arguments copyrighted, 1904, by The Banks Law Publishing Co.

Argument for appellant.

A State cannot maintain an action in equity to restrain a corporation from violating the provisions of the act of July 2, 1890, on the ground that such violations by decreasing competition would depreciate the value of its public lands and enhance the cost of maintaining its public institutions, the damages resulting from such violations being remote and indirect and not such direct actual injury as is provided for in § 7 of the act.

[49] Article IV of the Constitution of the United States only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State, other than that in which the court is sitting. It has nothing to do with the conduct of individuals or corporations.

THE facts are stated in the opinion of the court.

Mr. W. B. Douglas, Attorney General of the State of Minnesota, and *Mr. M. D. Munn*, with whom *Mr. George P. Wilson* was on the brief, for appellant:

As to removal to and jurisdiction of the Circuit Court: The action was removed on the joint petition of all the defendants, on the ground that it arose under the Constitution and laws of the United States, and that the right upon which it was based and on which a recovery by plaintiff depended, would be defeated by one construction of the Constitution or said laws, and sustained by an opposite construction. Diverse citizenship did not form a basis for such removal, *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, and could not rightfully be presented as a ground therefor.

As to the doing of business by the Northern Securities Company within Minnesota and attempt to vacate service of summons, see *Goldey* v. *Morning News Co.*, 156 U. S. 518; *Wabash Western Railway* v. *Brow*, 164 U. S. 271.

The Circuit Court has jurisdiction of all civil actions in part arising under or depending upon the construction of the Constitution, laws or treaties of the United States. 24 Stat. 552; 25 Stat. 433; *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S. 482; *Ames* v. *Kansas*, 111 U. S. 462; *Gold-Washing and Water Co.* v. *Keyes*, 96 U. S. 203; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 507; *Cummings* v. *Chicago*, 188 U. S. 410.

Argument for appellant.

Read in the light of section 5 of the Court of Appeals Act—chap. 517 of the laws of 1891—it is equally clear that jurisdiction is assumed to exist in the Circuit Courts and an appeal authorized "in any case that involves the construction or application of the Constitution of the United States."

[50] The Supreme Court of the United States is without original jurisdiction of this controversy. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.

Assuming the facts to be as stated in the affidavit of the president of the Securities Company, above referred to, to the effect that the Securities Company is not the owner of any property situated in Minnesota and never transacted any business therein, the courts of Minnesota cannot acquire jurisdiction to hear and determine the issues involved herein, a jurisdiction over the person of the Securities Company cannot be obtained. *Pennoyer* v. *Neff*, 95 U. S. 714; *St. Clair* v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News Co.*, 156 U. S. 518; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100; *Cabanne* v. *Graf*, 87 Minnesota, 510; *Conley* v. *Matheson Alkely Works*, 190 U. S. 406.

The Northern Pacific and Great Northern Railway companies are necessary parties with the Securities Company, and being residents of different States and not engaged in doing business in any single State, jurisdiction of the person of all the defendants cannot be obtained elsewhere than in this court, in which the Securities Company has voluntarily appeared. *Minnesota* v. *Northern Securities Company*, *supra*.

Under *California* v. *Southern Pacific Ry. Co.*, 157 U. S. 270, and *Minnesota* v. *Northern Securities Co.*, unless a Federal question is deemed to exist in this record which gives to the Circuit Court jurisdiction over the subject matter of the action, under our dual form of government, a State will be deprived of the right to invoke the jurisdiction of any court in the land for the purpose of enforcing its laws or protecting its proprietary interests from unlawful acts done in violation of the laws of the State or Nation.

Two Federal questions are clearly set forth in appellant's bill of complaint. Whether the State to protect its proprietary interests had a cause of action against the defend-

Argument for appellant.

ants arising in part under the Federal Anti-Trust Act; and whether the state Anti-Consolidation and Anti-Trust acts (rightly con- [51] strued) had been violated. This presents a controversy between the appellant and the defendants, the correct determination of which involves or depends upon the construction and the application of the commerce clause as well as Article IV of the Constitution of the United States.

An issue was tendered in which the appellant alleged the commission of certain acts by the defendants which were specifically asserted to be not only seriously injurious to its proprietary interest, but in violation of the Federal Anti-Trust Act, and the learned trial court in its decision actually construed the act adversely to one contention of appellant and this construction rendered it unnecessary for the court to construe the act with reference to the other questions submitted. In this portion of the decree the court construed the act as excluding the appellant from invoking equity jurisdiction for its enforcement. Again, upon the argument in this court appellant's contentions upon both propositions were strenuously opposed by counsel for appellees.

It is therefore submitted that the pending controversy is one in part "arising under and depending upon the construction of the laws of the United States." Cases cited *supra*, and *Cummings* v. *Chicago*, 188 U. S. 410; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184; *N. P. Railway Co.* v. *Townsend*, 190 U. S. 270.

The test as to jurisdiction of the Circuit Court is clearly stated in the opinion of the court in *Gold-Washing & Water Co.* v. *Keyes*, *supra*, and affirmed in the case of *Shoshone Mining Co.* v. *Rutter*, *supra*, see p. 507; *Railroad Company* v. *Mississippi*, 102 U. S. 141; *Chapman* v. *Goodnow*, 123 U. S. 540; *Kaukauna Co.* v. *Green Bay & Canal Co.*, 142 U. S. 254, and cases cited; *O'Neil* v. *Vermont*, 144 U. S. 323.

If this construction of the act of Congress obtains in the application of the rule invoked, it is clear from the record that the State has suffered, and will continue from year to year to suffer, damages to its proprietary interests which will be difficult, if not impossible, to measure, running into mil- [52] lions of dollars. *Parker* v. *W. L. C. & W. Co.*, 2 Black,

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551, and cases cited; *Clark* v. *Smith*, 13 How. 194; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518.

Upon the proposition that a State may sue to redress injuries which are strictly analogous to those suffered by private individuals, see *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Am. Bell Tel. Co.*, 128 U. S. 315, 317; *Missouri* v. *Illinois*, 180 U. S. 240; *Kansas* v. *Colorado*, 185 U. S. 125.

The violation of the Minnesota Anti-Consolidation and Anti-Trust Act, rightfully construed, involves, as applied to this controversy, the construction and the application of Article IV of the Federal Constitution, as well as the commerce clause. For history of the clause, see Elliott's Debates, vol. 4, 123, vol. 5, 487, 504.

The gravamen of the charge in appellant's complaint is that the defendants created a corporate device in New Jersey and used it for the purpose and with the result that property rights in Minnesota were affected, in violation of its laws. Our contention is that Article IV must be so construed as to make the constitutional enactments of Minnesota effective throughout the United States, so far as they apply to and affect property rights within the State. Otherwise the policy and laws of any State may be easily evaded.

The test of jurisdiction must necessarily be determined by a correct answer to the question: What issues were fairly tendered for determination by the bill of complaint? If this be not the test, the trial court, by misconstruing a statute, has the power to eliminate from the record a jurisdictional question and deprive a party of the right of appeal.

The question of whether or not the case was properly removed from the state to the Federal court, is in itself a Federal question. *Railroad Company* v. *Koontz*, 104 U. S. 15. The determination of this question in itself gives the right of appeal to this court direct.

The case having been appealed to this court, and this court, [53] on its own motion, having questioned the correctness of the removal from the state to the Federal court, that establishes the jurisdiction of this court on appeal over the entire case should this court determine that the

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case was properly removed from the state to the Federal court. *Oakley v. Goodnow*, 118 U. S. 44; *Scott* v. *Goodnow*, 165 U. S. 58; *Carter* v. *Texas*, 177 U. S. 442.

Mr. John G. Johnson, and *Mr. George B. Young*, with whom *Mr. M. D. Grover* and *Mr. C. W. Bunn* were on the brief, for appellees:

On the question of removal to and jurisdiction of the Circuit Court:

The cause was properly removed to the Circuit Court, and upon such removal that court acquired jurisdiction of it as a "suit arising under the Constitution and laws of the United States."

As to the test of such a suit as determined by Chief Justice Marshall, see *Osborn* v. *Bank*, 9 Wheat. 738, 822, in which it was held that a cause may depend upon several questions of fact and law. Some of these may depend on the construction of a law of the United States, others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or laws of the United States and sustained by the opposite construction provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this which gives that jurisdiction. Under this construction, the judicial power of the United States extends effectively and beneficially to that most important class of cases which depends on the character of the cause. See also *Cohens* v. *Virginia*, 6 Wheat. 264, 379.

The following cases were decided under the act of 1875: *Gold-Washing Co.* v. *Keyes*, 96 U. S. 199, 201; *Tennessee* v. *Davis*, 100 U. S. 257, 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 140; *Ames* v. *Kansas*, 111 U. S. 449, 462; *Kansas* [54] *Pacific* v. *Atchison R. R.*, 112 U. S. 414; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Starin* v. *New York*, 115 U. S. 248, 257; *Southern Pacific R. Co.* v. *California*, 118 U. S. 109, 112; *Metcalf* v. *Watertown*, 128 U. S. 586; *Shreveport* v. *Cole*, 129 U. S. 36, 41; *Beck* v. *Perkins*, 139 U. S. 628. In the act of 1887–8, Congress used the same terms as in the

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act of 1875, in the same sense and reënacted them as thus construed.

And this court has never intimated that the criterion declared by Chief Justice Marshall and adopted and applied by itself in so many cases was erroneous in itself or had been rendered inapplicable to any class of cases by the amending act of 1887–8. The following cases originated after the latter act: *Cooke* v. *Avery*, 147 U. S. 375, 384; *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138, 143; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571, 580; *Patton* v. *Brady*, 184 U. S. 608, 611; *Swafford* v. *Templeton*, 185 U. S. 487, 494; *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U. S. 526.

As it is the proper function of the plaintiff's pleading to state his own case and not that of the defendant, to give jurisdiction the Federal question must appear in plaintiff's statement of his own case, or of his own claim, and that is all that is required.

In a few cases there are expressions,—inadvertent, no doubt—to the effect that the plaintiff's declaration must show that he asserts a right under the Constitution or some law of the United States,—as if only such suits were suits arising under the United States Constitution or laws. But this is directly opposed to the cases already cited and others that will be cited.

If such a requirement were essential to jurisdiction, one whose property was wrongfully seized by a United States marshal or revenue collector, or whose property was taken or his person or property injured by a Federal railway corporation, could have no redress in the Federal courts. His right of property or of personal security is not derived from the United States Constitution or laws, and when he asserts either [55] in a declaration he is not asserting a right under the United States Constitution or laws.

For trespass against a marshal, see *Bock* v. *Perkins*, 139 U. S. 628; *Sonnentheil* v. *Brewing Co.*, 172 U. S. 401. And compare *Walker* v. *Collins*, 167 U. S. 57. Against an internal revenue collector, see *Venable* v. *Richards*, 105 U. S. 636; *Harding* v. *Woodcock*, 137 U. S. 43.

The bill presents Federal questions both in its aspect of a bill by the State as a sovereign to enforce its local statutes,

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and as a landowner and shipper for relief under those statutes. And these questions are the same whether the State sues as sovereign or as property owner and shipper or in both of these capacities.

For cases analogous to the one at bar, see *South Carolina* v. *Coosaw Mining Co.*, 45 Fed. Rep. 804; 47 Fed. Rep. 225; 144 U. S. 550, cited with approval in *In re Debs*, 158 U. S. 564; *Ames* v. *Kansas*, 111 U. S. 449; *Harding* v. *Woodcock*, 137 U. S. 43; *South Carolina* v. *Port Royal &c. Ry. Co.*, 56 Fed. Rep. 333; *People* v. *Rock Island &c. Ry. Co.*, 71 Fed Rep. 753; *Minnesota* v. *Duluth &c. Ry. Co.*, 87 Fed. Rep. 497; *Tennessee* v. *Union Bank*, 152 U. S. 454.

The cause was properly removed because of the plaintiff's assertion of right and claim of relief under the Constitution and laws of the United States.

Besides the claims of the State under the full faith and credit clause of Article IV of the Constitution, and its claim under the swamp land granting acts of Congress, the State asserts a right as a property owner and as engaged in interstate commerce to carry on that commerce free from obstruction by combinations in restraint of commerce or by monopolies of such commerce—substantially the same right as that asserted by the United States in the *Debs Case*, 158 U. S. 564, 583. A citizen's right to carry on interstate commerce is a constitutional right. *Crutcher* v. *Kentucky*, 141 U. S. 47, 57; *Reid* v. *Colorado*, 187 U. S. 137. And there can be no doubt that a State has the same right as a citizen.

[56] The bill plainly asserts a right under the Constitution as well as under the Anti-Trust Act, and this gives jurisdiction. Whether the bill sufficiently alleges continuous or threatened injury to that right to make a case for the relief prayed or for any equitable relief is not a question of jurisdiction, but a question for the court to decide in the exercise of jurisdiction. *Swafford* v. *Templeton*, 185 U. S. 487, 493; *Southern Pacific R. Co.* v. *California*, 118 U. S. 112; *Hax* v. *Caspar*, 31 Fed. Rep. 499; *Lowry* v. *Chicago, B. & Q. R. Co.*, 46 Fed. Rep. 83.

The Circuit Court in a case like this, upon acquiring jurisdiction of the cause by reason of the Federal questions presented by the bill on the constitutionality of the state legislation and on the claim of rights under the Constitution and laws, has jurisdiction to decide, not only these Federal questions, but every question, Federal or non-Federal, that may be presented by the bill or arise upon the other pleadings or the evidence. *Osborn* v. *Bank of United States*, *supra*. It may decide the cause on these non-Federal grounds, without deciding or even considering the Federal questions presented by the bill. And this is the proper course where the Federal questions are constitutional questions. *Santa Clara Co.* v. *Southern Pacific R. R.*, 118 U. S. 394, 410. Its jurisdiction remains the same although the plaintiff should fail to establish by proofs the facts alleged as showing a right under the Constitution or laws or otherwise raising a Federal question, for the jurisdiction is determined by the averments of the bill. *Southern Pacific R. Co.* v. *California*, 118 U. S. 109, 112; *City Ry. Co.* v. *Citizens R. R. Co.*, 166 U. S. 537, 562.

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And the fact that the Federal questions may receive little or no attention in the argument in this court, or even in the Circuit Court, does not affect the jurisdiction of either court. It may pass by the questions argued and decide the Federal questions.

MR. JUSTICE HARLAN delivered the opinion of the court.

By a statute of Minnesota passed March 9, 1874, it was pro- **[57]** vided that no railroad corporation or the lessees, purchasers or managers thereof should consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad corporation owning or having under its control a parallel or competing line; nor should any officer of such corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads were parallel or competing lines should, when demanded by the party complainant, be decided by a jury as in other civil issues. Laws, Minnesota, 1874, p. 154.

A subsequent statute, passed March 3, 1881, provided that any railroad corporation, either domestic or foreign, whether organized under a general law or by virtue of a special charter, might lease or purchase, or become owner of or control,

or hold the stock of, any other railroad corporation, when the respective railroads could be lawfully connected and operated together "so as to constitute one continuous main line, with or without branches," § 1; and that any railroad corporation, whose lines of railroad, within or without the State, might be lawfully connected and operated together to constitute one continuous main line, so as to admit of the passage of trains over them without break or interruption, "could consolidate their stock and franchises so as to become one corporation." § 2. But by the same statute it was provided that no railroad corporation should consolidate with, lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchises, rights of property thereof, which owned or controlled "a parallel or competing line." § 3. Laws of Minnesota, 1881, p. 109.

At a later date, 1899, the Legislature of Minnesota passed another statute relating principally to such restraints upon trade and commerce as interfered with competition among those engaged therein. That statute contained these provisions:

[58] "SEC. 1. Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this State, or in restraint of trade or commerce between any of the people of this State and any of the people of any other State or country, or which limits or tends to limit or control the supply of any article, commodity or utility, or the articles which enter into the manufacture of any article [or] utility, or which regulates, limits or controls or raises or tends to regulate, limit, control or raise the market price of any article, commodity or utility, or tends to limit or regulate the production of any such article, commodity or utility, or in any manner destroys, limits or interferes with open and free competition in either the production, purchase or sale of any commodity, article or utility, is hereby prohibited and declared to be unlawful.

"That when any corporation heretofore or hereafter created, organized or existing under the laws of this State, whether general or special, hereafter unites in any manner with any other corporation wheresoever created, or with any individual, whereby such corporation surrenders or transfers, by sale or otherwise, in whole, or in part, its franchise, rights or privileges or the control or management of its business to any other corporation or individual, or whereby the business or the management or control of the business of such corporation is limited, changed or in any manner affected, and the purpose or effect of such union or combination is to limit, control or destroy competition in the manufacture or sale of any article or commodity, or is to limit or control the production of any article or commodity, or is to control or fix the price or market value of any article or commodity, or the price or market value of the material entering into the production of any article or commodity, or in case the purpose or effect of such union or combination

is to control or monopolize in any manner the trade or commerce, or any part thereof, of this State or of the several States, such union, combination, agreement, arrange- [59] ment or contract is hereby prohibited and declared to be unlawful. * * *

"SEC. 3. Any corporation heretofore or hereafter created, organized or existing under the laws of this State, which shall hereafter either directly or indirectly make any contract, agreement or arrangement, or enter into any combination, conspiracy or trust, as defined in section one of this act, shall, in addition to the penalty prescribed in section two of this act, forfeit its charter, rights and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any combination, trust or monopoly, except as to the final disposition of its property under the laws of this State. * * *

"SEC. 6. That for the purpose of carrying out the provisions of this act any citizen of this State may, and it is hereby declared to be the duty of the Attorney General, to institute, in the name of the State, proceedings in any court of competent jurisdiction against any person, partnership, association or corporation who may be guilty of violating any of the provisions of section one of this act, for the purpose of imposing the penalties imposed by this act, or securing the enforcement of section three hereof." Gen. Laws, Minnesota, 1899, c. 359.

These statutes being in force, the State of Minnesota instituted this suit in one of its own courts against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin, which, having filed its articles of incorporation with the Secretary of State of Minnesota, became subject to the laws of that State relating to railroad corporations; and James J. Hill, as President of the Northern Securities Company, and individually.

What is the nature of the case as disclosed by the complaint filed in the state court?

The complaint alleged—

That the Great Northern Railway Company and the North- [60] ern Pacific Railway Company each owned or controlled and maintained a system of railways connecting the Great Lakes and the Pacific Ocean, their main roads constituting, substantially, parallel and competing lines;

That pursuant to an agreement between the defendant Hill and other stockholders of the Great Northern Railway Company (representing a controlling interest in the stock of that company) and J. Pierpont Morgan and other stockholders of the Northern Pacific Railway Company (representing a controlling interest in the stock of that company) the Northern Securities Company was incorporated solely as

an instrumentality through which the stock, property and franchises of the Great Northern and Northern Pacific Railway companies should be consolidated in effect, if not in form, and the management and control of their business affairs, respectively, including the fixing of rates and charges for the transportation of passengers and freight over any and all the lines of railway of each of those companies, as well within as without the State, be vested in and controlled by the Securities Company, and all competition in freight and passenger traffic between the two systems of railway, within and without the State, to be suppressed and removed; that by means of such arrangement it was sought and intended to ignore, evade and violate the laws of the State prohibiting as well the consolidation of the stock, property or franchise of parallel or competing lines of railway therein, and the control or management thereof, as all combinations in restraint of trade or commerce within the State, and between the people of Minnesota and the people of other States and countries; and, that if the Securities Company was allowed to hold and control the stocks of the constituent railway companies and to carry out the purpose and object of its incorporators, as well as its own, " full faith and credit will not be given to the public acts of this complainant and it will be deprived of a further right guaranteed to it by the Constitution of the United States; "

That the said scheme had been consummated, and said two [61] railway systems were now under the absolute management and control of the Securities Company, and " by reason thereof all competition between said lines has been destroyed and a monopoly in railway traffic in Minnesota (as well as without said State) has been created, to the great and permanent and irreparable damage of the State of Minnesota, and to the people thereof, and in violation of its laws, *and of the laws of the United States* in such case made and provided, viz: The act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies;' " and

That the carrying out the above agreements and plan of consolidation and monopoly, and in every step taken to consummate it, the officers and directors of each of said railway

companies were severally fully advised and consented thereto, and, unless restrained by this court, the Securities Company would continue to manage and control the business and affairs of the Great Northern and Northern Pacific Railway companies, and to suppress all competition between them for freight and passenger traffic, as well as to monopolize railway traffic in that State, to the irreparable damage of the State and the people thereof.

The substantial relief asked was a decree declaring, among other things, the alleged agreement and combination to be unlawful, and all acts done and to be done in pursuance thereof contrary to and in violation of the laws of Minnesota *and of the United States;* prohibiting the Securities Company, its agents and officers, from acquiring, receiving, holding, voting or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific or the Great Northern Railway Company, or from exercising any management, direction or control over the constituent companies; and enjoining those railway companies from recognizing or accepting the Northern Securities Company as the holder or owner of any shares of the capital stock of either of those companies, or from effecting any combination or agreement [62] that would disturb their independent integrity, management and control, respectively, or that would directly or indirectly destroy free and unlimited competition between them by interchange of traffic, poolings of earnings, division of property or otherwise.

The Securities Company, appearing specially for that purpose, filed its petition for the removal of the case into the Circuit Court of the United States upon the ground that the suit was of a civil nature, in equity, involved, exclusive of costs, the sum of two thousand dollars, and was *one arising under the Constitution and laws of the United States.*

The state court approved the required statutory bond for removal, and made an order, reciting that the case was removed to the Federal court.

The Northern Securities Company, appearing specially for that purpose, gave notice of a motion to have the service of summons upon it vacated. Notice was also given of a like

motion as to the service of summons upon defendant Hill in his capacity as President of that company. Subsequently, the company, and defendant Hill as its President, gave notice that the above notices were withdrawn, and they accordingly entered their appearance in the cause.

At a later date the defendants severally answered, and the State filed its replication to each answer. Proofs were taken, and the cause having been heard, the bill was dismissed upon the merits. 123 Fed. Rep. 692.

After the cause was argued here the parties were invited to submit briefs upon the question whether the Circuit Court of the United States could take cognizance of the case upon removal from the state court. From the briefs filed in response to that invitation it appeared that both sides deemed the case a removable one and insist that this court should consider the merits as disclosed by the pleadings and evidence. But consent of parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own **[63]** motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute. *Mansfield C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379, 382; *Robertson* v. *Cease*, 97 U. S. 646; *King Bridge Co.* v. *Otoe County*, 120 U. S. 225; *Parker* v. *Ormsby*, 141 U. S. 81; *Mattingly* v. *Northwestern Va. R. R.*, 158 U. S. 53, 57; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 453; *Continental National Bank* v. *Buford*, 191 U. S. 119; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 194.

We proceed, therefore, to inquire whether the Circuit Court could take cognizance of this case upon removal from the state court and make a final decree upon the merits.

Of course, the Circuit Court could not take cognizance of the case as one presenting a controversy between citizens of different States; for the State of Minnesota is not a citizen within the meaning of the Constitution or the acts of Congress. *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S. 482, 487.

But the first section of the Judiciary Act of 1887–8, 24 Stat. 552, c. 373; 25 Stat. 433, c. 866, provides, among other things, that the Circuit Courts of the United States may take original cognizance of all suits of a civil nature at law or in equity, arising under the Constitution or laws of the United States,

where the matter in dispute, exclusive of costs, exceeds in value the sum of two thousand dollars. And the second section provides for the removal from a state court of "any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States * * * of which the Circuit Courts of the United States are given original jurisdiction by the preceding section."

In *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 461, which involved the scope and meaning of the acts of 1887–8, in respect of cases arising under the Constitution or laws of the United States, this court, after referring to section one, said: "But the corresponding clause in section 2 allows removals from a state court to be made only by defendants, and of suits 'of which the Circuit Courts of the United States are given **[64]** original jurisdiction by the preceding section,' thus limiting the jurisdiction of a Circuit Court of the United States *on removal* by the defendant under this section to such suits *as might have been brought* in that court *by the plaintiff under the first section*. 24 Stat. 553; 25 Stat. 434. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts of the United States." *Mexican Nat. Railroad* v. *Davidson*, 157 U. S. 201, 208; *Metcalf* v. *Watertown*, 128 U. S. 586. And in *Chappell* v. *Waterworth*, 155 U. S. 102, 107, the court, referring to *Tennessee* v. *Union & Planters' Bank*, said that it was there adjudged, upon full consideration, that, under the act of 1887–8, "a case (not depending on the citizenship of the parties, nor otherwise specially provided for,) cannot be removed from a state court into the Circuit Court of the United States, *as one arising under the Constitution, laws or treaties of the United States*, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or, in the subsequent pleadings." To the same effect are *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S. 482, 487; *United States* v. *American Bell Tel. Co.*, 159 U. S. 548, 553; *Oregon Short Line* v. *Skottowe*, 162 U. S. 490, 494; *Texas & Pacific Railway Co.* v. *Cody*, 166 U. S. 606, 608; *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255, 258; *Walker* v. *Collins*,

167 U. S. 57, 59; *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185; *Western Union Tel. Co.* v. *Ann Arbor Railroad Co.*, 178 U. S. 239. These cases establish, beyond further question in this court, the rule that, under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a state court, as one arising under the Constitution or laws of the United States, unless the plaintiff's complaint, bill or declaration shows it to be a case of that character. "If it does not appear at the outset," this court has quite recently said, "that the suit is one of which the Circuit Court at the time its jurisdiction **[65]** is invoked could properly take cognizance, the suit must be dismissed." *Third St. & Suburban Ry.* v. *Lewis*, 173 U. S. 457, 460.

We must then inquire whether the complaint presents a case arising under the Constitution or laws of the United States, in respect of which the original jurisdiction of the Circuit Court could have been invoked by the state.

The real purpose of the suit was to annul the agreement and suppress the combination alleged to exist between the defendant corporations upon the ground that such agreement and combination were in violation, first, of the laws of Minnesota, and, second, *of the Anti-Trust Act of Congress*. If relief had been asked upon the ground alone that what the defendant corporations had done and would, unless restrained, continue to do, was forbidden by the statutes of Minnesota, the Circuit Court of the United States could not have taken cognizance of the case; for confessedly such a controversy would not have been one between citizens of different States, nor could such a suit have been deemed one arising under the Constitution or laws of the United States.

The contention, however, is that a case arising under the laws of the United States was presented by the allegation in the complaint that the combination and consolidation between the Great Northern and Northern Pacific Railway Companies and their control of their affairs and operations by the Northern Securities Company, were also in violation of the Anti-Trust Act of Congress of July 2, 1890. An allegation in a complaint filed in a Circuit Court of the United States may, indeed, in a sense, confer jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, and *Pacific Electric Ry. Co.* v. *Los Angeles*, *post*, page 112, decided at present term. But if, notwithstanding such an allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction then, by the **[66]** express command of the act of 1875, its duty is to proceed no further. That is manifest from the fifth section of that act, which provides "That if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or *removed thereto*, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit *or remand it to the court from which it was removed* as justice may require, and shall make such order as to costs as shall be just." 18 Stat., 470. That provision has not been superseded by any subsequent legislation.

Does the present suit really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court? That is to say, could the suit, as disclosed by the complaint, have been brought by the State originally in that court? If it could not, then, under the act of 1887–8 and the adjudged cases, it should not have been removed from the state court and should be remanded.

By the first section of the Anti-Trust Act every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, is declared to be illegal. The second section condemns the monopolizing or attempting to monopolize, or combining or conspiring to monopolize, any part of such trade or commerce. By the third section, every contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce in any Territory of the United States

or the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or **[67]** with any foreign States, or between the District of Columbia and any State or States or foreign nations, is declared to be illegal. A violation of the provisions of each section is made a misdemeanor, punishable by a fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. Of course, a criminal prosecution under the act must be in the name of the United States and in a court of the United States—the District Attorney who conducts the prosecution being subject to the direction of the Attorney General as to the manner in which his duties shall be discharged. Rev. Stat. 362.

The fourth, sixth, seventh and eighth sections of the act are as follows:

"SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several District Attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

[68] "SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"SEC. 8. That the word 'person,' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State or the laws of any foreign country." 26 Stat. 209.

It thus appears that the act specifies four modes in which effect may be given to its provisions. It is clear that the present suit does not belong to either of those classes. It is not a criminal proceeding, (§§ 1, 2, 3,) nor a suit in equity in the name of the United States to restrain violations of the Anti-Trust Act, (§ 4,) nor a proceeding in the name of the United States for the forfeiture of property being in the course of transportation, (§ 6,) nor an action by any person or corporation for the recovery of threefold damages for injury done to business or property by some other person or corporation. (§§ 7, 8.)

But it is said that as the act of Congress was for the benefit of all the States and all the people, this case is to be deemed one arising under the laws of the United States, and, therefore, cognizable by the Circuit Court, because one of the objects of the State of Minnesota by its suit is to protect certain of its proprietary interests, which, it is alleged, would be injured by violations, on the part of the defendants, of the act of Congress. Let us see what, in that view, is the case as presented by the complaint.

The complaint alleged that the State is the owner of more than three million acres of land, of the value of more than fifteen millions of dollars, obtained, by donation, from the United States, and that "the value of said lands, and the **[69]** salability thereof, depends, in very large measure, upon having free, uninterrupted and open competition in passenger and freight rates over the lines of railway owned and operated by said Great Northern and Northern Pacific Railway companies."

The bill also alleges "that many of said lands are vacant and unsettled and located in regions not at present reached by railway lines, and depend for settlement upon the construction of lines in the future; that it has heretofore been the practice of said Great Northern and Northern Pacific Railway companies, respectively, to extend spur lines into territory adjacent to each of said roads, as well as into new territory, for the purpose of developing such territory, as well as to obtain traffic thereform; that such new lines have been built in the past very largely by reason of the rivalry heretofore existing between said companies for exist-

ing, as well as new, business; that under the consolidation and unity of control hereinafter set forth such rivalry will cease, and many of the lands now owned by the State of Minnesota will not be reached by railroads for years to come, if at all, owing to such combination and consolidation removing all rivalry and competition between said companies; that the settlement and occupation of said lands will add very much to their value, and such occupation will depend entirely upon the accessibility of railway lines and transportation facilities for marketing the products raised thereon; that if said lands are sold and become occupied, they will add very largely to the taxable value of the property of the State, and that said lands cannot be so sold, or the income of the State increased thereby, without the construction of railroad lines to or adjacent to the same."

It was further alleged that the State is the owner of, and has maintained at large expense, a state university, hospitals for the insane, normal schools for teachers, a training school for boys and girls, schools for deaf, dumb, blind and feeble-minded persons, a state school for indigent and homeless children, and a state penitentiary; that a great portion of the supplies of every kind for such institutions must, of necessity, be shipped [70] over the different lines of railway owned and operated by the Northern Pacific and Great Northern Railway companies; that the amount of taxes which the State must collect, and the successful maintenance of its public institutions, as well as the performance of its governmental functions and affairs, depend largely upon the value of the real and personal property situated within the State and the general prosperity and business success of its citizens; and that such prosperity and business depend very largely upon maintaining in the State free, open and unrestricted competition between the railway lines of those two companies.

The injury on account of which the present suit was brought is at most only remote and indirect; such an injury as would come alike, although in different degrees, to every individual owner of property in a State by reason of the suppression, in violation of the act of Congress, of free competition between interstate carriers engaged in business in such State; not

such a direct, actual injury as that provided for in the seventh section of the statute. If Minnesota may, by an original suit, in its name, invoke the jurisdiction of the Circuit Court, because alone of the alleged remote and indirect injury to its proprietary interests arising from the mere absence of free competition in trade and commerce as carried on by interstate carriers within its limits, then every State upon like grounds may maintain, in its name, in a Circuit Court of the United States, a suit against interstate carriers engaged in business within their respective limits. Further, under that view, every individual owner of property in a State may, upon like general grounds, by an original suit, irrespective of any direct or special injury to him, invoke the original jurisdiction of a Circuit Court of the United States, to restrain and prevent violations of the Anti-Trust Act of Congress. We do not think that Congress contemplated any such methods for the enforcement of the Anti-Trust Act. We cannot suppose it was intended that the enforcement of the act should depend in any degree upon original suits in equity instituted by the States or by [71] individuals to prevent violations of its provisions. On the contrary, taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States, under the fourth section of the act, by District Attorneys of the United States, acting under the direction of the Attorney General; thus securing the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. Possibly the thought of Congress was that by such a limitation upon suits in equity of a general nature to restrain violations of the act, irrespective of any direct injury sustained by particular persons or corporations, interstate and international trade and commerce and those carrying on such trade and commerce, as well as the general business of the country, would not be needlessly disturbed by suits brought, on all sides and in every direction, to accomplish

improper or speculative purposes. At any rate, the interpretation we have given of the act is a more reasonable one. It is a safe and conservative interpretation, in view as well of the broad and exclusive power of Congress over interstate and international commerce as of the fact that, so far as such commerce is concerned, Congress has prescribed a specific mode for preventing restraints upon it, namely, suits in equity under the direction of the Attorney General. Of the present suit the Attorney General has no control, and is without any responsibility for the manner in which it is conducted, although, in its essential features, it is just such a suit as would be brought by his direction when proceeding under the fourth section of the Anti-Trust Act.

The State presents still another view of the question of jurisdiction. Its complaint alleges that if the Securities Company be allowed to hold and control the stocks of the Great Northern **[72]** and Northern Pacific Railway companies and to carry out the purpose and object of its incorporation, full faith and credit will not be given to the public acts of the State. This, it is contended, presents a case arising under Article IV of the Constitution, providing that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." It is said by the state's counsel that the "gravamen of the charge in appellant's complaint is that the defendants created a corporation device in New Jersey and used it for the purpose and with the result that property rights in Minnesota were affected, in violation of its laws. Our contention is that Article IV must be so construed as to make the constitutional enactment of Minnesota effective throughout the United States, so far as they apply to and affect property rights within the State. Otherwise the policy and laws of any State may be easily evaded." We do not think that the rights within the State. Otherwise the policy and laws of any State may be easily evaded." We do not think that the clause of the Constitution above quoted has any bearing whatever upon the question under consideration. It only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts,

records and judicial proceedings of a State other than that in which the court is sitting. Even if it be assumed that the word "acts" includes "statutes," the clause has nothing to do with the conduct of individuals or corporations; and to invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States.

What was the duty of the Circuit Court when it ascertained that the suit was not one of which it could take cognizance? The answer is indicated by the clause of the Judiciary Act of March 3, 1875, to which we have adverted.

For the reasons stated, we are of opinion that the suit does not—to use the words of the act of 1875—really and substantially involve a dispute or controversy within the jurisdiction of the Circuit Court for the purposes of a final decree. *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239, 243. **[73]** That being the case, the Circuit Court, following the mandate of the statute, should not have proceeded therein, but should have remanded the cause to the state court.

The decree of the Circuit Court is reversed and the case is sent back with directions that it be remanded to the state court.

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[618] FIELD *v.* BARBER ASPHALT PAVING COMPANY.[a]

BARBER ASPHALT PAVING COMPANY *v.* FIELD.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Nos. 201, 202. Argued April 11, 1904.—Decided May 31, 1904.

[194 U. S., 618.]

Where there are allegations of diverse citizenship in the bill, but the jurisdiction of the Circuit Court is also invoked on constitutional grounds the case is appealable directly to this court under § 5 of the act of March 3, 1891, as one involving the construction or application of the Constitution of the United States, and where both parties have appealed the entire case comes to this court, and the respondent's appeal does not have to go to the Circuit Court of Appeals.[b]

[a] Decision in the Circuit Court (117 Fed., 925). See p. 192.

[b] Syllabus copyrighted, 1904, by The Banks Law Publishing Co.

Statement of the Case.

It is not the purpose of the Fourteenth Amendment to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed.

The provision in § 5989, Rev. Stat. of Missouri, that certain improvements are not to be made if a majority of resident owners of property liable to taxation protest, is not unconstitutional because it gives the privilege of protesting to them and not to non-resident owners.

Only such acts as directly interfere with the freedom of interstate commerce are prohibited to the States by the constitution, and the Sherman Act of July 2, 1890, is not intended to affect contracts which have only a remote and indirect bearing on commerce between the States. The specification in an ordinance, not invalid under the laws of the State, that a particular kind of asphalt produced only in a foreign country does not violate any Federal right.

Although the agent of the company obtaining a paving contract may have been active and influential in obtaining signatures to the petition, in the absence of proof of fraud and corruption, the levies will not be set aside after the improvement has been completed.

The necessity for an improvement of streets is a matter of which the proper municipal authorities are the exclusive judges and their judgment is not to be interfered with except in cases of fraud or gross abuse of power.

[The specification in an ordinance by a municipal council that Trinidad Lake asphalt shall be used for street improvement, does not violate the commerce clause of the Federal Constitution or the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 290), notwithstanding this particular kind of asphalt is the product of a foreign country and competitive bidding was thereby rendered impossible.]

THESE cases are appeals from the decree of the Circuit Court of the United States for the Western District of Missouri. **[619]** Richard H. Field, as owner of certain lands abutting on Main street, Baltimore avenue and Wyandotte street in Westport, Missouri, which city was then a suburb, and has since become a part, of Kansas City, filed a bill of complaint against the paving company. The relief sought was against certain tax bills, issued to pay for the paving of the above-named streets, held by the defendant company, and to have the same declared void because (1) the act under which they were assessed violated the Fourteenth Amendment to the Constitution of the United States; (2) that the

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paving in question was unnecessary and the contract for the same was the result of undue and illegal influence on the part of the agents of the defendant company exercised upon the board of aldermen of the city of Westport; (3) that the contracts for the paving required the same to be constructed of Trinidad Lake asphalt, thereby cutting off competition with other kinds of asphalt suitable for street paving; (4) that the proceedings and agreements by which such asphalt was designated in the resolutions, ordinances and rules for the construction of said pavements were in violation of the interstate commerce clause of the Constitution of the United States (Art. 1, sec. 8); and (5) that the said resolutions, ordinances and contracts and the action of the defendant company in securing the same were in violation of the Federal Anti-Trust Act of July 2, 1890.

Upon the trial, the Circuit Court held against the prayer of the complainant for relief upon the Federal grounds alleged, but, holding that the paving of Wyandotte street was unnecessary, granted the prayer of the bill as to the tax bills issued for work done on that street, and dismissed the bill as to the other two streets.

From so much of the decree as held the tax bills for the work done on Wyandotte street invalid the paving company also appealed. (Case No. 202.)

Mr. Richard H. Field, attorney in person, for appellant in No. 201, and appellee in No. 202.

[620] *Mr. William C. Scarritt*, with whom *Mr. John K. Griffith*, *Mr. Elliott H. Jones* and *Mr. Edward L. Scarritt* were on the brief, for appellee in No. 201, and appellant in No. 202.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

A motion was filed by the appellant to dismiss the appeal of the paving company, which was postponed to the hearing of these appeals upon the merits. An examination of the motion and a consideration of the briefs filed and arguments made in support of and in opposition to the same leads us to the conclusion that it cannot be sustained. The appellant

appealed directly to this court; for while there was an allegation of diverse citizenship in the bill, jurisdiction was also invoked on the constitutional grounds above stated. This made the case appealable directly to this court under section 5 of the act of March 3, 1891, 1 Comp. Stat. U. S. 549, as one which "involves the construction or application of the Constitution of the United States."

The contention is that the prayer of the complainant on the constitutional grounds having been denied, the appeal of the respondent should have been to the Circuit Court of Appeals. But we cannot agree to this view. There was no cross bill filed in the case and none was required. The bill of complaint contained allegations sufficient to make a case of alleged violation of constitutional rights. It is well settled that in such cases the entire case may be brought to this court by the appeal. In *Holder* v. *Aultman*, 169 U. S. 81, 88, discussing the act of March, 1891, Mr. Justice Gray said:

"Upon such a writ of error, differing in these respects from a writ of error to the highest court of a State, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but **[621]** includes the whole case. *Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Penn. Ins. Co.* v. *Austin*, 168 U. S. 685." *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472. See also *Chappell* v. *United States*, 160 U. S. 499, 509; *Horner* v. *United States*, *No. 2*, 143 U. S. 570, 577.

If, therefore, the whole case can come to this court by direct appeal under the allegations of this bill, and if all the questions, Federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. If he fails to take such appeal the correctness of the decision as against him will be presumed. *Mail Company* v. *Flanders*, 12 Wall. 130; *Chittenden* v. *Brewster*, 2 Wall. 191, 196.

The motion to dismiss the cross appeal must be denied.

Coming to the merits of the case, the grounds of Federal relief will first be considered. It is claimed that certain sections of the act of the general assembly of Missouri, which make the tax bills levied to pay the contract price for the paving a lien upon the complainant's real estate, deprive him

of his property without due process of law, and deny to him the equal protection of the laws. This argument is predicated on section 5989 of the Revised Statutes of Missouri.

The exact point of objection is that the improvement is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, which privilege of protest is not given to non-resident owners, thereby discriminating against them. It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all **[622]** persons similarly situated are treated alike in privileges conferred or liabilities imposed. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Hayes* v. *Missouri*, 120 U. S. 68; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Gulf, Colorado & Santa Fé Railroad* v. *Ellis*, 165 U. S. 150. The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-residents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike. It has been held to be within the power of the legislature of Missouri to authorize the council to order the improvement to be made without consulting property owners. *Buchan* v. *Broadwell*, 88 Missouri, 31. If the legislature saw fit to give to those most directly interested and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the Constitution.

Further objection on Federal grounds is urged, in that the specification of Trinidad Lake asphalt for this improvement is in violation of the interstate commerce clause of the Constitution of the United States, and of the so-called Sherman

Act of July, 1890. The right to provide for this paving was vested by the Missouri statute in the board of aldermen. The right to select the material for the paving was vested in that body; they saw fit to choose Trinidad Lake asphalt for the paving. Their right so to do, under the charter powers of such cities as Westport, notwithstanding competitive bidding is thereby rendered impossible, has been sustained by the Supreme Court of Missouri. *Barber Asphalt Paving Co.* v. *Hunt*, 100 Missouri, 22; *Warren* v. *Paving Co.*, 115 Missouri, 572; *Verdin* v. *St. Louis*, 131 Missouri, 26. With the wisdom of this choice the courts have nothing to do, and in this case we are only concerned to inquire as to the alleged violation of Federal rights **[623]** in such selection. The argument is that Trinidad Lake asphalt, being a product of a foreign country and brought into Missouri, and there being other deposits in other States within the United States from which suitable asphalt could be had, the specification of this kind of asphalt is an interference with and a regulation of interstate commerce, in violation of the exclusive right of Congress conferred by the Constitution. It is unnecessary to cite largely from cases in this court, which hold that only such acts as directly interfere with the freedom of interstate commerce are prohibited to the States, *Kidd* v. *Pearson*, 128 U. S. 1, in which case, Mr. Justice Lamar, speaking for the court, said (p. 23):

"As has been often said legislation [by a State] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution." *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, and cases cited in the opinion.

The right of a State in the exercise of the police power to make regulations which indirectly affect interstate commerce has been frequently sustained. In the present case it may be that the use of this kind of asphalt, under municipal authority conferred by the State, will in a limited degree affect interstate commerce, but it certainly is not one of those direct interferences with the power over and express control of the subject given by the Constitution to Congress. In this day of multiplied means of intercourse between the States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce. But

it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation.

The attempt to invoke the provisions of the Sherman Act in this case is equally unavailing. That act has been recently considered in the Northern Securities cases, decided at this term, and its construction and the nature of the remedies under it determined. It is not intended to affect contracts which have a remote and indirect bearing upon commerce **[624]** between the States. *Hopkins* v. *United States*, 171 U. S. 578; *Addyston Pipe Co.* v. *United States*, 175 U. S., 211.

In addition to the ground by which Federal jurisdiction was established in the courts below, it is alleged that the tax bills should be held void because they were obtained by undue influence of the agents of the paving company, improperly exercised to obtain the needed municipal action. The court below held, and an examination of the testimony has brought us to the same conclusion, that there was nothing in the case to establish the charges of fraud and corruption, although the record does show that an agent of the defendant company was active and perhaps influential in obtaining signatures to the petition which specified Trinidad Lake asphalt for this improvement; yet in the absence of proof of fraud or corruption we do not think the contract and resulting levies can be set aside for this reason. It is one thing to disapprove of such measures as a matter of propriety of action, but quite another to set aside a contract, especially after the full performance of its terms.

Upon the cross appeal, the learned judge in the court below held that the Wyandotte street tax bills were void, because that street had been previously paved with macadam in the years 1892–1893, four or five years before the asphalt paving was laid, which macadam he found to be in good condition, and but little worn. The effect of this decree was while finding against complainant as to the allegations of fraud and collusion in obtaining the contract, to hold that, in the opinion of the trial judge, the repaving of Wyandotte street was unnecessary. We think this conclusion overlooks the fact that the power to construct, improve and pave streets

was vested by the law of Missouri, as it generally is, in the board of aldermen. (Laws of Missouri, 1895, 65, § 85 to § 95, inclusive.) The necessity of such improvements is a matter of which they are the exclusive judges, and their judgment is not to be interfered with by the courts, except in cases of fraud or gross abuse of power. This power of the city board is a continuing [625] one, and the mere fact that a pavement has been once laid does not require the interference of the courts when the governing body of the city, in the exercise of its judgment, has determined that the necessity for repaving has arisen. The law has vested this power in the representatives of the city and the courts are not at liberty to determine whether the judgment is exercised wisely or unwisely. If this were not so, a contractor, who acts under the direction and because of the action of the city authorities in determining the necessity of an improvement, must lose his compensation, if, upon the suit of a property owner, the courts shall take a different view of the necessity of the improvement. In other words, the contractor, though acting in good faith and complying in all respects with his agreement, lawfully made, must abide the judgment of the courts as upon appeal from the tribunal solely empowered by law to pass upon the necessity of the improvement, and to make the necessary contracts to carry it out.

As we have said, there may be cases of fraud or arbitrary abuse of power, when the courts will intervene. Under other circumstances the municipality and property owners interested are bound by the acts of their agents. The authorities amply sustain this view. 2 Dillon Mun. Corp. (4th ed.) § 686; *Wabash R. R. Co.* v. *Defiance*, 167 U. S. 88; *Skinker* v. *Heman*, 148 Missouri, 349; *Warren* v. *Paving Co.*, 115 Missouri, 572, 580.

Applying the principles settled by the authorities to the facts disclosed in this case, we do not find such evidence of fraud or gross abuse of power as would warrant the setting aside of the tax bills for this improvement. The testimony tends to show that the macadam was considerably worn; its replacement, to the extent of laying an asphalt pavement on top of it, was deemed necessary by the city authorities. It does not appear that any protest or objection was made during the progress of the work. A majority of the resident owners of lots abutting upon the part of the street to be improved had petitioned for the asphalt pavement. There is considerable [626] testimony tending to show that the value of abutting property was enhanced by the improvement. These and kindred matters were before the board. It is not our province to review their judgment, and we do not think the courts are authorized to interfere with the discretion vested in them in making the improvement under the circumstances shown. To hold otherwise would be, as we have said, to substitute the judgment of the court as to the expediency or necessity of making such improvement for that of the body delegated by law with the power and responsibility of action in the premises.

The court below, having properly held that the case alleged must fail on the other grounds, should have regarded the judgment of the board of aldermen as to the necessity of repaving Wyandotte street as conclusive upon it. The conclusion reached renders it unnecessary to consider whether the complainant, having failed to protest or object to the work before it was begun or during its progress, can be heard in a court of equity to object to the tax bills assessed for the benefit of the contractor after the work is completed in compliance with the contract.

We think the court below erred in adjudging the tax bills on Wyandotte street to be void, and so much of the decree is reversed with costs, the decree as to the other streets is affirmed, and the case remanded to the court below with instructions to dismiss the bill.

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[633] D. E. LOEWE & CO. *v.* LAWLOR ET AL.[a]

(Circuit Court, D. Connecticut. June 9, 1904.)

[130 Fed., 633.]

ABATEMENT—PENDENCY OF ACTION IN STATE COURT[b]—INDEMNITY.—The pendency of a suit in a state court cannot be pleaded in abate-

[a] Motion to correct complaint denied (142 Fed., 216). See p. 854.

[b] Pendency of action in state or federal court as ground for abatement of action in the other, see note to *Bunker Hill & Sullivan Mining & Concentrating Co.* v. *Shoshone Min. Co.*, 47 C. C. A. 205.

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ment of an action in a Circuit Court of the United States to recover treble damages under section 7 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]) since the state court is without jurisdiction to enforce the remedy given by said section, and therefore the same case cannot be depending in both courts.[a]

ATTACHMENT—GROUNDS FOR DISSOLUTION—PRIOR ATTACHMENT IN STATE COURT.—Where the state statute provides for successive attachments of the same property, a prior attachment in a state court affords no ground for the discharge of an attachment in a federal court.

At Law. On demurrer to plea in abatement, setting up lis pendens in state court, and on motion to vacate attachments.

Davenport & Banks, for plaintiff.

Bristol, Stoddard, Beach & Fisher, De Forest & Klein, and *Howard W. Taylor*, for defendants.

PLATT, District Judge.

It appears to be conceded that when suits are pending between the same parties for the same cause of action, and demanding the same relief, in the state and federal courts, which have concurrent jurisdiction in the same territory, and the federal jurisdiction is based upon diversity of citizenship, a plea in abatement alleging the pendency of one will be futile as against the other, upon the authority of *Gordon* v. *Guilfoil*, 99 U. S. 168, 25 L. Ed. 383, and many cases in line therewith in the lower courts.

The point is made in argument upon the plea herein that when diversity of citizenship is absent the reason for the rule departs.

To maintain in the case at bar that the state and federal courts are "in a sense" foreign to each other would require careful and conscientious study. The step from foreign relations to hostility is so easy to be taken, and the desire of the federal authority to promote and insure friendship and tranquillity by all honorable means is so great, that an unnecessary assertion of the inherent distinctions at-

[a] Syllabus copyrighted, 1904, by West Publishing Co.

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[634] taching to its source of power should be declared only in the last instance.

Fortunately, the case in hand does not, from the court's point of view, demand such exhaustive examination. In the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) the Congress has established a new method of obtaining redress in a matter relating to interstate trade, over which its jurisdiction is plenary. It has directed the parties to the Circuit Court for the vindication of their rights.

Before sustaining the defendants' plea, it is obviously necessary to accept their preliminary contention that the state court can, in the trial of the cause therein pending, invoke section 7 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), and under its authority assess treble damages. It is not believed that such power exists in the state court. Congress was dealing with a delicate problem when it gave us the Sherman act, and it would seem to have been the thought that since a subject was up over which the federal jurisdiction was absolute it would be well to intrust its exploitation to the federal judiciary. The care exercised is plainly exhibited when equitable relief was provided for in section 4 (26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]), since such relief is further hedged about by the discretionary power afforded to the Attorney General.

The conclusion is easily reached. The same case is not depending in both courts. *Watson* v. *Jones*, 13 Wall. 679, 20 L. Ed. 666.

Having gone to this point, it is unnecessary to take up in detail the question of attachments. The rule of comity cannot be invoked unless the situation here will lead to conflict with the state court. No trouble about the res can arise. The attachment liens will be governed by the rules applicable to successive attachments under the state statutes, which furnish the rule of action for this court, since no federal statute governs the matter.

The demurrer to the plea in abatement is sustained, and the motion to vacate attachments is denied, at defendants' costs in each event.

Syllabus.

[31] DAVIS ET AL. *v.* A. BOOTH & CO.[a]

(Circuit Court of Appeals, Sixth Circuit. August 2, 1904.)

[131 Fed., 31.]

SALES—GOOD WILL—EQUITY—JURISDICTION—MULTIPLICITY OF SUITS.—Equity has jurisdiction to restrain the violation of an agreement entered into as a part of the sale of a business, by which the persons interested therein agreed not to again engage in business in certain localities for a definite time, because of the difficulty in estimating the damages accruing, and to prevent a multiplicity of suits.[b]

SAME—VALIDITY OF CONTRACT—PUBLIC POLICY.—An agreement by which the stockholders of a corporation, on selling its assets to complainant's assignor, agreed not to again engage in a similar business in specified localities for a period of 10 years, or do any act tending to impair the good will of the business sold, was not contrary to public policy.

SAME—ANTI-TRUST ACT.—Where a corporation engaged in the business of buying and selling fish sold out its assets and good will to plaintiff's assignor, and the seller no longer retained any interest in the property, so that the sale was not a mere combination of owners and properties under one management, the sale was not in violation of the federal anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], prohibiting contracts in restraint of trade, though the contract might incidentally or in some remote degree injuriously affect interstate commerce.

SAME—STATE STATUTES—CONSTRUCTION.—3 How. Ann. St. § 9354j, denominated an act prohibiting certain trust combinations, and providing that all contracts, the purpose or intent of which shall be in any manner to prevent or restrict free competition in the sale of any article or commodity, or in any other branch of business or labor, shall be utterly illegal and void, provided that it shall not invalidate or affect contracts for the sale of the good will of a trade or business, does not prohibit a contract for the sale of a business where it was not intended that the seller should thereafter have any interest in the property, or an agreement by which the seller's stockholders contracted not to again engage in a similar business in competition with the buyer in certain places for a specified time.

SAME—RESTRAINT OF COMPETITION.—An agreement ancillary to a sale of a corporation's business, by which the stockholders, who received the purchase price, agreed that, in order to protect the good will of the business so sold, they would not either directly or indirectly engage in the same business within certain distinct limits for a period of 10 years, was not void, as an unreasonable restraint of competition in trade, at common law.

SAME—CONSTRUCTION.—Where a contract ancillary to the sale of a business provided that the stockholders of the seller would not again engage in a similar business [32] for a period of 10 years in the territory, or the immediate vicinity of the territory, dealt in by the corporation, or operated in by it or its agents, or the immediate vicinity of such territory, the localities guarded against were restricted to those in which the selling company had establishments for doing business, and the immediate vicinity thereof, and did not include all parts or every one of the United States in which a former customer resided, or into which the corporation's correspondence had extended, or through which an agent of the company had traveled.[a]

[a] Injunction granted (127 Fed., 875). See p. 318. Modified and affirmed by Circuit Court of Appeals, Sixth Circuit (131 F., 31). Petition for writ of certiorari denied by Supreme Court (195 U. S., 636). A memorandum decision. Not reprinted.

[b] See Injunction, vol. 27, Cent. Dig. § 121.

Opinion of the Court.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

For opinion below, see 127 Fed. 875.

Edward E. Kane and *Fred A. Baker*, for appellants.

Henry M. Duffield and *Charles S. Thornton*, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge.

The object of this bill filed in the Circuit Court by the appellee, A. Booth & Co., was to obtain an injunction against the appellants to restrain them from violating an agreement made by them with William Vernon Booth, to the benefits of which the appellee claimed to be entitled. It states: That the complainant is a corporation organized under the laws of Illinois on August 1, 1898, with a capital of $5,500,000, for the purpose of buying, catching, and selling fish, and having its general office at Chicago. That the Davis Fresh & Salt Fish Company was a corporation organized under the laws of Michigan for a similar business, with headquarters at Detroit. That on or about August 14, 1898, the last-named company, for the consideration of $17,473.14, sold all its properties, including the good will of its business con-

[a] Syllabus copyrighted, 1904, by West Publishing Co.

ducted at Detroit, and gave a bill of sale, with warranty of title, to William Vernon Booth, on September 14, 1898, and Davis gave a personal guaranty of the contract of sale. That, as an inducement to the sale, Davis and the other stockholders of the selling company entered into the following agreement:

"This instrument witnesseth, that William Vernon Booth has purchased the plant, business and good will of the business of the Davis Fresh & Salt Fish Co., and has paid therefor the sum of $17,473.14; that in making said transfer, and as an inducement to said William Vernon Booth to purchase said plant, business and good will and pay the sum aforesaid for the same, we each have agreed that we would not, and we now do agree, each for himself, jointly and severally with him, the said William Vernon Booth, his heirs and assigns, forever, that we will not, during the next ten years, in the territory or the immediate vicinity of the territory dealt in by our company, or operated in by ourselves or the agents or employees of the company engage or in any manner be interested in, either directly or indirectly, for ourselves or for others, the same or like kind or character of business as that heretofore conducted and now being carried on by said company, its officers, agents, employees and assigns, and that we will not, during the said period of ten (10) years, either directly or indirectly, be guilty of any act interfering with the business, its good will, its trade or its customers, or come in competition with the same; and we will not, jointly or severally either in firms or corporations, or as individuals or in any other way, directly or indirectly interfere with the said trade or business, or do any act prejudicial to the same or any part thereof, or interfere with the persons employed therein; the meaning hereof being that the said William Vernon Booth is buying and paying for the good will of the business in the largest and fullest scope of the term; and that we will not, and each agrees that he will not, do anything to interfere [33] with or injure the said business, but will, during said period, lend his aid and best influence to the promotion and advancement of the same.

"In witness whereof, we hereunto subscribe our names and affix our seals, jointly and severally, this first day of August, A. D. 1898.

"EDGAR A. DAVIS.
"JAMES T. DONALDSON.
"BELLE R. HARPER.
"ED. E. KANE.
"BELLE B. DAVIS."

Which agreement was delivered and the consideration of $17,473.14 paid on September 14, 1898, and said consideration was then distributed among the stockholders of the selling company. That on September 27, 1898, said William Vernon Booth, for a valuable consideration, sold to the complainant all the properties so purchased of the Davis Fresh & Salt Fish Company, including the good will of the business, and assigned to said complainant the above-quoted agreement of the stockholders of said last-mentioned company. That at the time of its sale to William Vernon Booth the Davis Fresh

& Salt Fish Company was conducting its business not only at Detroit, but in the following named places—either selling to regular customers, or having established agencies there—namely: "Cincinatti, Cleveland, Columbus, and Dayton, in the state of Ohio; Louisville, Kentucky; Nashville, Tennessee; St. Louis and Kansas City, Missouri; Buffalo and New York City, in the state of New York; Grand Rapids, Jackson, East Saginaw, Battle Creek, Lansing, and Port Huron, in the state of Michigan." That Davis became an employé of the complainant, but after a time withdrew, and with Delos Cook, Michael J. Dee, and Alva M. Hungerford organized a limited partnership under the laws of Michigan, and filed a certificate thereof in the office of the clerk of the county of Wayne, in that state. That on August 26, 1898, the complainant made a similar purchase of the E. A. Edson Company, an Ohio corporation doing a similar business at Cleveland, and also at Detroit, and that Edson, its president, made a similar agreement with that of the stockholders of the Davis Fresh & Salt Fish Company, and that it made a like purchase of the Buffalo Fish Company, a New York corporation, and obtained a similar agreement from its stockholders. That Davis, after leaving complainant, organized the Gopher Fish Company in opposition to complainant, at St. Paul, Minn., and induced Donaldson, who was one of the signers of the agreement of the Davis Fresh & Salt Fish Company stockholders, who was subsequently in the employment of the complainant, to take charge of the said Gopher Fish Company, and also induced Hungerford, another of said signers, to leave complainant and become bookkeeper of the Wolverine Fish Company. That Davis and Edson made public announcement that they intended to "fight complainant in a business way," and intended to organize corporations in Detroit, Cleveland, New York and other places, which should be under one control, and act together in business policy, and fix prices for the purchase and sale of fish, whereby they could better promote the interests of the public, and that they caused to be published in leading journals articles (which are copied into the bill) indicating that they intended to carry on, or cause to be carried on, a strong competition with the complainant in [34] the fish business.

That they characterized the complainant as a "trust," the contrary of which the complainant avers to be the fact, and it vouches a decision of the Supreme Court of New York to that effect. That Davis, Edson, and another have entered actively into the fish business in the territory, and the vicinity of the territory, dealt in by their respective corporations, in violation of their agreements, and organized companies to prosecute said business at New York, Cleveland, and Detroit. That the Wolverine Fish Company was organized by Davis to more conveniently violate his agreement, and has been and now is conducting and threatens to conduct its business in a manner calculated to injure the complainant, and render the good will purchased of his company valueless. That he interferes with its business, trade, and customers. That he solicits consignments of fish and makes purchases thereof from the former customers of his company, and has in many instances drawn away such customers to the Wolverine Fish Company, and that Edson, Hungerford, and Dee are assisting him. That Davis is sending out to the former customers of his company false statements injurious to the complainant's reputation for honesty and fair dealing, which tend to the loss of complainant's business, and that Davis is insolvent, and a judgment against him would be uncollectible; and a considerable number of the statements referred to are set out, the truth of which is denied. And the complainant says it has been greatly injured by this conduct of the defendants, and has sustained already the loss of more than $100,000, and will continue to suffer further irreparable loss unless the defendants are enjoined, etc.

The prayer is that the defendant Davis be compelled to perform his agreement made with William Vernon Booth, and that he—

"And his agents and employés be enjoined duing the full term of ten years from August 1, 1898, from engaging or in any manner being interested, directly or indirectly, for themselves or for others, in the city of Detroit, or in the immediate vicinity of any territory dealt in on or prior to August 1, 1898, or operated by the said Davis Fresh & Salt Fish Company, or the defendant Davis, or the agents or employés of the Davis Fresh & Salt Fish Company, in catching, buying, selling, handling, or dealing in any kind of fish or other salt or fresh water food products, in the storage thereof, the manufacture of, or dealing in any manner in fish products, and from engaging in or in any manner being interested in, in the territory aforesaid, any other kind or character of business, the same as or like that conducted and carried on by the Davis Fresh & Salt Fish Company on and prior to August 1, 1898, or by its officers, agents, employés, or assigns, and from soliciting or inviting, in the territory aforesaid, other persons to buy from or sell to or otherwise deal with them, or either of them, in said business aforesaid, and from interfering with the business formerly transacted by the Davis Fresh & Salt Fish Company, and by it sold, assigned, and transferred to William Vernon Booth, its good will, its trade, or its customers, and from coming into competition with this complainant's business in the city of Detroit and vicinity, and wherever the business of the Davis Fresh & Salt Fish Company extended at the time of its sale to and contract with said Booth, and from interfering in any way, directly or indirectly, with the said trade or business, and from doing any act prejudicial to the same, or any part thereof, and from interfering with the persons employed in the service of this complainant, and from using their aid or influence in regard to this complainant's trade or business, otherwise than for the promotion and advancement of the same, and that the said defendants Eugene R. Edson, Alva M. Hungerford, Michael J. Dee, and Wolverine Fish Company, Limited, their agents, servants, and employés, be enjoined during the full period of ten years from August 1, 1898, from aiding the said Edgar [35] A. Davis or participating with said Davis in and otherwise, directly or indirectly, interfering with the business of the complainant, or with the persons employed therein, and from using their aid and influence in connection with the said Davis, otherwise in regard to complainant's trade or business, otherwise than for the promotion and advancement of the same, and that the said Edgar A. Davis, Eugene R. Edson, Alva M. Hungerford, Michael J. Dee, and the Wolverine Fish Company, Limited, be so enjoined and restrained during the pendency of this action; and that this complainant recover from the said defendants such sum as, upon a proper accounting, the complainant may show it has been damaged by reason of the wrongful action of the said defendants, and for such other and further relief as to the court may seem fit."

Many affidavits and exhibits were attached to the bill in support thereof. We have stated the contents of the bill with considerable fullness, in order to show the scope of the controversy.

The complainant moved for a preliminary injunction. All the defendants except Edson, who was not served or did not appear, answered the bill, and filed a large number of affidavits of other persons in opposition to the motion—so many that we cannot take space to array them. It is sufficient to say that the answers and affidavits raise a conflict of proof in reference to several of the matters stated in the bill and the affidavits accompanying it. The arguments made here, in the main, proceeded upon the broader aspects of the controversy. Besides, having regard to the practice which obtains in this class of appellate proceedings, we should not go into a nice balancing of proof or estimate of particulars. This being an appeal from an order granting

a preliminary injunction, unless we should see that the court below had fallen into a positive mistake in regard to some important fact, we should not disturb its findings, and it is not claimed that such a mistake has happened. The court below granted this preliminary injunction by the order following:

"Now, therefore, we strictly command and enjoin you, the said Edgar A. Davis, your attorneys, solicitors, clerks, servants, and agents, under the penalties that may follow on you in case of disobedience, that you forthwith, and until the further order of this court, desist from engaging or in any manner being interested, directly or indirectly, for yourself and for others, in the city of Detroit, or in the immediate vicinity of any territory on or prior to August 1, 1898, dealt in or operated by the Davis Fresh & Salt Fish Company, described in the bill of complaint in this cause, or the defendant Davis, or the agents or the employés of the said Davis Fresh & Salt Fish Company, in catching, buying, selling, handling, or dealing in any kind of fish, or other salt or fresh water food products, in the storage thereof, the manufacture of or dealing in any manner in fish products, and from engaging in, or in any manner being interested in, in the territory aforesaid, any other kind or character of business, the same as or like that conducted and carried on by the Davis Fresh & Salt Fish Company on and prior to August 1, 1898, or by its officers, agents, employés, or assigns, and from soliciting or inviting, in the territory aforesaid, other persons to buy from or sell to or otherwise deal with you or the Wolverine Fish Company, Limited, or either of them, in said business aforesaid, and from interfering with the business formerly transacted by the Davis Fresh & Salt Fish Company, and by it sold, assigned, and transferred to William Vernon Booth, its good will, its trade, or its customers, and from coming into competition with this complainant's business in the city of Detroit and vicinity, and wherever the business of the Davis Fresh & Salt Fish Company extended at the time of its sale to and contract with said Booth, and from interfering in any way, directly or indirectly, with the said trade or business, and from doing any act prejudicial to the same or any part thereof, and from interfering with the persons employed in the service of this complainant, and [36] from using your aid or influence in regard to this complainant's trade or business, otherwise than for the promotion and advancement of the same. And now, therefore, we strictly command and enjoin you, the said Alva M. Hungerford, Michael J. Dee, and the Wolverine Fish Company, Limited, your attorneys, solicitors, clerks, servants, and agents, under the penalty that may follow in case of disobedience, that you are forthwith and until the further order of this court to desist from aiding the said Edgar A. Davis, or participating with said Davis in, directly or indirectly, interfering with the business of the complainant, or with the persons employed therein, and from using your aid and influence in connection with the said Davis or otherwise in regard to complainant's trade or business acquired under the said contract, otherwise than for the promotion and advancement of the same."

The defendants appeal from this order.

1. It is assigned as error that the court held the bill of complaint to state a case entitling the complainant to relief by injunction; and it is argued that the proper remedy is by

an action at law, and further that public policy is opposed to the enforcement of such contracts. With regard to the objection that there is a remedy at law, it is quite clear that the difficulty in estimating the damages in such a case, and the succession of causes of action and the multiplicity of suits likely to ensue, furnish ample reasons for the exercise by a court of equity of its power to restrain the continuance of the supposed wrongdoing. And if the contract is not one which should be held by the court unlawful as opposed to public policy, there is no sufficient reason for withholding relief. We are referred to the case of *Bensley* v. *Texas & Pac. Ry. Co.*, 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274, as conclusive of the validity of this objection. A railroad company had entered into a contract that it would not establish another depot within three miles of one agreed to be built upon the plaintiff's land. Upon a bill filed to restrain the company from establishing a depot within that distance, as ordered by the State Railroad Commission, it was held that the injunction should not be allowed. The decision was rested upon the ground that the railroad company was by reason of its charter bound by a public duty in regard to the location of its depots, which it ought not to be permitted to disable itself from performing. In the present case the parties to the contract were private parties, upon whom no public duty was imposed, other than such as rest upon all private individuals. The ground upon which the decision cited was based is wholly absent here. In the case of *Norcross* v. *James*, 140 Mass. 188, 2 N. E. 946, the contract sought to be enforced was a merely personal covenant, and did not run with the land subsequently conveyed to the defendant. Whether the contract in question is void in law, upon the ground that it is in restraint of trade or competition in trade, is a question which will be discussed further on.

2. One of the principal grounds upon which it is urged for the appellants that the agreement in question is void is that it was an agreement in restraint of trade, in violation of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. But that act, as was held in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, is leveled against contracts which have a direct rela-

tion to interstate commerce, and does not extend to contracts which may incidentally or in some remote way come into relation with, or become the source of, interstate traffic. In that case a New Jersey [37] corporation, being already in control of a large majority of the sugar refineries in the United States, acquired the control, by a purchase of their stock, of four Philadelphia refineries, and the question was whether such an acquisition was a violation of the anti-trust act. It was not doubted that the sugar refined there would, to a large extent, at least, become the subject of interstate traffic, but such traffic was not the subject directly involved. We think there is nothing in the anti-trust act which rendered unlawful the purchase by William Vernon Booth and his transfer, to A. Booth & Co., of the plant of the Davis Fresh & Salt Fish Company, or which necessarily rendered invalid the agreement of the stockholders of the latter company, which was ancillary to the contract of sale. Nor can this conclusion be affected by the fact that A. Booth & Co. also purchased other plants and stocks to an extent that tended to create a power to monopolize the fish market. There is a clear distinction, which seems to be lost sight of in the argument here, between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination. To this latter class belongs the case of *Merz Capsule Co.* v. *United States Capsule Co.* (C. C.) 67 Fed. 414, affirmed in 71 Fed. 787. It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several states, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the lawmaking power, since the old law against forestalling the market has become obsolete. It is possible that it may be developed at the final hearing that interstate traffic may be directly involved in this agreement. But if so, it will be prudent to postpone final decision in respect to the consequences thereof upon the validity of the agreement until the

case is presented upon full proof, rather than by ex parte affidavits as now.

3. It is further contended that the contract was rendered void by the statute of Michigan of 1889, which enacted that:

"All contracts * * * the purpose, object or intent of which shall be * * * in any manner to prevent or restrict free competition in the sale of any article or commodity produced by mining, manufacture, agriculture or any other branch of business or labor, shall be utterly illegal and void * * * provided, however, that this section shall in no manner invalidate or affect contracts for what is known and recognized at common law and in equity as contracts for the good will of a trade or business."

But that act contained a proviso excepting certain classes and subjects which rendered it of doubtful constitutionality. Such legislation was held void in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, and the Michigan statute was amended in 1899, which was after this transaction, so as to remove the objection. The act of 1889 is denominated in 3 How. Ann. St. § 9354j, as one prohibiting "certain trust combinations," and we have no doubt it was intended for such cases. We think that the intent which made the contract or combination unlawful was one in which both parties participated, and that the act was not intended to comprise a case where there was a sale [38] and purchase of property, after which the seller should have no interest in the property, and therefore would have no intent as to its further use. The act of 1899 is subject to the same construction, but, as it would not render unlawful a contract which had been lawfully made, we need not consider it further.

4. But finally it is insisted that the stipulation in question contained in the agreement of date August 1, 1898, is void at common law, for the reason that it is an unreasonable restraint of competition in trade. The agreement was ancillary to the contract of sale made by the Davis Fresh & Salt Fish Company, in which these stockholders had the entire interest, and of the fruits of which sale they were the beneficiaries. That contract expressly included the good will of the business of the seller, and the stipulation of the stockholders was made, as it recites, to induce the sale; and it was for the protection of the vendee in the enjoyment of it, and, as it seems to us, would pass by the transfer of the

property, business, and good will to William Vernon Booth's vendee, to whom the agreement was also assigned. The question of the reasonableness of such a stipulation is one which was elaborately discussed by Judge Taft in delivering the opinion of this court in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122. It would be useless to reiterate the grounds and reasons upon which it was held that such a stipulation is valid if it goes no farther than to support and protect the interests transferred by the contract of sale. If tested by this rule alone, we think this stipulation should be held valid and obligatory.

But referring again to the distinction already alluded to between an aggregation effected by purchase, and a combination of several owners to pool their business and eliminate competition, it is to be observed that in the present instance it appears that the purchase price paid to the Davis Fresh & Salt Fish Company consisted partly of cash and partly of stock in the corporation or A. Booth & Co., and that therefore the transaction was of a mixed character. This is an aspect of the case which has given us most concern, and in respect of which we are not aware of any decision precisely in point. We are unwilling to decide a matter of so much importance at this preliminary stage of the case, and especially so because no particular attention has been given to it in the briefs and argument of counsel. We purpose, therefore, to give such directions in regard to the continuance of the injunction as will preserve the rights of parties from serious impairment in the interim, and reserve this and another question reserved in another part of this opinion until final hearing.

There are no other questions which seem to require independent discussion, except one which relates to the scope of the injunction awarded by the court below. We are of opinion that the proper construction of the agreement given by the stockholders of the Davis Fresh & Salt Fish Company requires that the description of the localities in which their stipulations should be operative, stated in the writing at the beginning of said stipulations, extends to and qualifies all of them, and that such localities are restricted to those in which the company had establishments for doing business,

and the immediate vicinity thereof. It could not mean all parts or every one of the United States in **[39]** which a former customer resided, or into which its correspondence had extended, or through which some agent of the company had traveled. No definite or reasonable bounds are indicated by the contract, other than those which we have indicated. Besides, the inclusion made by the words "or the immediate vicinity of the territory," etc., implies some place from which the "immediate vicinity" is to be estimated, and excludes the idea of reckoning from some indefinite point. The ordering part of the injunction directed to the Wolverine Fish Company is also too broad, when, in addition to forbidding certain conduct in conjunction with Davis, it proceeds to forbid that company from doing such things "otherwise." The Wolverine Fish Company was a stranger to the Davis agreement, and, as to anything in which he should not participate, it was not affected thereby. The injunction should be modified accordingly. We think, also, that the complainant should be required to give bond to indemnify the defendants from damages arising from the issuance of the writ, in case the bill should not be finally sustained, as a condition to the continuance of the injunction.

With these modifications, the order of the Circuit Court is affirmed. The costs of this appeal will be divided.

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[182] ELLIS *v.* INMAN, POULSEN & CO. ET AL.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1904.)

[131 Fed., 182.]

MONOPOLIES—ANTI-TRUST LAW—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.—In determining whether or not a combination is in violation of the federal anti-trust law, as in restraint of interstate commerce, it is immaterial that such is not its ultimate object, which is in most cases to increase the trade and profits of the parties to such combination; nor is it material to ascertain what proportion the resulting restraint of interstate commerce bears to other results. The true inquiry is whether it tends directly to appreciably restrain interstate trade, and, if it does, it is within the statute, although such effect may not be so considerable as its other effects.

Statement of the Case.

SAME.—A complaint alleged that plaintiff was a builder doing business in Portland, Or.; that in such business he purchased large quantities of rough lumber from mills located at Vancouver, Wash., which was seven miles from Portland, but that such mills did not manufacture finished or kiln-dried lumber; that defendants, who comprised all the manufacturers and dealers in Portland, combined to fix exorbitant prices on all lumber sold by them, and to compel all consumers in Portland to pay such prices by refusing to sell any finished lumber at any price to such consumers as bought lumber of any kind from other dealers, except on condition that such consumer pays to defendants the difference between the price he paid for lumber so bought from others and the price charged therefor by defendants and promises to buy all his lumber thereafter from defendants; that the purpose and effect of such combination was to prevent plaintiff and other consumers from buying lumber at Washington mills, and to obtain a monopoly of the trade in Portland at unreasonable and exorbitant prices. *Held*, that the combination charged constituted a violation of the federal anti-trust act, its effect being to directly restrain interstate commerce, and that the complaint stated a cause of action thereunder for the recovery of damages alleged to have resulted to plaintiff.[a]

In Error to the Circuit Court of the United States for the District of Oregon.

For opinion below, see 124 Fed. 956.[b]

[183] The plaintiff in error brought an action against the defendants in error under the provisions of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to recover damages resulting from a combination of the defendants in error to prevent him from purchasing lumber in the city of Vancouver, Wash., to be used in the city of Portland, Or. The substantial averments of the complaint are as follows: That the plaintiff in error is engaged in the business of constructing houses and other buildings in the city of Portland and selling the same for profit, and in the business of constructing such buildings on contracts with his customers; that the defendants in error are engaged in the business of manufacturing and selling both rough lumber and seasoned or kiln-dried lumber at Portland, Or., and that they are the only manufacturers of such lumber in or adjacent to said city who sell lumber therein; that there are persons engaged in the business of manufacturing and selling rough lumber at the city of Vancouver and at other points in the state of Washington, and that, until interfered with by the acts and combination of the defendants in error, the plaintiff in error could and did purchase at and import from the city of Vancouver large quantities of lumber for use in his business at Portland; that, in order to carry on his said business, it is necessary for him to purchase and use large quantities both of

[a] Syllabus copyrighted, 1904, by West Publishing Co.
[b] See p. 268.

Statement of the Case.

rough lumber and of seasoned or kiln-dried lumber; that the mills at Vancouver produce only rough lumber, and that the seasoned or kiln-dried lumber required by the plaintiff in his business can only be procured from the defendants in error, and he is absolutely dependent upon them for his supply thereof; that on July 2, 1902, the other defendants in error organized the defendant City Retail Lumber Company, and for the purpose and with the intent of creating a monopoly of the manufacture and sale of lumber for local use in the markets of the city of Portland, and of controlling and restricting the output of lumber from defendants' said mills, and fixing and controlling the price of lumber in said Portland market, and arbitrarily advancing said price and demanding and receiving excessive and unreasonable prices for the lumber manufactured and sold by them, and preventing the shipment of lumber by the said manufacturers in the state of Washington from said state to the city of Portland, and preventing the sale in the city of Portland of lumber manufactured in the state of Washington, and preventing the plaintiff in error and all other contractors and builders in Portland from purchasing lumber from any dealers other than the defendants, and particularly from said manufacturers in the state of Washington, did conspire, confederate, and agree together that they would sell lumber in the Portland market only through said City Retail Lumber Company at prices to be fixed by it and to persons to be designated and approved by it; that thereafter the entire sales of lumber in the Portland market from all the defendants in error were placed in the control of said City Retail Lumber Company for the purpose and with the intent of preventing the plaintiff in error and other contractors and builders in Portland from purchasing lumber from said manufacturers in the state of Washington, and that the defendants in error further conspired and agreed to adopt such means and prescribe and enforce such burdens and penalties as might be necessary to carry out said purpose, and thereby enable them to fix a price on lumber in the city of Portland, and control the output and sales of lumber therein; that to carry out said purposes the defendants in error have employed agents to watch the construction of all buildings in the city of Portland, and ascertain the sources from which lumber used therein is procured, and to report to the City Retail Lumber Company all buildings for the construction of which any lumber was procured from said manufacturers in the state of Washington, and that upon such report the defendants in error would refuse to supply any lumber upon any terms to such contractor, builder, or other consumer who purchased any lumber for use in Portland from said manufacturers in the state of Washington, and have refused to sell any lumber to such contractor, builder, or other consumer, except upon the condition that he pay them, in addition to the price charged by them for lumber required from them, the difference between the price he paid for the lumber so purchased in the state of Washington and the price then charged by them [184] for the same quantity of similar lumber, and the further condition that he promise them to purchase no more lumber from said manufacturers in the state of Washington, and that in all cases where the contractor, builder, or other consumer had procured a sufficient supply of rough lumber from manufacturers other than the defendants in error, and bought from manufacturers in the state of Washington, the defendants in error have refused to sell any finished, seasoned, or kiln-dried lumber to such contractor, builder, or other consumer, except upon his making such payment and such promise; that by these means the defendants in error have compelled all contractors and builders in Portland to cease buying lumber from the mills in the state of Washington, and have been enabled to and do control the

Statement of the Case.

output of lumber sold in the market in Portland, and have fixed extortionate prices therefor; that in March, 1903, in the course of his business, the plaintiff in error purchased from a manufacturer in Vancouver, Wash., and had shipped to and delivered to him at Portland, a large quantity of rough lumber at a price of $250 less than was then charged by the defendants in error for the same quantity of like lumber in Portland, and the plaintiff used the same in the construction of buildings; that on March 20, 1903, he required for use in the construction of said buildings large quantities of finished and seasoned or kiln-dried lumber, and was and has been unable to procure the same from any manufacturer or dealer other than the defendants in error, and that on or about that date he applied to the defendants in error to purchase such lumber, to wit, about 7,000 feet of flooring, about 7,000 feet of ceiling, and about 9,000 feet of rustic, which lumber was so needed by him in his business, and offered to pay them therefor the regular price charged by them for the same, but that because of his purchase of lumber at Vancouver, Wash., the defendants in error refused to sell him said or any lumber upon any terms, and so refused for a period of two months, and still refuse, unless the plaintiff in error pay them, in addition to the prices charged by them for the lumber which he wished to purchase from them, the sum of $250, the difference between the price he paid for lumber in Vancouver and the price they charged for the same quantity and quality at Portland, and unless, in addition thereto, he promise them in the future to purchase no lumber from any manufacturer or dealer in the state of Washington; that the plaintiff in error refused to comply with said conditions, and was unable to procure any lumber from the defendants in error; that at all the times mentioned in the complaint the defendants in error have had on hand and for sale in the city of Portland ample supplies of lumber of the quantity and kinds that the plaintiff in error required, and during all said time the plaintiff in error has been ready and able and has offered to pay therefor the regular prices charged by the defendants in error, but they have so refused to sell the same in pursuance and furtherance of their conspiracy, and for the purposes and with the intent above stated, and for the reason that the plaintiff in error had purchased lumber from said manufacturers in the city of Vancouver, and for the purpose and with the intent of preventing him from purchasing lumber from said manufacturers in the city of Vancouver and forcing him to purchase the same from the defendants in error, and for the purpose of punishing and injuring him for having made such purchase in Vancouver, and not for any other reasons. The plaintiff in error alleged that he was damaged in the sum of $7,000 through his inability to continue his business and through loss of profit on his business during the building season of 1903, and the loss of custom and good will of his said business; in the sum of $500 through the delay caused in the construction of two certain buildings and from being compelled to use unseasoned and inferior lumber in their construction; in the sum of $1,000, caused by delay in the construction of a certain building which he had contracted to build for the price of $4,000, and by the exposure of said building to the rains, and by being required to use unseasoned and inferior lumber in finishing the same, and by being unable to secure payment on his contract on that account; in the sum of $25 through being compelled by reason of said combination to purchase in the month of April, 1903, rough lumber from them at their own price, which was $25 in excess of the cost of the same lumber if purchased in Vancouver and shipped therefrom to Portland. The defendants in error filed demurrers to the complaint on the ground [185] that it did not state facts sufficient to

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constitute a cause of action. The demurrers were sustained, and the complaint was dismissed, with costs to the defendants in error. To review that judgment the plaintiff in error has sued out this writ of error.

Veazie & Freeman, for plaintiff in error.

Cake & Cake, for defendants in error Inman, Poulsen & Co.

Wm. D. Fenton, for remaining defendants in error.

Before GILBERT and Ross, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question presented is whether the complaint states a cause of action. It alleges that an interstate trade in lumber had existed between purchasers in the city of Portland, in the state of Oregon, and manufacturers at Vancouver, in the state of Washington, about seven miles distant from Portland, and that the defendants in error, who constitute all the manufacturers of lumber in the city of Portland, formed a combination for the purpose of preventing the importation of lumber from the state of Washington for use in Portland, and that they adopted means such as to accomplish their purpose. It is contended by the defendants in error: First. That the combination does not operate directly upon the manufacture, sale, or transportation of an article of interstate commerce; that it only incidentally and collaterally relates to or affects the sale and transportation of lumber from another state, and that it is therefore not within the prohibition of the act. Second. That the injury complained of by the plaintiff in error was not the direct or unavoidable result of an illegal combination, but that such injury, if any, resulted from the refusal of the defendants in error to deal with the plaintiff in error except upon terms acceptable to them. The interpretation of the statute applicable to the case is found in *Anderson* v. *United States*, 171 U. S. 615, 19 Sup. Ct. 54, 43 L. Ed. 300, in which it was said:

"Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where

the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. * * * If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good; otherwise there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to in some obscure way affect that commerce, and to be therefore void."

Also, in *United States* v. *Joint Traffic Association*, 171 U. S. 568, 19 Sup. Ct. 31, 43 L. Ed. 259, where it was said:

"The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate [186] business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

Does the combination which is set forth in the complaint in the present case tend directly to restrain interstate commerce? The complaint alleges that such was its purpose, and that such is its effect. Notwithstanding these allegations, however, it is clear that, if it can be seen from the facts set forth that the restraint is only indirect and incidental, no cause of action is stated within the intendment of the act. But it is equally clear that the distinct allegation of the purpose of such a combination may be taken into consideration in connection with the facts alleged. If it be true that the purpose of the defendants in error was as alleged, how can it be said of any means which they adopt to effectuate the purpose that they accomplish it only indirectly and incidentally? It is true that the complaint alleges the existence of another purpose—the purpose to obtain excessive and unreasonable prices for lumber; but one of the purposes alleged in attaining that end is the purpose of shutting off the Portland trade in Washington lumber. In determining whether or not the restraint of trade is the direct and necessary result of the combination, no assistance is to be found by pursuing the inquiry further and ascertaining whether its main purpose and chief effect are to foster the trade and increase the business of those engaged in it. It may be conceded that the main purpose of all such combinations is to foster the trade and increase the profits of those who are engaged in them, that the restraint of interstate trade as such is not their ultimate object, and that the effect of the combination on interstate trade is to the members of the combination an immaterial matter. Nor is it material, we think, to inquire what is the chief effect of the combination? The true inquiry is, does it tend directly to appreciably restrain interstate commerce? It is not material to ascertain just what proportion the resulting restraint of interstate commerce bears to other effects or results of the combination. Nor is the court called upon to weigh the effects, or to determine that, if the effect in restraining interstate trade is not so considerable as other effects, the combination is not forbidden. In the case of *W. W. Montague & Co.* v. *Lowry et al.*, 24 Sup. Ct. 307, 48 L. Ed. 608, in which the Supreme Court very recently affirmed the judgment of this court, a combination was made between certain dealers of tiles, mantels, and grates in the cities of San Francisco, Sacramento, and San José, who were members of an association formed for the purposes of the combination, and all of the manufacturers of such articles in the other states of the Union. By the terms of the agreement the manufacturers bound themselves not to sell goods in San Francisco, or within a radius of 200 miles therefrom, to any one who was not a member of the association. There was no manufacturer of such goods in California. The plaintiffs who brought the action were dealers in tiles, but not members of the association. They were unable to purchase goods of the manufacturers. The only restraint on trade was that which resulted from the inability of the plaintiffs to buy goods on equal terms with members of the association for use at their place of business in San Francisco. It could not be [187] demonstrated in that case that by reason of the agreement the total amount of interstate trade would be at all diminished. But the Supreme Court held that it was sufficient if it could be seen that the tendency of the combination was such as to diminish such interstate trade. Said

the court, "The amount of trade in the commodity is not very material."

The defendants in error admit that the business of importing lumber from the state of Washington into the city of Portland may be affected by the combination; but they say that the result is due, not to their combination to refuse to sell to purchasers in the city of Portland who make such importations, but to the inability of the Washington mills to supply the Portland market with kiln-dried or finishing lumber; and that the combination is not the direct and proximate cause of the inability of the Washington mills to sell lumber in the city of Portland. But that very inability is one of the essential facts which aid to create the situation which is complained of. It is a fact conceded to exist, and it is taken advantage of by the defendants in error. But for the existence of that fact, it is safe to assert that the combination would not have been formed. The facts must be reckoned with as they are found. Can it be said that the absence of factories and plants outside of the combination capable of producing finishing lumber so as to compete with the defendants in error shall relieve them from responsibility for their acts? Does the fact that the whole combination and its success are made possible by the adventitious circumstance that no one has yet seen fit to invest the capital necessary to establish a competing plant at Vancouver render the restraint of interstate commerce effected by the combination any the less direct and necessary? If such is the law, it follows that, to secure immunity for every such combination, it is necessary only to bring into it all manufacturers of its line of goods, and to intrench it behind the proposition that the resulting restraint of trade comes, not from the combination, but from the inability of others to supply the market. The mere statement of the proposition is its refutation. With equal reason it might have been urged in the Montague Case that the restraint of interstate trade was owing, not to the combination, but to the fact that there was no independent manufacturer of tiles from whom the plaintiffs in that case could purchase.

The opinion of the trial court in sustaining the demurrers seems to have been largely influenced by the argument that

if the defendants in error, instead of combining to advance prices and to refuse to sell to certain purchasers, had combined to reduce the prices of all kinds of lumber to all purchasers, it would have had an equal tendency to destroy the trade in lumber between Vancouver and Portland, and yet in so doing the defendants in error could not have been accused of acting unlawfully in restraint of that trade. But is this argument sound, and does it lead to the conclusion which was reached by the court? We submit that a combination which is made for the specific purpose of restraining interstate trade and which accomplishes that purpose, restrains it directly, and that, if such be its intention and its direct tendency, it is under the ban of the act, whether it include an agreement to raise prices or an agreement to lower them. The mere agreement to raise or lower prices, as was said by the court in the *E. C. Knight Case*, 156 U. S. 16, [188] 15 Sup. Ct. 255, 39 L. Ed. 325, might tend to restrain external trade, "but the restraint would be an indirect result, however inevitable and whatever its extent; and such result would not necessarily determine the object of the contract, combination, or conspiracy." But this is far from saying that a combination to raise or lower prices aimed directly at the destruction of a particular branch of interstate trade would accomplish that result indirectly, and therefore lawfully. In *United States* v. *Freight Association*, 166 U. S. 328, 17 Sup. Ct. 554, 41 L. Ed. 1007, the court, referring to the terms of the act, said:

"The plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

The same view was reaffirmed in *United States* v. *Joint Traffic Association*, 171 U. S. 558, 19 Sup. Ct. 25, 43 L. Ed. 259. In *United States* v. *Swift & Co.* (C. C.) 122 Fed. 534, Judge Grosscup, referring to the doctrine of the two cases just cited, well said:

"It is clear from them that restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination averred; nor is it to be tested by the prices that result from the combination. Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases, even

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as against the consumer, be restraint of trade; and combination that leads directly to higher prices may, as against the producer, be restraint of trade. The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition."

From the recent case of *Northern Securities Co.* v. *United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, it would appear that when the questions involved in the opinions of the Supreme Court in the two cases last above quoted shall again come before that court for consideration the majority of the members of the court may hold that the rulings in those cases should have gone no further than to decide that the contracts there presented were unreasonable restraint of interstate trade, and were, as such, within the scope of the act. But if we adopt that view of the law, and assume that the purpose of the act was to place a statutory prohibition only on those combinations which are unreasonable and against public policy, as well as in direct restraint of interstate trade, the present combination, as it is set forth in the complaint, clearly comes within the prohibition. The complaint alleges that the prices placed upon all lumber by the defendants in error are excessive and unreasonable, and that for unfinished lumber their price is double the price of Vancouver lumber of the same kind. The combination, as it is stated in the complaint, is more than a mere agreement to raise prices. It includes also an agreement to coerce purchasers of lumber by other means, and to compel them to desist from the interstate trade. Taking together all the allegations of the complaint, it appears that an active trade in lumber between the Vancouver mills and the Portland consumers of lumber has been restrained by the acts of the defendants in error. By combining as they did they wielded a power that no individual action could possess. They possessed the power to **[189]** ruin the business of any Portland contractor who imported lumber from the adjoining state, and they exercised that power. Restraint of the trade resulted therefrom, and the restraint was the direct and necessary result of a combination made to carry out that specific purpose. If the allegations of the complaint be true, the defendants in error have violated the prohibition of the act, and are answerable to the plaintiff in error in damages.

Syllabus.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings not inconsistent with these views.

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[464] HARRIMAN ET AL. *v.* NORTHERN SECURITIES CO. ET AL.[a]

(Circuit Court, D. New Jersey. July 15, 1904.)

[132 Fed., 464.]

INJUNCTION—ALLOWANCE.—Where, in a doubtful case, the denial of a preliminary injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant, through its allowance, the injunction usually should be granted.

SAME.—The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction.

SAME.—Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between, the showing of the complainant and of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction.

SAME—PRESERVATION OF FUND.—Where the sole object for which an injunction is sought is the preservation of a fund in controversy, or the maintenance of the status quo, until the question of right between the parties can be decided on final hearing the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant.

SAME.—While the consideration that an appeal does not lie from an interlocutory decree denying a preliminary injunction is entitled to no weight where, on the application, it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where, on such application, there is room for reasonable doubt as to the ultimate result.

SAME—NOVEL QUESTIONS OF LAW.—In accordance with the foregoing principles, *held*, that a preliminary injunction should issue in a case involving grave, novel and delicate questions of law and a controversy as to material facts bearing upon the equities, regard being had to the comparative hardship or convenience to the respective parties resulting from the awarding or denial of the injunction.

(Syllabus by the Court.)

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[a] Reversed by the Circuit Court of Appeals, Third Circuit (134 Fed., 331). See p. 618. Decree of C. C. A. affirmed by the Supreme Court (197 U. S., 244). See p. 669.

In Equity.

R. V. Lindabury, *Wm. D. Guthrie*, and *R. S. Lovett*, for complainants.

Elihu Root, *John G. Johnson*, *John W. Griggs*, *Francis L. Stetson*, and *W. P. Clough*, for defendants.

BRADFORD, District Judge.

Application has been made on bill, affidavits and exhibits, for a preliminary injunction in a suit brought by Edward H. Harriman, Winslow S. Pierce, the Oregon Short Line Railroad Company and The Equitable Trust Company of New York against the Northern Securities Company and the Northern Pacific Railway Company. The present controversy grows out of a situation created by the final decree of the circuit court of the United States for the district of Minnesota in *United States* v. *Northern Securities Co. et al.* (C. C.) 120 Fed. 721, and the affirmatory decree of the Supreme **[465]** Court of the United States in the same case. 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. That was a suit in equity brought by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont. Its object was to enforce the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Anti-Trust Act. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. Section 1 declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations," and provides that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court." Section 2 provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor," punishable in like manner and to the like extent as offences under the first section. Section 3 [U. S. Comp. St. 1901, p. 3201] declares illegal "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations," and declares that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor," punishable in like manner and to the like extent as offences under the preceding sections. Section 4 provides, among other things, that the several circuit courts of the United States shall have "jurisdiction to prevent and restrain violations of this act," and that proceedings under the act "may be by way of petition." The petition or bill of complaint in the Minnesota suit referred to set forth in substance, among other things, that the Northern Pacific Railway Company and the Great Northern Railway Company were common carriers of freight and passengers and, as such carriers, were engaged in trade and commerce among the several states of the United States and with foreign nations; that on and prior to November 13, 1901, the defendants, Hill, Clough, James and Kennedy, and certain other persons whose names were unknown to the complainant, thereinafter referred to as James J. Hill and his associate stockholders, owned or controlled a majority of the capital stock of the Great Northern Railway Company, and the defendants, Morgan, Bacon, Baker and Lamont, and certain other persons whose names were unknown to the complainant, thereinafter referred to as J. Pierpont Morgan and his associate stockholders, owned **[466]** or controlled a majority of the capital stock of the Northern

Pacific Railway Company; that these two railway companies at and prior to the doing of the acts thereinafter complained of, owned or controlled and operated two separate, independent, parallel and competing lines of railway, running east and west, forming the Northern Pacific system and the Great Northern system, connecting the Great Lakes and the Mississippi River with Puget Sound and the Pacific ocean; that Hill and his associate stockholders, and Morgan and his associate stockholders, acting for themselves as such stockholders and on behalf of the two railway companies respectively in which they owned or held a controlling interest, on and prior to November 13, 1901, entered into an unlawful combination and conspiracy "to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce," through the instrumentality of a holding company to be created under the laws of New Jersey and to be called the Northern Securities Company, with a capital stock of $400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate was to be transferred the capital stock or a controlling interest in the capital stock of each of the two railway companies, with power in the holding corporation to vote such stock and act as the owner thereof, and do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stock; that thus the individual stockholders of the two competing railway companies were to be eliminated, and the Northern Securities Company, substituted as a single common stockholder, the interest of such individual stockholders in the property and franchises of the railway companies being converted into an interest in the property and franchises of the holding company; that in pursuance of such unlawful combination or conspiracy, and solely as an instrumentality for effecting the purposes thereof, the Northern Securities Company was, November 13, 1901, created under the laws of New Jersey, with an authorized capital stock of $400,000,000, and on or about the next following day was organized by the election of a board of directors and the selection of a president and other officers; that thereupon Hill and his associate stockholders assigned and transferred to that company a controlling interest in the capital stock of the Great Northern Railway Company, upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and Morgan and his associate stockholders assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company offered to the stockholders of the two railway companies to issue and exchange its capital stock for the capital stock of those companies [467] upon the above mentioned basis of exchange, no other consideration being required; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company had acquired an additional amount of the stock of the two railway companies, issuing therefor its own stock upon the same basis of exchange, and was then holding as owner substantially all of the capital stock of the Northern Pacific Railway Company and a majority of or controlling interest in the capital stock of the Great Northern Railway Company, and was voting the same, collecting the dividends thereon, and in all respects acting as owner thereof in the organization, management and operation of such railway companies, and in receipt and control of their earnings; that thus a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific railway systems had been effected, a combination or conspiracy in restraint of the trade or commerce among the several states and with foreign nations, formerly carried on by the two railway companies independently and in free competition one with the other, had been formed and was in operation,

and the defendants were thereby attempting to monopolize, and had monopolized, such interstate and foreign trade and commerce, in violation of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], above referred to; that no consideration whatever had existed, or would exist, for the above mentioned transfer of the stock of the railway companies by their stockholders to the Northern Securities Company other than the issue of the stock of the latter company to them in exchange therefor, for the purpose, in the manner, and upon the basis above stated; that the Northern Securities Company was not organized in good faith to purchase and pay for the stock of the two railway companies, but solely to incorporate the pooling of the stock of said companies and to carry into effect such unlawful combination or conspiracy; that the Northern Securities Company was a mere depositary, custodian, holder and trustee of the stock of the railway companies, and its shares of stock were but beneficial certificates issued against such railway stock to designate the interest of the holders in the pool; and that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to cover the exchange value of substantially the entire stock of the two railway companies, upon the basis and at the rate agreed upon, such exchange value being about $122,000,000 in excess of the combined capital stock of such railway companies taken at par. Answers and replications were duly filed, evidence was taken and such procedings were thereafter had in the case that a decree was entered in the circuit court April 9, 1903, pursuant to the prayers of the petition or bill, but not including all the relief therein asked. In that decree it was declared that the defendants, in violation of the Anti-Trust Act, had entered into a combination or conspiracy in restraint of trade and commerce among the several states, and that all of the stock of the Northern Pacific Railway Company and of the Great Northern Railway Company "now claimed to be owned and held by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States," [468] and

a perpetual injunction was granted restraining the Northern Securities Company from "acquiring or attempting to acquire further stock of either of the aforesaid railway companies," or "voting the aforesaid stock which it now holds or may acquire," or "attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies," or "exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein;" and restraining the Northern Pacific Railway Company and the Great Northern Railway Company respectively and collectively from "permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies," or "paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold," or "permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies." Immediately after the injunctive portion of the decree is the following clause:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

It may not be without significance, although it is unnecessary now to discuss the point, that the relief prayed in the petition or bill of the United States was in some particulars broader than that granted in the final decree. This decree was in all respects affirmed by the Supreme Court of the

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United States March 14, 1904, "with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require." Mr. Justice Harlan in his opinion affirmatory of the decree of the court below, among other things, said:

"No valid objection can be made to the decree below, in form or in substance. * * * The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose."

No opinion is now expressed or intimated as to the force or effect of the above utterance.

[469] Thereafter the board of directors of the Northern Securities Company adopted March 22, 1904, certain preambles and resolutions, reciting that the company "has acquired and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company," and "has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company," and that "there are now outstanding 3,954,000 shares of its own capital stock," and that it "desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay," and declaring it "necessary and desirable for this company so to reduce its present capital stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it," and advisable that the fourth article of its certificate of incorporation should be so amended as to read as follows:

"Fourth. The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four [thousand] dollars ($3,954,000), divided into thirty-nine thousand five hundred and forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine per centum of the shares held by him. Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company."

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The resolutions also called for a meeting of the stockholders of the Northern Securities Company, to be held April 21, 1904, for the purpose of taking action upon the proposed alteration of its certificate of incorporation.

The bill in the present suit sets forth in substance, among other things, that the total authorized capital stock of the Northern Pacific Railway Company in November, 1901, amounted to $155,000,000 par value, consisting of $75,000,000 par value of preferred stock and $80,000,000 par value of common stock; that such proceedings were had in November and December, 1901, that such preferred stock was converted into common stock, so as to make the entire issue of stock of the Northern Pacific Railway Company consist of common stock to the amount of $155,000,000 par value, and such is the authorized amount of its capital stock issued and now outstanding; that the authorized capital stock of the Great Northern Railway Company in November, 1901, was and still is about $125,000,000 par value, of which about $123,000,000 par value has been issued and was then and is now outstanding; that the Northern Pacific and Great Northern railway systems are substantially parallel and in a position to compete with each other in the transaction of interstate and foreign commerce carried on by them; that the North- **[470]** ern Securities Company, although incorporated and organized in form according to and nominally for objects authorized by the laws of New Jersey, in reality was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several states and for objects prohibited by the Anti-Trust Act; that prior to November 13, 1901, Hill,

Morgan, Clough, James, Kennedy, Bacon, Baker, and Lamont, and their associates, owning or controlling a majority of the capital stock of the Great Northern Railway Company and a majority of the common capital stock of the Northern Pacific Railway Company, agreed to organize a holding company under the laws of New Jersey, and that such holding company should acquire and permanently hold a majority of the shares of the capital stock of those railway companies respectively and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with such holding company and receive in lieu thereof share certificates of the holding company upon the basis of $180 par value of its stock for each share of the Great Northern Railway stock, and $115 par value of its stock for each share of the Northern Pacific Railway stock, and that the holding company should act as custodian, depositary or trustee of such railway shares on behalf of the existing shareholders of the two railway companies and their associates; that thereupon in pursuance of such agreement the Northern Securities Company was created and organized under the laws of New Jersey, for the object of acquiring and holding shares of the capital stock of other corporations, and with an authorized capital stock of $400,000,000, divided into four million shares of the par value of $100 each, and forthwith agreed to acquire and hold the shares of stock of the two railway companies as custodian, depositary or trustee, and to issue in exchange therefor its own share certificates upon the above mentioned basis; that prior to April 9, 1903, about $176,822,900 par value of the stock of the Northern Securities Company was issued in exchange for about $153,759,400 par value of the stock of the Northern Pacific Railway Company, and about $211,057,600 par value of the stock of the former company was issued in exchange for about $118,124,200 par value of the stock of the Great Northern Railway Company, and about $7,522,000 par value of the stock of the Northern Securities Company was issued for cash used for the purchase of other property and for corporate purposes; that the Northern Securities Company caused the certificates for such railway shares to be transferred to

and registered in its own name or the names of its agents and ever since has held and now holds the same so registered; that such issue of capital stock of the Northern Securities Company for the stock of the two railway companies was to the then existing holders of stock in such railway companies in exchange for certificates for such railway stock and for the purpose of effectuating the above mentioned scheme or combination whereby the Northern Securities Company, holding a majority of the shares of stock of the two railway companies, would be enabled to control the operation and management of the same; that all the persons to whom stock of the Northern Securities Company was issued for shares of either of the railway companies or for cash had full knowledge of the purposes for which it was organized, and of the fact that a **[471]** majority of the capital stock of each of the railway companies had been or was to be deposited with it as custodian or depositary in pursuance of the above mentioned agreement; that prior to the time of the incorporation and organization of the Northern Securities Company, the Oregon Short Line Railroad Company had acquired and at that time owned $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, represented by certificates issued to and registered in the names of the complainants Harriman and Pierce; that after the incorporation of the Northern Securities Company had been resolved upon Harriman, Pierce and the Oregon Short Line Railroad Company agreed with the promoters and incorporators of the former company to transfer to and deposit with it under the terms and conditions before stated, the shares of the Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by the Oregon Short Line Railroad Company, and to receive in exchange therefor certificates of the Northern Securities Company representing an interest therein of $82,491,871 par value, and $8,915,629 in cash, and in pursuance of such agreement Harriman and Pierce, acting for the Oregon Short Line Railroad Company, did, on or about November 18, 1901, transfer and deliver to the Northern Securities Company certificates for $37,023,000 par value of

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the common stock and $41,085,000 par value of the preferred stock of the Northern Pacific Railway company, owned by the Oregon Short Line Railroad Company, and received in exchange therefor certificates of the Northern Securities Company representing an interest of $82,491,871 par value, and the above mentioned sum of $8,915,629 in cash; that Harriman and Pierce are now, and ever since November 18, 1901, have been, the registered owners and holders of the $82,491,871 par value of the shares of the Northern Securities Company, and such holding of stock is and at all times has been by them as trustees for the use and benefit of the Oregon Short Line Railroad Company, which is the beneficial owner thereof; that the $82,491,871 par value of the stock of the Northern Securities Company so standing in the names of Harriman and Pierce, was part of the original issue of stock by that company; that the above mentioned exchange was made by Harriman and Pierce and the Oregon Short Line Railroad Company in good faith and in the belief that the organization of the Northern Securities Company was not, and the acquisition and holding by it of the stock of the two railways as stated would not be, in violation of any statute of the United States, and it was owing to such belief that the complainants did not, pending the final determination of the suit brought by the United States in Minnesota, take any steps or institute any proceedings for the protection of their rights in the premises; that the Oregon Short Line Railroad Company by indenture dated July 17, 1902, duly pledged $82,491,000 par value of the stock of the Northern Securities Company with The Equitable Trust Company of New York, as trustee, for an issue of bonds of that railroad company, of which bonds $82,491,000 face value have been certified and issued and are now outstanding; that the stock of the Northern Securities Company, so issued to Harriman and Pierce November 18, 1901, is still registered in their names and the certificates therefor duly endorsed are now in the actual cus- **[472]** tody of The Equitable Trust Company of New York as pledgee, and are available for tender, return or restoration to the Northern Securities Company; that at the time of such exchange, on or about November 18, 1901, it was agreed between Harriman and Pierce and the Northern Securities Company that the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company should be converted into common stock of that railway company, and such preferred stock was subsequently, in or about December, 1901, converted by the Northern Securities Company into such common stock of the same par value; that certificates for $34,709,062 par value of such common stock registered in the name of the Northern Securities Company on the books of the railway company were substituted in lieu of the certificates for such preferred stock; that the Northern Securities Company caused such original common stock to be transferred to it upon the books of the railway company, and now holds within the jurisdiction of this court certificates registered in its name on the books of the railway company, namely, the Northern Pacific Railway Company, for such common stock so originally received from Harriman and Pierce, and for the common stock into which such preferred stock was so converted and certificates substituted as above mentioned. The bill then sets forth in substance the proceedings in *United States* v. *Northern Securities Company et al.* (C. C.) 120 Fed. 721, and the final decree therein of the circuit court and the decree of the Supreme Court of the United States on appeal. The bill further alleges in substance that the complainants were represented in that suit by the Northern Securities Company and the Northern Pacific Railway Company as well as by the individual defendants, Morgan, Bacon, Baker and Lamont, who were named as the representatives of original holders and owners of the stock of the Northern Pacific Railway Company acquired and held by the Northern Securities Company; that the effect of the decree of the circuit court as affirmed by the Supreme Court of the United States was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian, of the shares of stock of the two railway companies acquired and held by it; that it acquired and held possession thereof in violation of the Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]; that it acquired no title thereto and cannot transfer any rights in respect

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thereof; that the legal and equitable owners thereof were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns; that immediately upon the rendition of the decision of the Supreme Court of the United States the Northern Securities Company, through its board of directors, determined fully and unreservedly to abandon and terminate the above mentioned combination and its holding of such railway stock, and to that end to reduce the capital stock of the company by ninety-nine per cent thereof, or to $3,954,000 par value, and to distribute and divide the stock of the two railway companies held by it, pro rata among its own stockholders, but not to return and retransfer to the stockholders of those railway companies, respectively, or their assigns, any of the shares of stock in either of them which it, the Northern Securities Company, originally received from such stockholders in exchange for its own stock; that in order to consummate such purposes **[473]** the board of directors of the Northern Securities Company on or about March 22, 1904, adopted the preambles and resolutions hereinbefore referred to; that thereupon a circular or notice was issued by and on behalf of that company to its stockholders, notifying them of a special meeting for the purpose of voting upon the proposition submitted by the directors in the resolutions adopted; that such meeting of stockholders was held April 21, 1904, and at it the stock of the Northern Securities Company was reduced ninety-nine per cent by a vote of more than seventy-five per cent. in interest of its stockholders, and by a like vote the proposed plan of pro rata distribution was assented to, but the complainants then and there duly protested that such plan of distribution was illegal and in violation of their rights; that such plan is unauthorized by law, illegal and ultra vires the Northern Securities Company, in violation of the rights and equities of the complainants, and of the laws of the United States and of New Jersey; that such plan has never been assented to by the complainants and is not binding upon them; that the books and records of the Northern Securities Company show for what purpose or consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, and will disclose that a large part of the stock of the Northern Securities Company, issued originally in exchange for stock of those railway companies, is now held in the name or on behalf of original holders who exchanged the same for stock of the railway companies, and, wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Northern Securities Company so transferred to third parties can be so traced and shown in and by such books and records that the assignees of the original holders can be identified and the stock of either railway company originally exchanged by the assignors can be delivered to such assignees in exchange for their present holdings of stock of the Northern Securities Company; that the Northern Securities Company threatens and intends immediately to distribute the shares of stock of each of the two railway companies pro rata among its, the Northern Securities Company's, stockholders in disregard of the rights of the complainants, and unless enjoined by this court from so doing, will forthwith make such distribution, whereby stock of the Northern Pacific Railway Company belonging to the complainants, and to which they are entitled will be lost by them, and they will thereby suffer injury which cannot be compensated in damages, in that the shares of stock of that railway company to which they are so entitled are registered on the books of the railway company in the name of the Northern Securities Company, and those railway company shares or any like amount of such shares cannot be purchased in any market or from any persons; that the proposed distribution pro rata in lieu of the return and restitution of the stock of the railway companies would involve a loss of annual income to the complainants amounting to over $1,000,000, the dividends at the rate now paid upon the stock of the Northern Pacific Railway Company to which they are en- **[474]** titled exceeding by more than $1,000,000 per annum the dividends upon the stock of the Great Northern Railway Company and Northern Pacific Railway Company which they would receive upon such

pro rata distribution; that the value of the stock of the Northern Pacific Railway Company to which the complainants are entitled now exceeds and at all times mentioned in the bill exceeded by more than $10,000,000 the aggregate value of the pro rata share of the stock of the two railway companies which they would receive upon such pro rata distribution, which would be $32,070,612 par value of stock of the Northern Pacific Railway Company and $24,638,919 par value of stock of the Great Northern Railway Company, instead of $78,108,000 par value of stock of the former company; that the complainants are ready, able and willing, and offer, to return and deliver, or cause to be returned and delivered, and they tender, to the Northern Securities Company all the certificates for the shares of its capital stock so received by them, and such part of the above mentioned sum of $8,915,629 in cash, paid to them by or on behalf of that company, as may be just, or such further or other sum as the court shall fix, in exchange for and upon the return of the common stock of the Northern Pacific Railway Company, delivered and exchanged by them as above stated, and the common stock of such railway company into which the preferred stock so exchanged was converted, and they offer to bring into court such stock of the Northern Securities Company and such moneys whenever the court shall direct, and in all respects to do equity and right in the premises; and that, after the return and restoration of the original depositors or their assigns of all the shares of stock of the railway companies, acquired and held by the Northern Securities Company, as above stated, there will remain in the treasury of that company assets and funds sufficient to pay and redeem all of the $7,522,000 par value of its stock issued for cash, or to fully compensate any holders thereof if compensation be adjudged. The complainants pray that it may be decreed that the proposed plan of distribution is illegal and in violation of their rights and equities, and that they are entitled to the return and transfer to them by the Northern Securities Company of the shares of common stock of the Northern Pacific Railway Company, which were so delivered by Harriman and Pierce, and the shares of

common stock into which the preferred stock of that railway company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by the complainants, and such sum in cash as may be just; that the Northern Securities Company may be ordered and directed to endorse the certificates now held by it for such stock of the Northern Pacific Railway Company to the Oregon Short Line Railroad Company, or in blank, and deliver the same to The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by such trust company, to be subject to its rights and lien as trustee; that the Northern Securities Company be perpetually enjoined and restrained from parting with, disposing of, transferring, assigning or distributing any part of the stock of **[475]** the Northern Pacific Railway Company received from Harriman and Pierce, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to the complainants in exchange for its own stock issued as above stated and the cash now tendered by them; that the complainants have such other or further relief as shall be proper under the circumstances; and that the Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing the stock of the Northern Pacific Railway Company in question, or any part thereof, or any certificates now representing the same during the pendency of this suit.

The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and against the awarding of a preliminary injunction counsel on both sides have with strong insistence urged, and with elaboration and signal ability dis-

cussed, a number of legal propositions, important and far-reaching in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved. The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, **[476]** the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship

ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between, the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the status quo, until the question of right between parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting. In *Russell* v. *Farley*, 105 U. S. 433, 438, 26 L. Ed. 1060, the court through Mr. Justice Bradley said:

"It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party."

In *City of Newton* v. *Levis*, 79 Fed. 715, 25 C. C. A. 161, the circuit court of appeals for the eighth circuit through Judge Sanborn said:

"The granting or withholding of a preliminary injunction rests in the sound judicial discretion of the court, and the only question presented by this appeal is whether or not the court below erred in the exercise of that discretion, under the established legal principles which should have guided it. The propriety of its action must be considered from the standpoint of that court. * * * The controlling reason for the existence of the right to issue a preliminary

injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond if the injunction is granted. A preliminary injunction maintaining the status quo may properly issue when- [477] ever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted. * * * The arguments and brief of counsel invite us to a consideration of the questions of law which must be finally determined upon a demurrer to the bill, or upon a final hearing of this case after answer. We have, however, found it unnecessary to decide these questions on this appeal, and we express no opinion upon them. They are of sufficient importance and difficulty to demand careful examination and deliberate consideration," etc.

In *Glascott* v. *Lang*, 3 Myl. & C. 451, 455, Lord Chancellor Cottenham said:

"In looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

In *Hadden* v. *Dooley*, 74 Fed. 429, 431, 20 C. C. A. 494, the circuit court of appeals for the second circuit through Judge Shipman said:

"When the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper 'to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined' by evidence and proofs which have the merit of accuracy."

In *Great Western R. Co.* v. *Birmingham, etc., R. Co.*, 2 Phil. Ch. 597, Lord Chancellor Cottenham said:

"It is certain that the court will in many cases interfere and preserve property in statu quo during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser pendente lite would gain a title; but it would embarrass the original purchaser in his suit against the vendor which the court prevents by its injunction. * * * It is true that the court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff. If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?"

In *Shrewsbury & Chester R. Co.* v. *Shrewsbury R. Co.*, 1 Sim. N. S. *410, *426, *427, *432, the Vice-Chancellor, Lord Cranworth, said:

"When the court is called on to interefere to perserve property pendente lite, there are, I apprehend, two points on which the court must satisfy itself. First, it must satisfy itself, not that the plaintiff has, certainly, a right, but that he has a fair question to raise as to the existence of such a right. * * * Where it is made out that there is a point to be decided which the plaintiff is fairly raising, still, there is a further question, namely, whether interim interference, on a balance of convenience and inconvenience to the one party and to the other, is or is not expedient. Where the alternative is interference or [478] probable destruction of the property, there, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But where, on the other hand, the only evil to result from non-interference is, that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the court will be far more ready to listen to any suggestion of the defendant showing that interference during litigation will prejudice his rights. * * * Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between interim interference and non-interim interference the balance greatly preponderates in favor of the defendant and against the plaintiff."

In the above case a preliminary injunction was refused on the ground of the "enormous preponderance of inconvenience in granting the injunction over any possible inconvenience in refusing it." The doctrine of the foregoing cases is contained in many others from which there is no occasion to quote. *Denver & R. G. R. Co.* v. *United States*, 124 Fed. 156, 59 C. C. A. 579; *Allison* v. *Corson*, 88 Fed. 581, 32 C. C. A. 12; *Buskirk* v. *King*, 72 Fed. 22, 18 C. C. A. 418; *Sanitary Reduction Works* v. *California Reduction Co.* (C. C.) 94 Fed. 693; *Southern Pac. Co.* v. *Earl*, 82 Fed. 690, 27 C. C. A. 185; *New Memphis Gas & Light Co.* v. *Memphis* (C. C.) 72 Fed. 952; *Indianapolis Gas Co.* v. *Indian-*

apolis (C. C.) 82 Fed. 245; *Georgia* v. *Brailsford*, 2 Dall. 402, 1 L. Ed. 433.

It does not appear, nor has it been claimed or intimated, that the granting of the preliminary injunction asked for would interfere with the operation of the Northern Pacific Railway Company and the Great Northern Railway Company, or either of them, or otherwise prove detrimental to the interests of the public. It undoubtedly would, during the continuance in force of the injunction, preclude the stockholders of the Northern Securities Company, or a considerable proportion of them, from directly or indirectly receiving dividends on the stock of either of the railway companies, unless under and by virtue of some voluntary extrajudicial arrangement. But this court has power to require of the complainants as a condition precedent to the issuing of the injunction, a bond in such form and amount as fully to indemnify all persons, who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand, the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned. The stock of the two railway companies would be distributed pro rata among the stockholders of the Northern Securities Company in accordance with the plan of distribution adopted by the latter company. The complainants would receive, instead of stock of the Northern Pacific Railway Company of the par value of $71,732,062 claimed by them, stock of that company amounting at par to only $32,070,612, and stock of the Great Northern Railway Company of the par value of **[479]** $24,638,919. The difference in the par value between the stock of the Northern Pacific Railway Company claimed by the complainants and the stock of that company which they would receive under the proposed plan is $39,661,450. If the complainants be sustained in their contention here made as to their ownership and right to recover stock, such right would not extend to stock of the Great Northern Railway Company, but only to stock of the Northern Pacific Railway Company. A pro rata distribution under the proposed plan of the $39,661,450 par value of stock of the latter

company, included in the amount now sued for, among the stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to a moral certainty entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder, embarrass and probably or possibly defeat them in their effort to recover large quantities of such stock from persons purchasing the same in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such pro rata distribution, through the creation of new equities on the part of such purchasers. In view of the character of the questions involved in this case it would be highly inequitable that the complainants should, in advance of any final decision on the merits, be put in such a position as to be precluded, either wholly or in large measure, from the realization and enjoyment of the fruits which should be theirs through the immediate result of a final decree in the present case, should it ultimately be determined in their favor.

It appears from the bill, affidavits and exhibits, that, aside from any question of right between the parties to one kind of stock in contradistinction to another, the real value in dispute is of great magnitude. For $37,023,000 par value of common stock and $41,085,000 par value of preferred stock of the Northern Pacific Railway Company turned over by Harriman and Pierce to the Northern Securities Company November 18, 1901, the latter company issued to them $82,491,871 par value of its stock and also paid them $8,915,629 in cash. All of the common and preferred stock so turned over by Harriman and Pierce, aggregating $78,108,000 par value was taken by the Northern Securities Company at an agreed real valution of $115 for each $100 at par without distinction between common and preferred stock. The plan of pro rata distribution of the Northern Securities Company contemplates the transfer and assignment to all stockholders of that company of both preferred stock of the Great Northern Railway Company and common stock of the Northern

Pacific Railway Company, in such manner that each and every holder of stock of the Northern Securities Company will, on the basis of the surrender to it for cancellation of 99 per cent. of such stock, receive for each $100 par value of such surrendered stock $30.17 par value of the preferred stock of the Great Northern Railway Company and $39.27 par value of the common stock of the Northern Pacific Railway Company. Under the proposed plan **[480]** the holders of the remaining one hundredth of the stock of the Northern Securities Company would also be entitled to share in the residue of property in the treasury of that company remaining after the reduction of its stock by 99 per cent. The complainants hold $82,491,871 par value of the stock of the Northern Securities Company, and, as before stated, would receive $24,638,919 par value of the preferred stock of the Great Northern Railway Company and $32,070,612 par value of the common stock of the Northern Pacific Railway Company. The present real or market value of the preferred stock of the former company is about, and is admitted to be, $170 for each $100 par value, while that of the common stock of the Northern Pacific Railway Company is $135 for each $100 par value. Under the proposed plan the real value which the complainants would receive in stock of the Great Northern Railway Company would be $41,886,162, and the real value which they would receive in stock of the Northern Pacific Railway Company would be $41,295,326, making a total of $83,181,488, aside from any interest they might have in any undisposed of residue of property remaining in the treasury of the Northern Securities Company. Reference will later be made to such undisposed of residue. It appears from the affidavits and exhibits that in November, 1901, the Northern Pacific Railway Company adopted a plan for the conversion of all its preferred stock into common stock; the preferred stock then amounting to $75,000,000 par value, and the common stock to $80,000,000 par value. Under this plan the Northern Securities Company, as the holder of $37,023,000 par value of the common stock became entitled to surrender preferred stock of the Northern Pacific Railway Company and receive therefor seventy five eightieths of its par value in the new common stock. There is evidence furnished by

the affidavits and exhibits that the Northern Securities Company exercised this right and received of such new common stock $34,709,062 at par. If such be the fact, the latter company thereupon became the holder of $71,732,062 par value of common stock, the real value of which at $135 for $100 par value is $96,838,283. The deduction from the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company of the $37,023,000 par value of such stock, the surrender of which to that company for cancellation was necessary for the acquisition of the $34,709,062 of its new common stock, left a balance of $4,062,000 par value of its preferred stock. If this balance was sold or disposed of at par,—and it may reasonably be inferred from the affidavits and exhibits that it was not sold or disposed of for less,—its proceeds, $4,062,000 fairly may be treated as an offset to the cash payment of $8,915,629, originally made by the Northern Securities Company to Harriman and Pierce. On this theory the balance of the $8,915,629 over the $4,062,000, amounting to $4,853,629, when deducted from $96,838,283, the present real value of the $71,732,062 par value of the common stock of the Northern Pacific Railway Company, leaves a balance of $91,984,654. From this balance would be deducted $83,181,488 which the complainants would receive under the pro rata plan, leaving $8,803,166 in their favor, less the amount of their share of **[481]** the above mentioned residue in the treasury of the Northern Securities Company and a just allowance of interest on the cash balance. The above mentioned sum of $8,915,629, paid by the Northern Securities Company to Harriman and Pierce November 18, 1901, had been loaned to that company by the firm of J. P. Morgan & Company. On or about January 1, 1902, $6,375,938 par value of the $41,085,000 par value of preferred stock of the Northern Pacific Railway Company originally transferred by Harriman and Pierce to the Northern Securities Company, having previously been surrendered to the Northern Pacific Railway Company and retired, its proceeds, amounting to its par value, were paid by the Northern Securities Company to J. P. Morgan & Company in partial liquidation of the cash loan of $8,915,629 made by that firm to the

latter company. The affidavits and exhibits furnish evidence of some weight that the above mentioned par value of $6,375,938 of preferred stock of the Northern Pacific Railway Company was deducted by the Northern Securities Company from the $41,085,000 par value of preferred stock of that railway company, thereby reducing the latter amount to $34,709,062 at par, and that the remaining preferred stock, namely, $34,709,062 par value was, through the instrumentality of convertible certificates issued by the Northern Pacific Railway Company converted into new common stock of equal par value. If such be the case, the claim of the complainants would extend to the $37,023,000 par value of the old common stock, and the $34,709,062 par value of the new common stock, aggregating $71,732,062 par value of common stock, having a real value of $96,838,283. The deduction from this amount of $2,539,691, representing the difference between the original cash payment of $8,915,629 and $6,375,938, proceeds of preferred stock retired, should be deducted from the total amount leaving a balance amounting in real value to $94,298,592. Deducting from this amount $83,181,488, which the complainants would receive under the proposed distribution, leaves $11,117,104 in their favor, less the amount of their share of the residue in the treasury of the Northern Securities Company after the proposed distribution. There should also be a further deduction of such sum by way of interest on cash received as above stated by Harriman and Pierce from the Northern Securities Company as may be just. This item, however, would be of comparative insignificance in its relation to the other values involved in the suit. In a journal of the Northern Securities Company is the following entry:

"1901.
Novbr. 18th.

Investment Account No. 1.

To Capital Stock a/c.

For 410,850 shs. N. P. Pfd. stock bought from E. H. Harriman and Winslow S. Pierce for	$41,085,000
Less paid in cash as per entry in cash book this day	8,915,629
Balance paid in stock	$32,169,371

say 321,693 shs. & $71 scrip issued as fully paid up stock @ par."

[482] Whatever may be the merit of this entry as viewed from the standpoint of scientific bookkeeping, the words and figures "Balance paid in stock $32,169,371," are, when considered in connection with other exhibits and the affidavits, confusing and misleading in their bearing upon the conversion, whether directly or indirectly, of preferred stock of the Northern Pacific Railway Company originally turned over by Harriman and Pierce to the Northern Securities Company into new common stock of the former company. Any assumption that the above mentioned balance of $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was not converted, either at par or on the seventy five eightieths basis, into new common stock of that company, by the Northern Securities Company, appears irreconcilable with controlling evidence touching the conversion of preferred into common stock, furnished by the affidavits and exhibits considered as a whole. A fact, which on the present showing seems indisputable, is that the Northern Securities Company, in addition to the $37,023,000 par value of the common stock of the Northern Pacific Railway Company originally turned over to the former company by Harriman and Pierce, acquired through the instrumentality of convertible certificates issued by the railway company new common stock of the par value of $34,709,062. It is unimportant, so far as the point under immediate discussion is concerned, whether that amount of new common stock was secured, on the one hand by a surrender to the railway company of $37,023,000 par value of its preferred stock on the seventy five eightieths basis, or, on the other, by a surrender to the railway company of its preferred stock of the par value of $34,709,062 for its new common stock of the same par value. It is not claimed or suggested that the balance of $32,169,371 par value of preferred stock, mentioned in the journal entry, was sold by the Northern Securities Company absolutely for cash and without intention on its part, directly or indirectly, to convert such balance of preferred stock into the new common stock of the Northern Pacific Railway Company. Any such contention would, on the present showing, be wholly inadmissible. The affidavits and exhibits fail to disclose, and coun-

sel have not attempted to explain, how that balance of preferred stock was, or, on any basis or theory justified by the evidence, could have been, converted into $34,709,062 par value of the new common stock of the Northern Pacific Railway Company. Yet, if, notwithstanding the foregoing considerations, it be assumed that only $32,169,371 par value of the original $41,085,000 par value of preferred stock of that railway company, transferred by Harriman and Pierce to the Northern Securities Company was converted into the new common stock of the railway company of an equal par value, the old and new common stock would aggregate $69,172,371 par value or a real present value of $93,409,701. The deduction from the latter amount of the $83,181,488 which the complainants would receive under the proposed pro rata distribution would leave a balance of $10,228,213 of real value in their favor, less the amount of their participation in the residue of the property remaining in the treasury of the Northern [483] Securities Company. Or, further, if it be assumed that the $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was converted into new common stock of that company on the basis of seventy five eightieths, it would represent $30,158,785 par value of new common stock, the real value of which is $40,714,360. This latter sum added to $49,981,050, representing the real value of $37,023,000 par value of the old common stock would aggregate $90,695,410, and the deduction from this sum of the $83,181,488 which the complainants would receive under the proposed distribution, would leave a balance of $7,513,922 of real value in their favor, less their share of the residue of the property in the treasury of the Northern Securities Company.

The stock of the Northern Securities Company outstanding April 21, 1904, and presumably now outstanding, is of the par value of $395,400,000, divided into 3,954,000 shares of the par value of $100 each. That company now holds 1,537,594 shares of the stock of the Northern Pacific Railway Company and 1,181,242 shares of stock of the Great Northern Railway Company, of the par value of $100 each. The proposed pro rata plan of distribution contemplates the reduction of the total outstanding stock of the Northern Securities Company by 99 per cent. To accomplish this result the Northern Securities Company offers, on the surrender to it of that proportion of its stock, amounting at par to $391,446,000, to deliver or pay for each $100 par value thereof surrendered $39.27 par value of stock of the Northern Pacific Railway Company, and $30.17 par value of stock of the Great Northern Railway Company, and "proportional amounts thereof for fractional shares of the stock of this company." $39.27 on each $100 of $391,446,000 so closely approximates to the par value of the 1,537,594 shares of stock of the Northern Pacific Railway Company that for any practical purpose on the present application it may be considered equal to it. And $30.17 on each $100 of $391,446,000 so closely approximates to the par value of the 1,181,242 shares of stock of the Great Northern Railway Company that for any such purpose it may be considered equal to it. Thus, the surrender of ninety nine one hundredths of the outstanding stock of the Northern Securities Company would necessarily involve the transfer and alienation by it of practically all the stock of the Northern Pacific Railway Company and Great Northern Railway Company now held by it. Whatever of real value the remaining one hundredth of the par value of the outstanding stock of the Northern Securities Company, $3,954,000, might represent, would consist wholly, or practically wholly, of property other than stock of both or either of the two railway companies. It does not appear from the affidavits and exhibits what amount of property would remain in the treasury of the Northern Securities Company after the distribution of the railway stock referred to. Nor does it appear whether the company is or is not indebted, nor whether there are or are not other charges or expenses paramount to the claims of the holders of the remaining one hundredth of its stock. As between the complainants applying for a preliminary injunction, and the Northern Securities Company resisting the application [484] partly on the ground that the real value in dispute is not sufficient to warrant an exercise of the injunctive power, the burden of showing the amount of property in which the complainants would share under the proposed plan, clearly, in view of the fact that the company is chargeable with full

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knowledge of the character, amount and condition of its own property and finances, rested upon it. It must be presumed to have been able to make such a showing. Its failure so to do gives rise to an unfavorable inference. But even if it be assumed that the real value of the residue of the property would be $3,954,000, the par value of the remaining stock, the complainants would under the proposed plan, in the absence of any reduction or obliteration of the fund through possible indebtedness or other charges or expenses, receive as their share approximately $824,919. This sum, though a large amount, is but a small proportion of the real value which the complainants would receive, if entitled to recover. It is less than one twelfth of $11,117,104; less than one eleventh of $10,228,213; less than one ninth of $8,803,166; and less than one eighth of $7,513,922. It is unnecessary, and would be tedious, to discuss in this connection and on the present application the subject of interest, as at most it is a matter of comparative insignificance. In leaving the discussion of real values involved in this suit it should be borne in mind that the right of the complainants to recover. if it exists, extends to stock of the Northern Pacific Railway Company, amounting on the present showing to from $69,000,000 to $71,000,000 approximately at its par value, and to a much larger sum at its real value, and that they disclaim all right to the stock of the Great Northern Railway Company which the Northern Securities Company insists should be taken by them, instead of the larger amount of the stock of the Northern Pacific Railway Company claimed by them. From this point of view there possibly may be some doubt of the pertinency of the foregoing discussion of balances of real values to the consideration of the propriety of granting or withholding the injunction. On this point no opinion is expressed. It was urged by the defense at the hearing that the granting of the relief sought by the complainants would be injurious to many stockholders of the Northern Securities Company, other than the complainants, who acquired their stock in good faith and for full consideration, for the reason that in many instances and to a large amount stock of that company had been so issued or transferred as to render it impossible to trace or identify the consideration of such issue or transfer. It appears that prior to April 9, 1903, stock of the Northern Securities Company of the par value of $7,522,000 was issued for cash used in the purchase of stock of the Great Northern Railway Company and other stocks held by the Northern Securities Company, and also that its stock to a large amount has been transferred from time to time among and is now held by a large number of persons. The bill avers that those becoming stockholders of the Northern Securities Company, whether for shares of the Northern Pacific Railway Company or the Great Northern Railway Company or for cash, had full knowledge and information of the purposes for which the [485] first-named company was organized, and the affidavits are conflicting on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of that company can be traced and identified on its books or otherwise. It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the court. They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master. It should also be borne in mind that this court, as a court of equity, has power so to mold its decrees and impose such terms as may be necessary to protect the equities of persons who may be affected by its action.

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Language justly applicable to the present case was employed by Judge Sanborn in *Denver & R. G. R. Co.* v. *United States*, 124 Fed. 156, 161, 59 C. C. A. 579, 584, as follows:

> "The case falls well within the established rule that a preliminary injunction maintaining the status quo may properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted."

An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. While this consideration is entitled to no weight where, on the application for an injunction, it clearly appears that the complainant cannot prevail on the final hearing, it is often of con-

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trolling importance where, on such application, there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals.

An interlocutory decree for a preliminary injunction may be prepared and submitted.

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[331] NORTHERN SECURITIES CO. *v.* HARRIMAN ET AL.[a]

(Circuit Court of Appeals, Third Circuit. January 3, 1905.)

[134 Fed., 331.]

APPEAL — ORDER GRANTING PRELIMINARY INJUNCTION — REVIEW.— Where the opinion of a Circuit Court in granting a preliminary injunction shows that the judge regarded as of controlling importance the fact that an order denying the injunction would not be reviewable by appeal, the rule that the appellate court will not interfere with the exercise of the discretionary power of the court of first instance unless there is strong reason for it does not apply, and the question of the right to the injunction will be determined on the merits.[b]

CORPORATIONS—PURCHASE OF STOCKS—CONSTRUCTION OF CONTRACT.— A contract by which defendant, the Northern Securities Company, acquired from complainants certain shares of stock of the Northern Pacific Railway Company, *held*, under the evidence, to have been one of purchase and sale, by which defendant, on payment of the agreed price, became the absolute owner of the shares, free from any trust in favor of the complainants, and free to distribute the same pro rata among all its stockholders upon the entry of a decree declaring it to be an illegal combination, and prohibiting it from voting or receiving dividends on such stock.

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[a] Circuit Court awarded a preliminary injunction restraining the Northern Securities Company from disposing of certain shares of the common stock of the Northern Pacific Railway Company (132 Fed., 464. See p. 587. Reversed by the Circuit Court of Appeals, Third Circuit (134 Fed., 331), which action was affirmed by the Supreme Court (197 U. S., 244). See p. 669.

[b] Syllabus copyrighted, 1905, by West Publishing Co.

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SAME—MANNER OF DISTRIBUTING ASSETS.—Defendant corporation having been adjudged an illegal combination in restraint of interstate commerce, and enjoined from voting or receiving dividends on certain railroad stock which it owned, but permitted to transfer the same to its stockholders, a plan adopted by its directors and stockholders to distribute the same pro rata among all its stockholders was equitable, and its execution should not be enjoined.

APPEAL—ORDER GRANTING PRELIMINARY INJUNCTION—REVIEW.—It is a proper exercise of discretion for a court to grant a preliminary injunction where the bill and evidence present a prima facie case and raise important and doubtful questions of law and fact, and, unless the injunction is granted to preserve the status quo until the hearing, the suit would be ineffective; and an order for an injunction, granted on such grounds after the court has given due consideration to the balance of inconvenience and injury which may result to one party or the other, should not be reversed by an appellate court before the case has been finally heard and determined by the court below on full proofs. Per Gray, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Elihu Root and *John G. Johnson*, for appellant.

D. T. Watson and *Wm. D. Guthrie*, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge.

This is an appeal by the Northern Securities Company from a decree of the Circuit Court for the District of New Jersey awarding a preliminary injunction, by which that company was restrained from disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company. It appears from the opinion of the learned judge of the court below that in granting this injunction he was materially influenced by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justi- [332] fied in requiring that the status quo should be preserved, and the subject-matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But now the substantial rights of the

parties only need be considered, and whether the injunction should stand or be dissolved ought, in our judgment, to be determined upon the merits, and without further delay. *Western Union Telegraph Company* v. *Pennsylvania Railroad Company*, 123 Fed. 33–36, 59 C. C. A. 113. There have been cases, it is true, in which it has been held that, where the court of first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court, "unless there is some strong reason for it." *Massie* v. *Buck*, 128 Fed. 31, 62 C. C. A. 535. But to the circumstances of this case those rulings are inapposite. Attentive reading of the opinion of the learned judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie from a denial of the injunction as "of controlling importance," and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court; and we think that reason and justice demand that such an adjudication shall not be further postponed. The injunction complained of precludes the enjoyment of rights of ownership in property of great value. The facts upon which the propriety of upholding it depends are unquestionably disclosed in the record before us, and the principles by which the legality of the order awarding it must be tested are indubitable, and may be as readily applied now as at any time hereafter. The only substantial question is as to whether the decree below was accordant with law, and that question this court could not refuse to determine without, in effect, renouncing the appellate jurisdiction which Congress has expressly conferred upon it.

In November, 1901, the Northern Securities Company was incorporated under the laws of the state of New Jersey. Its total authorized capital stock was $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation could commence business was fixed at $30,000. Its duration was to be perpetual, and its objects were certified to be, inter alia, as follows:

"(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the state of New Jersey or of any other state, territory or country.

"(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

"(3) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

[333] The Securities Company was promptly organized in pursuance of its certificate of incorporation, from which the foregoing clauses have been extracted, and very shortly thereafter the associate stockholders of the Great Northern Railway Company transferred to the Securities Company a controlling interest in the capital stock of the Great Northern Railway Company upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and the associate stockholders of the Northern Pacific Railway Company assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company. For the stock of these railway companies, whether transferred as above stated, or subsequently acquired upon the same basis, and also for about $7,522,000 paid to it in cash, the Securities Company issued its stock certificates in the following form:

Authorized Capital Stock, $400,000,000.

No. ———. ——— Shares.

Northern Securities Company.

Incorporated and Registered Under the Laws of the State of New Jersey.

This Certifies that ——— is the registered holder of ——— Shares of the Capital stock of the Northern Securities Company of One hundred dollars each, transferable only on the books of the company by the holder hereof, in person or by duly authorized attorney, upon surrender of this certificate.

This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

In testimony whereof, the said company has caused this certificate to be signed by its President and Treasurer this ——— day of ———, A. D. 190–.

———, *Treasurer.* ———, *President.*

Countersigned this ——— day of ———, A. D. 190–.

———, *Transfer Agent.*

Countersigned and Registered this ——— day of ———, A. D. 190–.

MANHATTAN TRUST COMPANY, *Registrar of Transfers.*

By ———, *Secretary.*

Shares, $100 each.

In March, 1902, a bill was exhibited by the United States, in the Circuit Court for the District of Minnesota, against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel Lamont. The object of this bill was to restrain the violation of the act of Congress of July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and the suit which it originated was so proceeded with that in April, 1903, the said Circuit Court adjudged and decreed:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several states, such as an act of Congress approved July 2, 1890, entitled 'An act to [334] protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company now claimed to be held and owned by the defendant the Northern Securities Company was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several states; that the Northern Securities Company, its officers, agents, servants, and employés, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively an-

collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. * * * "

Upon March 14, 1904, this decree was affirmed by the Supreme Court of the United States (193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679), and thereupon, viz., on March 22, 1904, the board of directors of the Securities Company adopted the following preambles and resolutions:

"Whereas, in the course of its business, this company has acquired and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company, and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

"Whereas, in a suit brought by the United States against this company, the said railway companies, and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company, held by this company; and

"Whereas, this company has issued, and there are now outstanding, 3,954,000 shares of its own capital stock; and

"Whereas, this company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay:

"*Resolved*, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railway companies held by it.

"*Resolved*, That the board of directors of this company hereby declares it advisable that article (4th) of this company's certificate of incorporation be amended, so as to read as follows:

"'Fourth.—The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the [335] shares held by him. Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of

the stock of this company. The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.'

"*Resolved*, That a meeting of the stockholders of this company for the purpose of taking action upon the said alteration of the certificate of incorporation of this company, and also upon such other business as may come before the meeting, be, and is hereby, called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and state of New Jersey, at 11 o'clock a. m. on April 21, A. D. 1904."

Notice of a meeting of the stockholders of the Securities Company was accordingly given, and such meeting was duly held upon April 21, 1904. At that meeting the stock of the company was reduced 99 per centum, and the proposed pro rata distribution of the stock of the Northern Pacific Railway Company and of the preferred stock of the Great Northern Railway Company to and amongst the shareholders of the Securities Company was assented to. This was followed by the institution of the present suit, wherein the complainants alleged "that the defendant Northern Securities Company threatens and intends to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway companies pro rata amongst its stockholders in disregard of the rights of your orators, and that, if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled, will be lost to your orators. * * * " The bill accordingly prayed for an injunction, and thereupon, and on affidavits and exhibits, the injunction now in question was awarded.

The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them "as custodian, depositary, or trustee," and that the "legal and equitable owners of said shares of stock of said railway com-

panies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, the Securities Company, insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in **[336]** form, and prima facie in substance, was one of purchase and sale, is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was "to purchase said stock * * * at an aggregate price of $91,407,500, payable, as to $82,491,871 thereof, in the fully paid-up and nonassessable shares of the capital stock of this company at par, and as to $8,915,629 in cash." It is obvious that this resolution contemplated a "purchase," and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company. The price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock, for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to about $7,522,000, was (as is stated in the bill) "used for the purchase of other property and for corporate purposes." The complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock which it thereby pledged. It is claimed, however, that notwithstanding these facts the beneficial interest in the railway stock was not transferred to the

Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common capital stock of the Northern Pacific Railway Company, "to organize a holding company, * * * and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies, and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company;" and that "in pursuance of said agreement said Northern Securities Company was organized, * * * and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale; and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by **[337]** the Oregon Short Line Company, and that "they further stated that, upon the organization of the proposed holding company," not that it would take as custodian or trustee, but that "they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line, and pay therefor in the stock of the holding company." These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a

custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which, by executed contract of purchase, it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and admittedly that payment was made. The situation, then, is this: The Northern Securities Company is the owner of 1,537,594 shares of the stock of the Northern Pacific Railway Company, and 1,181,242 shares of the stock of the Great Northern Railway Company, which it has been restrained, at the suit of the United States, from voting or receiving dividends upon, and in view of this restraint all parties agree that it should not continue to hold them. It accordingly proposes to assign them pro rata to its shareholders, including not less than 2,500 persons, whose shares were unquestionably acquired by purchase, and who are not parties to this suit; and as such disposition of them would effect a ratable, and therefore equitable, division of them amongst all who are entitled to participate in a distribution of the corporate assets, we are of opinion that the injunction which prohibited it should no longer remain in force.

If the question before us had been involved and decided in the suit of the *United States* v. *The Northern Securities Company*, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in disposing of the appeal in that case, we, of course, would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. The petition or bill of the United States did pray, inter alia, that the stockholders of the railroad companies who had exchanged their stock therein for stock of the Northern Securities Company

should be required to surrender any stock of the Northern Securities Company so acquired and held by them, and to accept therefor the railway stock "in exchange for which the same was issued;" but the decree, in so far as it was mandatory, went no further than to prohibit the doing of "the specific things which, being done, would effect the result denounced by the act." 193 U. S. 356, 24 Sup. Ct. 465, 48 L. Ed. 679. This was all that was requisite, and it was accomplished by that part of the decree which has been already quoted; and the added clause, though apparently suggested [338] by the prayer of the bill to which we have referred, was obviously not intended to have any obligatory effect. It was permissive merely, and this so plainly appears from its terms that it is necessary only to direct attention to them. They are: "But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignment of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies." This decree was affirmed in its entirety, and without modification, and thereafter the three principal complainants in the present case applied to the Circuit Court for the District of Minnesota for leave to intervene in the suit in which it had been made. The ground of that application was substantially the same as that upon which this bill is founded; but in denying it the court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to command stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The government was satisfied with the relief which it obtained, and expresses itself as fully satisfied therewith at the present time. * * * It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become the owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be returned, or exclude other methods of disposing of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance, and make an order which we ex- [339] pressly, and on full consideration, declined to make when the decree was entered. This we must decline to do."

The facts which have been mentioned negative the contention that the question here in dispute was adjudicated in the government suit, and the further contention that it was at least authoritatively dealt with in the principal opinion rendered upon the appeal in that case is, we think, likewise fallacious. Some phrases in that opinion, if considered separately, and without reference to the precise subject which was under investigation, may seem to sanction the interpretation which the appellees have sought to put upon it; but when it is read as a whole it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be

unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree.

"The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation, as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose." 193 U. S. 357, 24 Sup. Ct. 465, 48 L. Ed. 679.

We have been asked to infer from this statement in the opinion that the learned justice who made it intended to affirm that the property interests of the original holders of the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the Circuit Court; and the plain and natural meaning of the language used is that by that decree no property interests had been disturbed. As was said by the learned judges who made it:

"When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able, and likewise disposed, to make some disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject-matter of an independent suit between the parties immediately interested."

The present suit is an independent one, and, as its subject-matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative.

The conclusions reached upon the questions we have discussed render it unnecessary for us to express any opinion upon the other points argued by counsel. From what has been said it follows that the decree of the Circuit Court must be reversed, and therefore it is so ordered.

[340] GRAY, Circuit Judge (dissenting).

I am constrained to dissent from the judgment of the majority of the court. I do not think the learned judge of the court below exercised other than a sound judicial discretion in granting the motion for a special injunction, pendente lite. He has stated in his opinion that important and doubtful questions of law and fact had been raised by the pleadings and affidavits, and I cannot agree that these questions should have been so determined by him on a motion for a preliminary injunction, as to make necessary the dismissal of the bill. I say, to make necessary the dismissal of the bill, because it is apparent that, to have denied the injunction pendente lite, and thus to have permitted the distribution of the stocks of the Northern Pacific and Great Northern, in the custody and control of the defendant company, according to the plan proposed, would have practically frustrated the object of the suit, and have rendered unavailing a decree, as prayed for, in favor of complainants. Nothing but a clear conviction that complainant's bill was without equity, and should therefore be dismissed without further hearing, would have justified the court below in refusing the preliminary injunction. On the other hand, if the court were satisfied that a prima facie case had been presented by complainants, and that the balance of advantage or disadvantage to result to the parties respectively from the granting or withholding an injunction was such as to sanction such action, it was the exercise of a sound judicial discretion to grant the injunction and preserve the status quo, until there was opportunity, after full hearing, in the orderly progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact raised by the pleadings and evidence in the case. The responsibility for the exercise of this power and duty rested upon the court below.

Upon appeal from an order granting a preliminary injunction, a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court should not interfere with

its discharge of the responsibility and duty imposed upon it. "The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action." That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammeled opportunity he sought, for a full hearing and deliberate investigation of what he has stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties, or a reviewing court, of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory **[341]** decree for a special injunction, given by the act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view, that it is our duty in the case at bar to do more than merely determine whether the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this, and I think we can conform to this general rule "without in effect renouncing the appellate jurisdiction conferred upon us by Congress."

As I am clearly of the opinion that the court below, in granting the special injunction, pendente lite, has given due consideration and effect to the balance of inconvenience and injury which may result to one party or the other, and that the prima facie case was sufficiently established at the hearing

to entitle the complainants to the protection of such an injunction, I am in favor of affirming the interlocutory decree.

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[464] RICE *v.* STANDARD OIL CO.

(Circuit Court, D. New Jersey. January 6, 1905.)

[134 Fed., 464.]

MONOPOLIES—ACTION FOR VIOLATION OF ANTI-TRUST ACT—PLEADING.—Section 1 of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations," makes a distinction between a contract and a combination or conspiracy in restraint of trade, and a declaration in a suit based on section 7 (26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]) to recover damages resulting to plaintiff from a violation of such provision, which alleges in a single count that defendant entered into a "contract, combination, and conspiracy" in restraint of trade, is bad for duplicity.[a]

[465] SAME.—A declaration in an action brought under section 7 of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]) to recover damages for a violation of section 1 of the act, construed, and *held* bad for indefiniteness and uncertainty in describing the alleged combination and conspiracy entered into by defendant and the acts done which resulted in damage to plaintiff.

At Law. On motion to strike out declaration.

Charles W. Fuller and *R. V. Lindabury*, for the motion.

Charles E. Hendrickson, Jr., and *John Griffin*, opposed.

LANNING, District Judge.

This matter comes before the court on a motion to strike out the plaintiff's declaration on the ground that it is irregular and defective, and so framed as to prejudice, embarrass, and delay a fair trial of the action. Such procedure is warranted by section 110 of the New Jersey practice act (P. L. 1903, p. 569). The cause of action set forth in the declara-

[a] Syllabus copyrighted, 1905, by West Publishing Co.

tion is supposed to be created by section 7 of the Sherman anti-trust act, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]. That section is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

Amongst the things by the act declared to be unlawful are those mentioned in its first section (26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), which is as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

It is apparent that mere proof that the defendant has entered into a contract or engaged in a combination or conspiracy in restraint of trade or commerce among the several states will not be sufficient to support a cause of action under the seventh section, for there must, in addition thereto, be proof that the plaintiff has, by reason thereof, sustained damage. In his declaration, therefore, the plaintiff must aver not only facts showing such a contract or combination or conspiracy as is declared by the act to be unlawful, but facts showing that by reason of such unlawful thing he has been injured in his business or property.

It is further apparent that the act makes a distinction between a contract and a combination or conspiracy. In his dissenting opinion in *Northern Securities Co.* v. *United States*, 193 U. S. 197, Mr. Justice Holmes, after quoting the words of the first section of the act, at page **[466]** 403, 24 Sup. Ct. 436, page 469, 48 L. Ed. 679, said: "The words hit two classes of cases, and only two—contracts in restraint of trade, and combinations or conspiracies in restraint of trade." Each of these things the act condemns as an unlawful thing. They are not confused in the act, but are mentioned as distinct offenses. Good pleading, whether it be in an indictment in a criminal proceeding or in a declaration in a civil suit, requires the same distinction to be observed. If in a single count in an indictment the charge should be that the defendant entered into a contract, combination, and conspiracy in restraint of trade or commerce among the several states, it would be bad for duplicity. Compare *United States* v. *Cadwallader* (D. C.) 59 Fed. 677. So, in a declaration in a civil suit the confusion of the two condemned things in one count must likewise be irregular and defective for duplicity. In one count there may be a charge of an unlawful contract, and in another a charge of an unlawful combination or conspiracy, but the two unlawful things cannot be declared upon as synonymous terms and charged in a single count.

In the declaration now before me the plaintiff sets forth by way of inducement that from 1876 to 1904 he was a refiner of crude petroleum, and a manufacturer of the refined products of crude petroleum; was engaged in trade and commerce among the several states of the United States, selling his manufactured products refined by him from crude petroleum to the citizens of Mississippi and Louisiana, and a large number of other states specifically named, at prices profitable to him, and shipping the same to his customers in those states from his refinery at Marietta, Ohio, by certain common carriers, namely, the Cincinnati, Washington & Baltimore Railroad Company, and a large number of other railroad companies specifically named, and was lawfully entitled to ship and deliver his products to his customers over the railroads of these common carriers for a reasonable fee or reward to be paid by him or his customers to these common carriers; that More, Cox & Lee, of Columbus, Miss., and Richard M. Ong, of New Orleans, La., and 4,000 other persons in the various states named, became and were his customers of products shipped over the railroads of the common carriers specifically named, and that he had made contracts with his customers yielding him a profit of $50,000 per year, which they would have continued except for the

wrongful acts and misconduct of the defendant and its associates; that he was possessed of a plant, refinery, and business of the value of seven hundred and fifty thousand dollars; that on January 2, 1882, the individuals, firms, and corporations mentioned in a certain written contract annexed to the declaration, and forming part thereof, and marked "Schedule A," were engaged in lawful competition with the plaintiff and among themselves in the same line of business as that carried on by the plaintiff; that, in order that a combination of these individuals, firms, and corporations might be formed to put an end to competition and injure and destroy the plaintiff's business and the business of others engaged in the same line throughout the United States, and drive the plaintiff and others out of competition with them, and unlawfully secure for themselves the customers who theretofore had traded or might thereafter trade with the plaintiff and others, those individuals, firms, and corporations en- [467] tered into the above-mentioned contract; and that on January 4, 1882, they entered into a further written contract supplemental to the contract of January 2, 1882, which supplemental contract is also annexed to the declaration as a part thereof, and marked "Schedule B." The plaintiff then avers that in pursuance of these two contracts, and as a part of the scheme of the individuals, firms, and corporations mentioned in them, the defendant, on August 1, 1882, was incorporated under the laws of the state of New Jersey with a capital of $3,000,000, under the name "Standard Oil Company of New Jersey;" that on June 14, 1889, the name of the company was changed to "Standard Oil Company," and its capital stock increased to $110,000,000; and that the defendant, from the date of its said incorporation down to the time of the commencement of this suit, joined and co-operated with the several individuals, firms, and corporations mentioned in the two contracts in a general plan or scheme to destroy the plaintiff's business, to render his plant worthless, to secure for themselves his customers, and to destroy competition and create a monopoly "by the actings and doings and in manner and form as hereinafter stated."

The first series of averments concerning these "actings and doings," which, for convenience of reference, I have designated by numbers, is as follows:

"(1) On the 4th day of August, 1882, at Trenton, in said district, the defendant entered into and became a party to said two contracts aforesaid, which said contracts were and are in restraint of trade and commerce among the several states of the United States; and (2) likewise, to wit, on the day and year last aforesaid, at Trenton, aforesaid, entered into a combination in the form of a trust and conspiracy in restraint of trade and commerce among the several states of the United States with respect to business of the character of the plaintiff's aforesaid; and (3) pursuant to the true intent and purpose of said contracts, combination and conspiracy, together with the other persons, parties to said agreement, from the day and year last aforesaid, continuously, day by day, down to the day of the commencement of this suit, did, together with other persons, parties to said agreements hereto annexed as Schedules A and B, conspire with, coerce, intimidate, and induce the above-named common carriers (4) to discriminate against the plaintiff in the matter of freight or carriage charges, (5) and to charge the said plaintiff and his customers unreasonable, excessive, and exorbitant sums of money as fee or reward for the carriage and delivery of the plaintiff's products aforesaid to the customers of the plaintiff aforesaid, to wit, from fifty per cent. to three hundred and thirty-three per cent. more than reasonable fee or reward for such carriage and delivery, and to discriminate in favor of defendant and its associates aforesaid by charging said defendant and associates for like carriage and delivery unreasonably small sums, considerably less than proper charges as fees or rewards to be paid in that behalf by the said defendant and its associates aforesaid to the common carriers aforesaid, (6) and to charge the said plaintiff from fifty per cent. to three hundred and thirty-three per cent. more for freight or carriage charges for transporting the same amount of the plaintiff's refined oils the same distance to the same points and under the same conditions as charged the said defendant and its associates aforesaid; and (7) in many cases causing and compelling [grammatically, the language should evidently be "to cause and compel"] said common carriers to pay to said defendant and its associates aforesaid the excess of freight charges charged the plaintiff over and above the rate charged the defendant and associates aforesaid, or some part thereof, thereby taking from the plaintiff his money to enable said defendant to oppress and injure the plaintiff in other ways, and to enable the said defendant and its associates aforesaid to recoup the losses, or some part thereof, sustained by it and them by reason of its and their selling oil like the [468] plaintiff's at prices netting a loss for the purpose of destroying the plaintiff's market for his oils and the value of oil in the plaintiff's market as hereinafter stated."

These averments, in my judgment, are bad for duplicity and uncertainty. The first clause relates exclusively to the two contracts, copies of which are annexed to the declaration. The second clause relates to what is called "a combination in the form of a trust and conspiracy." In the third clause it is averred that "pursuant to the true intent and purpose of said contracts, combination, and conspiracy" the defendant did certain things to the injury of the plaintiff. Here

the pleader makes the two distinct offenses condemned by the act the basis of his complaint. This contravenes the rule which forbids duplicity in pleading. But the averments are also bad for indefiniteness and uncertainty. The third clause, particularly, is badly framed. It avers that the defendant, with other persons, did "conspire with, coerce, intimidate, and induce the above-named common carriers" to do the acts mentioned in the fourth, fifth, sixth, and seventh clauses. As the conspiracy, coercion, intimidation, and inducement are declared to have been pursuant to the true intent and purpose of the contracts, combination, and conspiracy mentioned in the first and second clauses, the fourth, fifth, sixth, and seventh clauses must be held to relate, not to an additional conspiracy, but to acts done to give effect to the contracts, combination, and conspiracy mentioned in the first and second clauses, and thus to injure the plaintiff in his business or property. When so read, we find that we have no information concerning the combination and conspiracy mentioned in the second clause, except that the combination is in the form of a trust, and that the combination and conspiracy are in restraint of trade. When they were formed, or how, or by whom, or for what purpose, is not stated. The defendant cannot be required to plead to averments that are so general and indefinite. The fourth clause is to the effect that one of the acts done was "to discriminate against the plaintiff in the matter of freight or carriage charges." This also is too general and indefinite to comply with the rules of good pleading. The fifth clause, which relates to alleged unreasonable freight rates charged against the plaintiff and his customers, is necessarily defective because of its connection with the preceding clauses. Whether it is further defective because it states none of the customers of the plaintiff against whom unreasonable charges were made, or because no facts are stated tending to show what would be reasonable rates, are questions that need not now be considered. The great difficulty, if not impossibility, of formulating a rule which shall govern in the matter of determining what are reasonable rates for transportation was commented on in *United States* v. *Freight Association*, 166 U. S., at pages 331 and 332, 17 Sup. Ct. 540, 41 L. Ed. 1007.

Possibly, the sixth clause might stand if the clauses with which it is connected were not defective. The seventh clause is too indefinite, because it relates to "many cases" in which it is said that common carriers were compelled to pay to the defendant and its associates the excess of freight charges collected from the plaintiff, without the averment of any fact tending to show when, where, with whom, or in what circumstances any such case arose. The next averment in the declaration is as follows:

[469] "And the said defendant and its associates aforesaid did also conspire with, cause and compel the railroads and other common carriers aforesaid and their employés to harass the plaintiff in his business by delaying to furnish cars and to promptly ship the plaintiff's oil sold by the plaintiff to his customers."

This averment deals with a conspiracy separate and distinct from that alleged in the preceding averments. There is no mention of any time when the alleged conspiracy was entered into, or when the alleged acts were done. The defendant's counsel have argued that it should be read in connection with the preceding averments, and that it must be understood to relate to the time which in the preceding averment is said to have been "from the day and year last aforesaid continuously, day by day, down to the day of the commencement of this suit." But the language employed will not permit such a reading. The same thing is true of each of the succeeding averments concerning alleged conspiracies. Other defects appear in the conspiracy averments. For example, it is said that the defendant conspired with the other persons, parties to the two agreements above mentioned, to cause the plaintiff's customers to cease purchasing his oil by furnishing oil like the plaintiff's product "to other dealers in localities where the plaintiff was selling oil to his customers at prices netting a loss to said defendant and its associates." But no dealer or locality is named where oil was thus supplied by the defendant, notwithstanding, if the averment be true, the plaintiff must have knowledge as to who the dealers were and as to the localities in which those dealers carried on their business. Another averment is that:

"The said defendant and its associates aforesaid also, in pursuance of said conspiracy, sought out and sold oil to the plaintiff's customers

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at prices less than cost, while keeping the price of oil to the defendant's and its said associates' customers in the same localities up to prices showing large net profits on sales, which facts were unknown to the customers of defendant and its associates aforesaid, thereby causing the plaintiff's customers to leave the plaintiff, and trade with the defendant and its associates aforesaid."

But the plaintiff fails to name any of his customers who were thus sought out or to whom oil was sold at prices less than cost. Another averment is that in further pursuance of the alleged conspiracy the defendant did "intimidate the customers of the plaintiff by threatening to boycott them in their business if they purchased oil of the plaintiff." But the plaintiff fails to name any of his customers who were thus intimidated. The next two averments are to the effect that the defendant and its associates "did also operate retail stores for the sale of groceries, oil, and other commodities in localities where retailers banded together and agreed to purchase and did purchase oil of the plaintiff, for the purpose of injuring such retailers and customers of the plaintiff by destroying their grocery or other business so long as they should buy oil of the plaintiff," and that they also sold groceries and merchandise "to the customers of the plaintiff's customers at such ruinous prices as to threaten ruin and loss to the plaintiff's customers." But the plaintiff fails to name any of his customers who were thus affected. Another averment is that the defendant and its associates "bribed and bought out the plaintiff's sales agents, and caused the plaintiff's agents **[470]** and employés to betray the trust confided to them by the plaintiff in his said business, and to wrongfully abandon the plaintiff's service and disregard their duty to the plaintiff in the course of his business." But none of the plaintiff's agents thus alleged to have been bribed or to have betrayed their trust is named. The next averment is that the "defendant and its associates intimidated merchants and others engaged in the business of selling oil in various markets, and thus prevented such merchants and others from purchasing and dealing in oil manufactured by the plaintiff." The plaintiff has failed to name any merchant or other person thus intimidated, or what the acts of intimidation were, or any of the markets in which such practice was carried on. The last averment is that the defendant

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and its associates "hampered the plaintiff in getting the necessary supplies of crude oil, and made the said crude oil more expensive to the plaintiff, and hampered, delayed, and made more expensive the work of the plaintiff in the construction of the pipe line for his use." But there is no averment as to the manner in which the defendant and its associates thus hampered, delayed, or injured the plaintiff.

It seems to me clear that the averments in the declaration are too vague to give to the defendant the information to which it is entitled before being required to plead. A declaration which was much less indefinite than the one before me was, in the case of *Minnuci* v. *Philadelphia & Reading R. R. Co.*, 68 N. J. Law, 432, 53 Atl. 229, declared to be one which would have been stricken out on motion for that purpose. The same thing was true of the declaration in the case of *Race* v. *Easton & Amboy R. R. Co.*, 62 N. J. Law, 536, 41 Atl. 710. See, also, *Ackerman* v. *Shelp*, 8 N. J. Law, 125; *Stephens & Condit Transp. Co.* v. *Central R. R. Co.*, 34 N. J. Law, 280.

In my opinion, the motion to strike out the declaration must be granted, and an order to that effect will be signed.

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[375] SWIFT AND COMPANY *v.* UNITED STATES.[a]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 103. Argued January 6, 7, 1905.—Decided January 30, 1905.

[196 U. S., 375.]

A combination of a dominant proportion of the dealers in fresh meat throughout the United States, not to bid against, or only in conjunction with, each other in order to regulate prices in and induce shipments to the live stock markets in other States, to restrict shipments, establish uniform rules of credit, make uniform and improper rules of cartage, and to get less than lawful rates from railroads to the exclusion of competitors with intent to monopolize commerce among the States, is an illegal combination within the meaning and prohibition of the act of July 2, 1890, 26 Stat. 209, and can be restrained and enjoined in an action by the United States.

[a] Demurrer overruled and preliminary injunction granted by the Circuit Court (122 Fed., 529). See p. 237.

Syllabus.

It does not matter that a combination of this nature embraces restraint and monopoly of trade within a single State if it also embraces and is directed against commerce among the States. Moreover the effect of such a combination upon interstate commerce is direct and not accidental, secondary or remote as in *United States* v. *E. C. Knight Co.*, 156 U. S. 1.

Even if the separate elements of such a scheme are lawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize interstate commerce the plan may make the parts unlawful.

When cattle are sent for sale from a place in one State, with the expectation [376] they will end their transit, after purchase, in another State, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a constantly recurring course, it constitutes interstate commerce and the purchase of the cattle is an incident of such commerce.

A bill in equity, and the demurrer thereto, are neither of them to be read and construed strictly as an indictment but are to be taken to mean what they fairly convey to a dispassionate reader by a fairly exact use of English speech.[a]

[49 L. ed., 518.] [b]

[A general allegation of intent may color and apply to all the specific charges of a bill which seeks relief against alleged violations of the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies.]

[A bill charges a violation of the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies, as against the objections of want of equity, multifariousness, and failure to set forth sufficient definite or specific facts, where it avers the existence of a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different states, to bid up prices for a few days in order to induce shipments to the stock yards, to fix selling prices, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and to secure less than lawful freight rates, to the exclusion of competitors.]

[a] The foregoing syllabus and the abstracts of arguments copyrighted, 1905, by The Banks Law Publishing Co.

[b] The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 49, p. 518. Copyrighted, 1904, 1905, by The Lawyers' Co-Operative Publishing Co.

Syllabus.

[A combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to restrict the competition of their respective agents when purchasing stock for them in the stock yards, is an interference with interstate commerce, forbidden by the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies, where such dealers and their slaughtering establishments are largely in different states from those of the stock yards, and the sellers of the cattle largely in different states from either.]

[Trade in fresh meat is sufficiently shown to be commerce among the states, protected from restraint by the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), by allegations in a bill charging meat dealers with violations of that act, which, even if they import a technical passage of title at the slaughtering places in cases of sales, also import that the sales are to persons in other states, and that the shipments to other states are pursuant to such sales, and by allegations charging sales of such meat by their agents in other states, which indicate that some, at least, of the sales were in the original packages.]

[Vagueness can not be asserted of a charge in a bill seeking relief against an attempt to monopolize commerce in fresh meat among the states, in violation of the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), that a combination exists among independent meat dealers to restrain their respective agents from bidding against each other when purchasing live stock for them in the stock yards.]

[Interstate commerce is unlawfully restrained, in violation of the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), by a combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to bid up prices for live stock for a few days at a time, in order to induce cattle men in other states to make large shipments to the stock yards, or by a combination for the same purpose to fix the selling price of fresh meat, and to that end to restrict shipments, when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, or by a combination in aid of such purpose to make uniform and improper charges for cartage for the delivery of meat sold to be shipped to dealers and consumers in the several states.]

[A combination to secure less than lawful freight rates, entered into by independent meat dealers with the intent to monopolize commerce in fresh meat among the several states, is forbidden by the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies.]

Argument for appellants.

THE facts are stated in the opinion.

Mr. John S. Miller, with whom *Mr. Merritt Starr* was on the brief, for appellants:

The charges in each of the paragraphs or counts of the bill or petition of alleged violations of the Sherman Act are, respectively, mere statements of legal conclusions. Each is bad on demurrer for that reason.

These charges would be bad on that ground, even in an indictment under this act. *In re Greene*, 52 Fed. Rep. 104; *United States* v. *Cruikshank*, 92 U. S. 542, 563; *United States* v. *Simmons*, 96 U. S. 360; *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Britton*, 107 U. S. 655; *Hazard* v. *Griswold*, 21 Fed. Rep. 178. And *a fortiori* are they bad in a bill or petition in equity, which is required to state the facts essential to the cause of action. *Lawson* v. *Hewell*, 118 California, 613; *Wright* v. *Dame*, 22 Pick. 59; *Ambler* v. *Choteau*, 107 U. S. 586; *Van Weel* v. *Winston*, 115 U. S. 228, 237; 1 Foster Fed. Prac. § 67.

The *facts* alleged are looked at and not adjectives or adverbs or epithets. *Magniac* v. *Thompson*, 2 Wall. Jr. 209; *Price* v. *Coleman*, 21 Fed. Rep. 357; *Van Weel* v. *Winston*, and *Ambler* v. *Choteau*, *supra*.

The importance of applying this rule with strictness here is more marked because answer by the defendants under oath is called for. This point is properly raised by demurrer. 1 Daniel Ch. Pr. 372. It was so raised in *Van Weel* v. *Winston*, *supra*.

The decree complained of, which is merely one of injunction, is erroneous on like grounds of indefiniteness. *Laurie* v. **[377]** *Laurie*, 9 Paige, 234, 235; *Robinson* v. *Clapp*, 65 Connecticut, 365; *Whipple* v. *Hutchinson*, 4 Blatchf. 190.

It makes clear the misconception of the Sherman Act and of Federal power to regulate commerce upon which the bill and decree proceed. They appear to go upon the theory that under the act of Congress the Federal courts are to regulate commerce, and the decree enjoins, not specific acts, but violations of the statute in terms as general as the act of Congress itself. A defendant cannot know from its terms what he may or may not do without making himself liable as in contempt.

Argument for appellants.

This makes the insufficiency of the bill more obvious, as no valid decree could have been entered upon its allegations.

The provisions of the Sherman Act do not contemplate such a general proceeding or decree to interfere in advance with future dealings, as interstate commerce, which may be interstate trade or may be domestic trade according to the future and changeable intention of the dealers. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 15.

The business of defendants of purchasing live stock and of selling fresh meats produced therefrom, as described in the bill, is not, upon the allegations of fact in the bill, interstate or foreign commerce.

The purchase of cattle as alleged and described in the first paragraph of the bill is not alleged or shown to be interstate commerce.

The business of defendants of selling such fresh meats, at the several places where they are so prepared, as described in the second paragraph, is not, under the facts there alleged, interstate trade or commerce. The sales and deliveries, although to dealers in other States and Territories, are there alleged to be made at the places where the meats are prepared by defendants, and are domestic sales.

The deliveries by defendants to the carriers, who are agents of the purchasers in that respect, under the allegations of the bill, are deliveries to the purchasers in the State where the sale is made; and the sales and deliveries are there fully completed. **[378]** *Merchant* v. *Chapman*, 4 Allen, 362; *Orcutt* v. *Nelson*, 1 Gray, 543; *Waldron* v. *Romaine*, 22 N. Y. 368; *Ramsey & Gore Co.* v. *Kelsea*, 55 N. J. L. 320; *Cotte* v. *Harden*, 4 East. 211; *Brown* v. *Hodgson*, 2 Camp. 86; *Groning* v. *Needham*, 5 Maule & S. 189; 2 Kent. Com. 499; *Crossman* v. *Lurman*, 192 U. S. 189, 198.

The sellers' act in delivering the merchandise to the common carrier, or carrying the merchandise to the carrier's depot (if that is taken to be in effect alleged), is not any part of the interstate transportation, and does not make the goods the subject of interstate commerce. *Coe* v. *Errol*, 116 U. S. 517, 528.

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The fact that the sale is made with a view to the goods being transported by the buyer's agent to another State after the sale and delivery is fully completed, does not make the sale interstate commerce.

The sales alleged in the third paragraph of the bill, by agents of the owners in other States and Territories to whom the owners of the fresh meats have shipped the same for sale there by such agents on the ground, are not incidents of interstate commerce. *Coe* v. *Errol*, 116 U. S. 517, 525; *Kidd* v. *Pearson*, 128 U. S. 1, 23; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13, 17; *Austin* v. *Tennessee*, 179 U. S. 343; *Crossman* v. *Lurman*, 192 U. S. 189, 198; *Am. Harrow Co.* v. *Shaffer*, 68 Fed. Rep. 750; *Stevens* v. *Ohio*, 93 Fed. Rep. 793.

Under the allegations here in question, it is to be taken that the meats, before the sales here referred to are made, have come to their place of rest and are at rest for an indefinite time awaiting sale at their place of destination, and are a commodity in the market where the sales are made; and that the sales are not in the "original packages"; and that the meats, at the time of the sales, have become a part of the general property in the State where sold, and are there handled and sold as such. *Southern Coal Co.* v. *Bates*, 156 U. S. 577, 588; *Brown* v. *Houston*, 114 U. S. 623, 632; *Emert* v. *Missouri*, 156 U. S. 296, 310; *Singer Mfg. Co.* v. *Wright*, 97 Georgia, 123.

The point here made is entirely consistent with the rulings **[379]** in many cases, that the owner of merchandise, who transports it from one State to another for sale, has a right (which cannot be interfered with by state or municipal laws) to sell it as an article of interstate commerce. He also has a right to make such article part of the general property of the State into which it is taken, and he then has the right to sell and others have the right to purchase it as an article of domestic commerce, which cannot be interfered with by Federal law. The Sherman Act does not seek to and could not interfere with that right. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 15, and *Kidd* v. *Pearson* and *Veazie* v. *Moor*, there cited. But this bill here does seek to interfere with that right. Again, the point here made is not touched by the line of decisions holding that state or municipal laws are

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invalid, which, by taxation or other regulations, discriminate against merchandise brought from another State, or seek to prevent interstate commerce therein,—such as *Welton* v. *Missouri*, 91 U. S. 465; *Walling* v. *Michigan*, 116 U. S. 446; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78, and *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 24, 25.

The bill of complaint does not show any contract, combination or conspiracy in restraint of interstate trade or commerce within the meaning of the Sherman Act.

It does not allege any acts of defendants monopolizing or attempting to monopolize or combining or conspiring to monopolize such trade or commerce.

If the act in question be given a construction which would sustain this bill of complaint, the statute would be unconstitutional.

The alleged offenses complained of are set forth in the sixth, seventh, eighth, ninth, tenth and eleventh paragraphs of the bill. As to the sixth and seventh paragraphs we maintain: The allegations of combination and conspiracy here are of mere legal conclusions. That the purchases of live stock referred to in the sixth and seventh paragraphs, as therein alleged, are not interstate commerce.

[380] The first paragraph of the bill in which the business of purchasing live stock for slaughter is set forth and described, does not allege or show that the business is interstate commerce.

The description of the live stock in the sixth paragraph, as live stock produced and owned principally in other States and Territories, and shipped by the owners to the places where sold, for sale to persons engaged in producing and dealing in fresh meat, does not show that the sales of the live stock are interstate commerce. The live stock, when offered for sale in the pens of the stock yards, are, under the allegations of fact in the bill, to be considered as having become part of the general mass of property of the State where offered for sale. The defendants purchasing the live stock have the right so to treat and deal therewith. *Brown* v. *Houston*, 114 U. S. 622. 632; *Pittsburgh Coal Co.* v. *Bates*, 156 U. S. 577, 588, 589; *Emert* v. *Missouri*, 120 U. S. 489, 497. When purchased,

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the live stock is, under the allegations of this bill, at rest for an indefinite time, awaiting sale at its place of destination. *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82, 92.

The defendants have as much right, then, to treat and deal with and purchase such live stock as an article of domestic commerce as the State has so to treat it for the purposes of taxation or regulation. This bill seeks to interfere with that right under the Sherman Act.

If the sworn allegations of the bill in this respect were to be supplemented by other facts, as matters of common knowledge, with respect to the situation of the live stock when sold, such as appeared in the Hopkins and Anderson cases, the case of the Government would be no better. It would then appear that the cattle and other live stock are shipped to commission merchants at the stock yards; are then placed in the pens of the stock yards companies, and there held, cared for and fed by the stock yards company for the account of the commission merchants, and under the allegations here it must be taken that their bulk is broken up; they are divided into lots and sold and delivered by the commission merchant as the principal or **[381]** owner thereof, and so are not purchased as articles of interstate commerce.

But if these purchases of live stock are interstate commerce, the acts alleged in the sixth and seventh paragraphs are not violations of the Sherman Act. *Hopkins* v. *United States*, 171 U. S. 591: *Anderson* v. *United States*, 171 U. S. 604. They are the exercise of a constitutional right of defendants to control their own business.

There is nothing in the bill to show the proportion of the entire number of head of live stock offered for sale at the markets in question, which is bought by the defendants for the purposes of the production of fresh meat; and so there is nothing to show anything like monopoly or attempt at monopoly of the live stock purchases by the defendants.

There is nothing in the bill to show any attempt on the part of the defendants to control or affect the purchases or business in the purchases of live stock of any other persons than themselves. The alleged combinations by defendants in the sixth and seventh paragraphs charged have to do merely with their own business conduct in themselves buying live stock,

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or determining how much they shall buy, at private sale for consumption in their own private business.

The combination charged in the sixth paragraph, for directing their respective purchasing agents "to refrain from bidding against each other, except perfunctorily, and without good faith," does not allege a combination to restrain trade; or even a combination to refrain from bidding. A perfunctory bid, made without good faith, is one which the seller could accept and enforce.

The alleged combination in the seventh paragraph, "for bidding up, through their respective purchasing agents, the prices of live stock for a few days at a time at the said stock yards and open markets," does not charge a combination to restrain trade.

These alleged combinations do not have the direct and immediate effect of restraining interstate commerce, but their **[382]** effect, if any, upon interstate trade in live stock is indirect and incidental, within the meaning of the decisions of this court. The effect is not near so direct or immediate as the mutual agreement of the traders who were members of the Traders' Exchange in the Anderson case.

Obviously the supply of live stock for fresh meat greatly varies in the market at different seasons and times, while the demand for fresh meats for human consumption, for which defendants purchase such live stock, is comparatively constant and uniform.

It is a public benefit and not a public evil that defendants should always be able to supply such constant demand for their fresh meats, and that at the same time they should not overstock the market with their perishable meats. This makes it proper that they should act with some concert and common understanding in their purchases of live stock for that purpose.

As to the eighth paragraph we contend: The allegation of combination and conspiracy is of a mere legal conclusion, and insufficient. The sales of fresh meats by agents of defendants, as there described, under the facts alleged, are not interstate commerce. But if it be interstate commerce, no violation of the Sherman Act is thereby shown.

No criminal conspiracy is alleged. The charge there is not

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of a combination or conspiracy to restrain trade (which the statute forbids), but is of a combination or conspiracy to do a lawful act, the exercise of a constitutional right, viz: to raise, lower, fix and maintain their own prices, for their own property, in private sales thereof by themselves. The doing that is not prohibited or made criminal by the Act of Congress.

A criminal conspiracy is an agreement of two or more, either to do an act criminal or unlawful in itself, or to do a lawful act by means which are criminal or unlawful. *Pettibone* v. *United States*, 148 U. S. 203; *Commonwealth* v. *Shedd*, 7 Cush. 514. Here neither the act nor the means alleged are criminal or unlawful. The allegation of intent is immaterial. *Stevenson* v. *Newham*, 13 C. B. 285; *Allen* v. *Flood*, App. Cas. 1.

[383] Again, this point is settled by the ruling in the *Knight Case*, 156 U. S. 1, 16, that the restraint of trade, if any, which a combination by defendants to raise or lower their own prices would tend to effect would be an indirect result, and such result would not necessarily determine the object of the contract, combination or conspiracy.

As to the ninth paragraph we contend: The allegation is of a conclusion of law. The cartage as there described is not, under the allegations of the bill, interstate commerce. *State* v. *Knight*, 192 U. S. 1, 21; *Detroit &c. Ry.* v. *Interstate Comm. Com.*, 74 Fed. Rep. 803, 808; *Hopkins* v. *United States*, 171 U. S. 578, 592. The charge is not of a conspiracy either to do a criminal or unlawful act, or to do by unlawful means the lawful act of fixing their own charges for cartage. Nothing here charged has the direct, immediate or necessary effect to restrain interstate commerce.

As to the tenth paragraph we maintain: The allegation is of a legal conclusion. It also is too indefinite and general. Sufficient facts are not alleged. *United States* v. *Hanley*, 71 Fed. Rep. 672.

A contract or combination among manufacturers or producers of an article which is intended to become the subject of interstate commerce, to raise, lower and fix prices of such article, is not necessarily a contract, combination or conspiracy in restraint of interstate trade or an attempt to monopolize that trade under the Sherman Act. *United States* v. *Nelson*, 52 Fed. Rep. 646; *In re Greene*, 52 Fed. Rep. 104; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *Gibbs* v. *McNeeley*, 102 Fed. Rep. 504. See also *Distillery Co.* v. *People*, 156 Illinois, 468; *Glucose Company* v. *Harding*, 182 Illinois, 551.

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There was no jurisdiction herein of this charge. No common contract, combination or conspiracy of the defendants with each other is alleged. The allegation that "all and each" have made agreements for less than lawful transportation rates is that they did so acting separately. That was not unlawful on **[384]** the part of the defendants; much less was it any violation of the Sherman Anti Trust Act. There is here no sufficient showing of an attempt to monopolize either the interstate transportation of live stock or fresh meats or interstate trade in live stock or fresh meats. The paragraph is multifarious, and there is therein a misjoinder of causes and parties.

As to the eleventh paragraph we submit that it is too general and insufficient to require argument. It is disposed of by what has been urged as to previous paragraphs.

Prior rulings by this court in cases arising under the Sherman Act do not sustain the Government's case here.

With respect to the supposed limitations of the Sherman Act upon the right of private contract, that act is to be interpreted in the light of the principles of the common law. *United States* v. *Wong Kim Ark*, 169 U. S. 649; *Moore* v. *United States*, 91 U. S. 270, 274; *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd* v. *United States*, 116 U. S. 616, 624; *Smith* v. *Alabama*, 124 U. S. 465.

The bill of complaint is multifarious; and there is therein a misjoinder of causes and of parties. *Walker* v. *Powers*, 104 U. S. 251; *Brown* v. *Guarantee Trust Company*, 128 U. S. 403; *Zeigler* v. *Lake Street Railway*, 76 Fed. Rep. 662.

The bill is too general and indefinite to require answer. It does not sufficiently set forth definite or specific facts.

The demurrers to so much of the bill as prays for answer under oath, and to so much thereof as prays discovery of defendants' books, papers, etc., are well taken.

Argument for the United States.

Rights protected by the Fourth and Fifth Amendments are thereby infringed. *United States* v. *Saline Bank*, 1 Pet. 100; *Boyd* v. *United States*, 116 U. S. 616; *Counselman* v. *Hitchcock*, 142 U. S. 547; *Livingston* v. *Tompkins*, 4 Johns. Ch. 415, 432; *Entick* v. *Carrington*, 19 Howell's St. Tr. 1029; *S. C.*, 2 Wils. 275; *Huckle* v. *Money*, 2 Wils. 206; Mitford & Tyler's Eq. Pldg. 289.

Mr. Attorney General Moody, with whom *Mr. William A.* **[385]** *Day, Assistant to the Attorney General*, was on the brief, for the United States:

The facts show a combination which restrains or monopolizes trade or commerce and operates upon and directly affects interstate or foreign trade or commerce.

The combination or conspiracy which the Government is seeking to destroy and which it was the aim of the petition in this case to set forth is one between all the principal American producers or packers of fresh meats for the purpose of jointly controlling the market for those products throughout the entire United States so as to maintain uniform prices therefor and destroy competition in the sale thereof to dealers and consumers.

The combination set forth in the bill is in restraint of trade, for if in the entire field of the law concerning monopolies and restraints of trade there is a single proposition to which all courts now yield assent, it is that a combination, conspiracy, or agreement between independent manufacturers or producers of a necessary of life to fix and maintain uniform prices for their products, or otherwise to suppress competition with each other, is an unlawful restraint upon trade. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed. Rep. 610; judgments of Lord Bramwell and Lord Hannen in *Mogul S. S. Co.* v. *McGregor*, L. R. App. Cas. (1892) 46, 58; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 155, 173; *Nester et al.* v. *Continental Brewing Co.*, 161 Pa. St. 473; *Salt Co.* v. *Guthrie*, 35 Ohio St. 166; *People* v.

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Sheldon, 139 N. Y. 251; *Cummings* v. *Union Blue Stone Co.*, 164 N. Y. 405; *Trenton Potteries Co.* v. *Olyphant*, 58 N. J. Eq. 507; *Craft* v. *McConoughby*, 79 Illinois, 346; Noyes on Intercorporate Relations, p. 513, note 1, and see the cases collected; and necessarily the means agreed upon to effect the unlawful object of the com- **[386]** bination of conspiracy are inseparable parts of the combination or conspiracy itself, and along with it fall within the condemnation of the law.

The combination or conspiracy in controversy operates upon interstate or foreign commerce, and its operations are not confined to commerce carried on wholly within state lines.

The sales of live stock to the defendants and the sales by them of the prepared meats are interstate and not intrastate transactions.

As to what is interstate commerce, see *Gibbons* v. *Ogden*, 9 Wheat. 1, 194; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337. If interstate commerce is commerce which concerns more States than one, and if a combination of independent producers to suppress competition between its members is a restraint upon commerce, it must follow that a combination of independent producers to fix and control prices and suppress competition between each other in an area covering more States than one is in restraint of interstate commerce and the petition in this case discloses such a combination.

It is impossible to say with even a color of reason that the facts stated in the bill, which cannot be denied, do not show a combination between the defendants to suppress competition between themselves in an area embracing more States than one and it is immaterial to inquire whether the particular purchases and sales made by the defendants are, technically, interstate or intrastate transactions. There is nothing unreasonable or novel in the conclusion that a combination may restrain interstate commerce, although the individual transactions of its members might, standing alone and viewed separate and apart from the purpose and necessary effect of the whole combination, be intrastate in character. *Montague & Co.* v. *Lowry*, 193 U. S. 38. The char-

acter of a combination—that is, whether or not it is interstate in its operation—is decided, not by the nature of the particular transactions of its individual members, but by the extent of the territory in which it operates—in which it controls prices and sales and [387] suppresses competition. If that territory embraces more States than one the combination restrains interstate commerce. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 240.

Whether a combination in restraint of trade operates upon interstate or only intrastate commerce does not depend upon whether the individual transactions of its members, standing alone and viewed separate and apart from the purpose and necessary effect of the whole combination, are interstate or intrastate in character, and the petition here discloses a combination which operates upon *interstate* commerce; for whatever may be the character of the individual transactions of its several members, it is also true in this case that the individual transactions of the members of the combination do fall within the jurisdiction conferred upon Congress by the commerce clause of the Constitution. These transactions consist of the defendants' purchases of live stock; the sales and shipments of fresh meats made directly by the defendants to dealers and consumers in the several States, and the sales of fresh meats to dealers and consumers in the several States by agents of the defendants located in those States.

From all over the stock-raising section, embracing many different States, cattle, sheep and hogs are habitually shipped to the great live-stock markets at Chicago, Omaha, Sioux City, St. Joseph, Kansas City, East St. Louis and St. Paul for sale, to those, the defendants chief among them, engaged in the business of converting live stock into fresh meats for human consumption. The shipments are made with the express and sole purpose of sale as soon as market conditions will permit, and the sales are made while the cattle yet remain in first hands, that is, in the hands of the owners or their agents, and in the ordinary form or condition in which cattle are shipped from one country or State to another, which is analogous to the form or condition of the original package in the case of merchandise. *Austin* v. *Tennessee*, 179 U. S. 343, 359.

[388] The cattle are not dealt with in a commercial way

from the time of their arrival until their sale to the defendants and others, but are simply fed and cared for. No act is done with reference to them that would cause them to become mixed with the general mass of local property. Now, it may be that a distinction should be made between what may be called an interstate sale proper and in the full sense of the term—that is, a sale between persons negotiating and dealing from two or more different States, and a sale, at its destination and while it still remains in the original state or package, of an article of commerce sent from another State. But so far as the result in this instance is concerned it is a distinction without a difference. If the sales of live stock set forth in the petition do not fall within the first of these classes they certainly fall within the second, and that brings them within the protection of the Federal power over commerce and therefore within the protection of the Anti Trust Act; for the right to transport articles of commerce from one State to another includes the right of the owner or consignee to sell them in the latter free from any burden or restraint that the States might attempt to impose. *Brown* v. *Maryland*, 12 Wheat. 419; *Bowman* v. *Chicago and Northwestern Railway Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Rhodes* v. *Iowa*, 170 U. S. 412, and, *a fortiori*, free from any burden or restraint that a combination of individuals might attempt to impose. *In re Debs*, 158 U. S. 564, 581; *Hopkins* v. *United States*, 171 U. S. 578, 590.

Paragraph 2 of the bill contains matter of description and inducement, and must be read in conjunction with the stating part of the petition, which alleges, *inter alia*, that "in order to restrain and destroy competition among themselves" the defendants have engaged in a "combination and conspiracy to arbitrarily from time to time raise, lower, and fix prices, and to maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout the said States and Territories and the District of Columbia and foreign countries."

[389] As the sales made directly by the defendants to dealers and consumers throughout the United States are interstate sales, and as decisions of this court have settled that a combination to control and suppress competition in such sales is a combination in restraint of interstate commerce,

the petition in this case, having shown that much, cannot in any event be dismissed, even should it be held to have failed in all other respects.

Paragraph 3 of the petition states that the defendants are engaged in shipping fresh meats from their plants in certain States to their respective agents at and near the principal markets in other States and Territories for sale by such agents to dealers and consumers in those States and Territories. Upon the question whether or not the sales made by these agents under the circumstances set forth are within the body of interstate commerce, there is nothing to add to the cogent argument in the opinion of the circuit judge.

The bill is not multifarious and does not disclose a misjoinder of parties. 14 Ency. of Pl. and Pr. 198; 1 Bates Fed. Eq. Pro. §§ 135, 195. The Circuit Court did not err in sustaining the demurrers to the bill in its aspect as a bill of discovery. The demurrers are demurrers to the whole bill. *Livingstone* v. *Story*, 9 Pet. 632, 654.

The well-settled rule of equity pleading is that a demurrer to a whole bill cannot be sustained as to part of the bill and overruled as to part, but must be overruled as to the whole if any part of the bill is good and entitles the complainant to any relief. Fletcher, Eq. Pl. §§ 203, 204; Story, Eq. Pl., 10th ed., §§ 443, 444; *Parker* v. *Simpson*, 62 N. E. Rep. (Mass.) 401; *Metler's Admn's.* v. *Metler*, 18 N. J. Eq. 270, 273. When the defendants leveled their demurrers at the relief as well as the discovery, instead of answering as to the relief and demurring as to the discovery they did so at their peril. Daniell's Chan. Prac., 3d Am. ed., 568–608; see also Acts of Congress of February 25, 1903, 32 Stat. 903; of February 11, 1893, 27 Stat. 443, and *Interstate Comm. Com.* v *Baird*, 194 U. S. 25, 44, **[390]** citing *Brown* v. *Walker*, 161 U. S. 591; *Boyd* v. *United States*, 116 U. S. 616.

Judges have differed as to the validity of aggregations of capital effected by some form of organic union between several smaller and competing corporations, and economists are far from agreeing that such aggregations, within limitations, are hurtful. So too, associations of manufacturers to regulate competition within a restricted area have not always been condemned by courts and have sometimes been approved by publicists. But as yet no responsible voice has been heard to justify, legally or economically, a conspiracy or agreement between nearly all the producers of a commodity necessary to life by which the confederates acquire absolute control and dominion over the production, sale and distribution of that commodity throughout the entire territory of a nation, with the power, at will, to raise prices to the consumer of the finished product and lower prices to the producer of the raw material. Yet such is that now at the bar of this court. That there is a conspiracy to control the market of the nation for fresh meats, that it does control it, and that its control is merciless and oppressive, are facts known of all men. The broad question here is, Does the Government's petition, with its statements of fact standing unchallenged, discover that conspiracy to the court? We submit that it does and that the decree of the Circuit Court should in all things be affirmed.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court, on demurrer, granting an injunction against the appellants' commission of alleged violations of the act of July 2, 1890, c. 647, 26 Stat. 209, "to protect trade and commerce against unlawful restraints and monopolies." It will be necessary to consider both the bill and the decree. The bill is brought against a number of corporations, firms and individuals of different States and makes the following allegations: 1. The defend- **[391]** ants (appellants) are engaged in the business of buying live stock at the stock yards in Chicago, Omaha, St. Joseph, Kansas City, East St. Louis and St. Paul, and slaughtering such live stock at their respective plants in places named, in different States, and converting the live stock into fresh meat for human consumption. 2. The defendants "are also engaged in the business of selling such fresh meats, at the several places where they are so prepared, to dealers and consumers in divers States and Territories of the said United States other than those wherein the said meats are so prepared and sold as aforesaid, and in the District of Columbia, and in foreign countries, and shipping the

same meats, when so sold from the said places of their preparation, over the several lines of transportation of the several railroad companies serving the same as common carriers, to such dealers and consumers, pursuant to such sales." 3. The defendants also are engaged in the business of shipping such fresh meats to their respective agents at the principal markets in other States, etc., for sale by those agents in those markets to dealers and consumers. 4. The defendants together control about six-tenths of the whole trade and commerce in fresh meats among the States, Territories and District of Columbia, and, 5, but for the acts charged would be in free competition with one another.

6. In order to restrain competition among themselves as to the purchase of live stock, defendants have engaged in, and intend to continue, a combination for requiring and do and will require their respective purchasing agents at the stock yards mentioned, where defendants buy their live stock (the same being stock produced and owned principally in other States and shipped to the yards for sale), to refrain from bidding against each other, "except perfunctorily and without good faith," and by this means compelling the owners of such stock to sell at less prices than they would receive if the bidding really was competitive.

7. For the same purposes the defendants combine to bid up, through their agents, the prices of live stock for a few days at **[392]** a time, "so that the market reports will show prices much higher than the state of the trade will warrant," thereby inducing stock owners in other States to make large shipments to the stock yards to their disadvantage.

8. For the same purposes, and to monopolize the commerce protected by the statute, the defendants combine "to arbitrarily, from time to time raise, lower, and fix prices, and to maintain uniform prices at which they will sell" to dealers throughout the States. This is effected by secret periodical meetings, where are fixed prices to be enforced until changed at a subsequent meeting. The prices are maintained directly, and by collusively restricting the meat shipped by the defendants, whenever conducive to the result, by imposing penalties for deviations, by establishing a uniform rule for the giving of credit to dealers, etc., and by notifying one another

of the delinquencies of such dealers and keeping a black list of delinquents, and refusing to sell meats to them.

9. The defendants also combine to make uniform charges for cartage for the delivery of meats sold to dealers and consumers in the markets throughout the States, etc., shipped to them by the defendants through the defendants' agents at the markets, when no charges would have been made but for the combination.

10. Intending to monopolize the said commerce and to prevent competition therein, the defendants "have all and each engaged in and will continue" arrangements with the railroads whereby the defendants received, by means of rebates and other devices, rates less than the lawful rates for transportation, and were exclusively to enjoy and share this unlawful advantage to the exclusion of competition and the public. By force of the consequent inability of competitors to engage or continue in such commerce, the defendants are attempting to monopolize, have monopolized, and will monopolize the commerce in live stock and fresh meats among the States and Territories, and with foreign countries, and, 11, the defendants are and have been in conspiracy with each other, with **[393]** the railroad companies and others unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States, etc. And to that end defendants artificially restrain the commerce and put arbitrary regulations in force affecting the same from the shipment of the live stock from the plains to the final distribution of the meats to the consumers. There is a prayer for an injunction of the most comprehensive sort, against all the foregoing proceedings and others, for discovery of books and papers relating directly or indirectly to the purchase or shipment of live stock, and the sale or shipment of fresh meat, and for an answer under oath. The injunction issued is appended in a note.[a]

[a] "And now, upon motion of the said attorney, the court doth order that the preliminary injunction heretofore awarded in this cause, to restrain the said defendants and each of them, their respective agents and attorneys, and all other persons acting in their behalf, or in behalf of either of them, or claiming so to act, from entering into, taking part in, or performing any contract, combination or conspiracy, the purpose

[394] To sum up the bill more shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different States, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination. But as it is alleged that the defendants have each and all made arrangements with the railroads, that they were exclusively to enjoy the unlawful advantage, and that their intent in what they did was to monopolize the commerce and to prevent competition, and in view of the general allegation to

or effect of which will be, as to trade and commerce in fresh meats between the several States and Territories and the District of Columbia, a restraint of trade, in violation of the provisions of the act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock; or collusively and by agreement to refrain from bidding against each other at the sales of live stock; or by combination, conspiracy or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats, the effect of which rules will be to restrict competition; or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers, the effect of which will be to restrict competition; or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid; and also from violating the provisions of the act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' by combining or conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of the trade and commerce in fresh meats among the several States and Territories and the District of Columbia, by demanding, obtaining, or, with or without the connivance of the officers or agents thereof, or of any of them, receiving from railroad companies or other

which we [395] shall refer, we think that we have stated correctly the purport of the bill. It will be noticed further that the intent to monopolize is alleged for the first time in the eighth section of the bill as to raising, lowering and fixing prices. In the earlier sections, the intent alleged is to restrain competition among themselves. But after all the specific charges there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meats throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill. Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it farily conveys to a dispassionate reader by a fairly exact use

common carriers transporting such fresh meats in such trade and commerce, either directly or by means of rebates, or by any other device, transportation of or for such means, from the points of the preparation and production of the same from live stock or elsewhere, to the markets for the sale of the same to dealers and consumers in other States and Territories than those wherein the same are so prepared, or the District of Columbia, at less than the regular rates which may be established or in force on their several lines of transportation, under the provisions in that behalf of the laws of the said United States for the regulation of commerce, be and the same is hereby made perpetual.

"But nothing herein shall be construed to prohibit the said defendants from agreeing upon charges for cartage and delivery, and other incidents connected with local sales, where such charges are not calculated to have any effect upon competition in the sales and delivery of meats; nor from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers, nor from curtailing the quantiy of meats shipped to a given market where the purpose of such arrangement in good faith is to prevent the over-accumulation of meats as perishable articles in such markets.

"Nor shall anything herein contained be construed to restrain or interfere with the action of any single company or firm, by its or their officers or agents (whether such officers or agents are themselves personally made parties defendant hereto or not) acting with respect to its or their own corporate or firm business, property or affairs."

of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme.

We read the demurrer with the same liberality. Therefore we take it as applying to the bill generally for multifariousness and want of equity, and also to each section of it which makes a charge and to the discovery. The demurrer to the discovery will not need discussion in the view which we take concerning the relief, and therefore we turn at once to that.

The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time **[396]** and space, that something of the same impossibility applies to them. The law has been unheld, and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can.

The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens* v. *Wisconsin*, 195 U. S. 194, 206. The statute gives this proceeding against combinations in

restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will hapen. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. What we have said disposes incidentally of the objection to the bill as multifarious. The unity of the plan embraces all the parts.

One further observation should be made. Although the **[397]** combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single State is an object of attack. See *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; *Crutcher* v. *Kentucky*, 141 U. S. 47, 59; *Allen* v. *Pullman Co.*, 191 U. S. 171, 179, 180. Moreover, it is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States* v. *E. C. Knight Co.*, 156 U. S. 1, where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end. Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct. *Montague & Co.* v. *Lowry*, 193 U. S. 38.

So, again, the line is distinct between this case and *Hopkins* v. *United States*, 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges, was left open. In *Anderson* v. *United States*, 171 U. S. 604, the defendants were buyers and sellers at the stock yards, but their agreement was merely not to employ brokers, or to [398] recognize yard-traders, who were not members of their association. Any yard-trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the States, and, being formed with a different intent, was not within the act. The present case is more like *Montague & Co.* v. *Lowry*, 193 U. S. 38.

For the foregoing reasons we are of opinion that the carrying out of the scheme alleged, by the means set forth, properly may be enjoined, and that the bill cannot be dismissed.

So far it has not been necessary to consider whether the facts charged in any single paragraph constitute commerce among the States or show an interference with it. There can be no doubt, we apprehend, as to the collective effect of all the facts, if true, and if the defendants entertain the intent alleged. We pass now to the particulars, and will consider the corresponding parts of the injunction at the same time. The first question arises on the sixth section. That charges a combination of independent dealers to restrict the competition of their agents when purchasing stock for them in the stock yards. The purchasers and their slaughtering establishments are largely in different States from those of the stock yards, and the sellers of the cattle, perhaps it is not too much to assume, largely in different States from either. The

intent of the combination is not merely to restrict competition among the parties, but, as we have said, by force of the general allegation at the end of the bill, to aid in an attempt to monopolize commerce among the States.

It is said that this charge is too vague and that it does not set forth a case of commerce among the States. Taking up the latter objection first, commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect [399] they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated. See *Norfolk & Western Ry.* v. *Sims*, 191 U. S. 441. But the sixth section of the bill charges an interference with such sales, a restraint of the parties by mutual contract and a combination not to compete in order to monopolize. It is immaterial if the section also embraces domestic transactions.

It should be added that the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500. But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it. The injunction against taking part in a combination, the effect of which will be a restraint of trade among the States by directing the defendants' agents to refrain from bidding against one another at the sales of live stock, is justified so far as the subject matter is concerned.

The injunction, however, refers not to trade among the States in cattle, concerning which there can be no question of original packages, but to trade in fresh meats, as the trade forbidden to be restrained, and it is objected that the trade in fresh meats described in the second and third sections of the bill is not commerce among the States, because the meat is sold at the slaughtering places, or when sold elsewhere may be sold in less than the original packages. But the allegations of the second section, even if they import a technical passing **[400]** of title at the slaughtering places, also import that the sales are to persons in other States, and that the shipments to other States are part of the transaction—"pursuant to such sales"—and the third section imports that the same things which are sent to agents are sold by them, and sufficiently indicates that some at least of the sales are of the original packages. Moreover, the sales are by persons in one State to persons in another. But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States. Nor do we mean to intimate that the statute under consideration is limited to that point. Beyond what we have said above, we leave those questions as we find them. They were touched upon in the *Northern Securities Company's Case*, 193 U. S. 197.

We are of opinion, further, that the charge in the sixth section is not too vague. The charge is not of a single agreement but of a course of conduct intended to be continued. Under the act it is the duty of the court, when applied to, to stop the conduct. The thing done and intended to be done is perfectly definite: with the purpose mentioned, directing the defendants' agents and inducing each other to refrain from competition in bids. The defendants cannot be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete. See *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211. The injunction follows the charge. No objection was made on the ground that it is not confined to the places specified in the

bill. It seems to us, however, that it ought to set forth more exactly the transactions in which such directions and agreements are forbidden. The trade in fresh meat referred to should be defined somewhat as it is in the bill, and the sales of stock should be confined to sales of stock at the stock yards named, which stock is sent from other States to the stock yards for sale or is bought at those yards for transport to another State.

[401] After what we have said, the seventh, eighth and ninth sections need no special remark, except that the cartage referred to in section nine is not an independent matter, such as was dealt in *Pennsylvania Railroad* v. *Knight*, 192 U. S. 21, but a part of the contemplated transit—cartage for delivery of the goods. The general words of the injunction "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid," should be stricken out. The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid. To the same end of definiteness so far as attainable, the words "as charged in the bill," should be inserted between "dealers in such meats," and "the effect of which rules," and two lines lower, as to charges for cartage, the same words should be inserted between "dealers and consumers" and "the effect of which."

The acts charged in the tenth section, apart from the combination and the intent, may, perhaps, not necessarily be unlawful, except for the adjective which proclaims them so. At least we may assume, for purposes of decision, that they are not unlawful. The defendants, severally, lawfully may obtain less than the regular rates for transportation if the circumstances are not substantially similar to those for which the regular rates are fixed. Act of Feb. 4, 1887, c. 104, § 2, 24 Stat. 379. It may be that the regular rates are fixed for carriage in cars furnished by the railroad companies, and that the defendants furnish their own cars and other necessi-

ties of transportation. We see nothing to hinder them from combining to that end. We agree, as we already have said, that such a combination may be unlawful as part of the general scheme set forth in the bill, and that this scheme as a whole might be enjoined. Whether this particular combination can be enjoined, as it is, apart from its connection with the other **[402]** elements, if entered into with the intent to monopolize, as alleged, is a more delicate question. The question is how it would stand if the tenth section were the whole bill. Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. The same distinction is recognized in cases like the present. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13; *Kidd* v. *Pearson*, 128 U. S. 1, 23, 24. We are of opinion, however, that such a combination is within the meaning of the statute. It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation. And even if the advantage is one which the act of 1887 permits, which is denied, perhaps inadequately, by the adjective "unlawful," still a combination to use it for the purpose prohibited by the act of 1890 justifies the adjective and takes the permission away.

It only remains to add that the foregoing question does not apply to the earlier sections, which charge direct restraints of trade within the decisions of the court, and that the criticism of the decree, as if it ran generally against combinations in restraint of trade or to monopolize trade, ceases to have any force when the clause against "any other method or device" is stricken out. So modified it restrains such combinations only to the extent of certain specified devices, which the defendants are alleged to have used and intend to continue to use.

Decree modified and affirmed.

[244] HARRIMAN *v.* NORTHERN SECURITIES COMPANY.[a]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 512. Argued March 1, 2, 1905.—Decided March 6, 1905.—Opinion delivered April 3, 1905.

[197 U. S., 244.]

After affirmance of the decree in the Northern Securities case, 193 U. S. 197, adjudging the combination illegal under the Anti-Trust Act, the corporation adopted a resolution reducing its capital stock and distributing the surplus of assets created by the reduction and consisting of shares of the Northern Pacific and Great Northern Railway Companies ratably among its stockholders. Complainants objected to the *pro rata* distribution and insisted that the Northern Pacific stock they had delivered to the Securities Company was not so delivered in pursuance of an absolute sale but to be held in trust; that they were entitled to have their stock returned to them; that the decree in the Government suit practically so adjudicated and that as they acted in good faith, believing that the original contract was not within the prohibitions of the Anti-Trust Act, the doctrine of *in pari delicto* did not apply.[b]

The Circuit Court granted a temporary injunction against *pro rata* distribution and the Circuit Court of Appeals reversed the order and practically disposed of the entire case adversely to complainants. This court granted a writ of certiorari. *Held*, that:

Where the decree of the Circuit Court of Appeals in an action in equity only reverses an order of the Circuit Court granting an injunction, but the court, the record presenting the whole case, practically disposes of the entire controversy on the merits, certiorari may issue from this court and this court may finally dispose of it by its direction to the Circuit Court.

The decree of the Circuit Court in the Northern Securities case, affirmed by this court, 193 U. S. 197, did not determine the quality of the transfer as between the defendants, and the provisions therein as to return of shares of stock transferred to it by the railway stockholders were permissive only, and not an adjudication that any of the vendors were entitled to a restitution of their original railway shares.

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[a] Circuit Court awarded a preliminary injunction restraining the Northern Securities Company from disposing of certain shares of the common stock of the Northern Pacific Railway Company (132 Fed., 464). See p. 587. Reversed by the Circuit Court of Appeals, Third Circuit (134 Fed., 331). See p. 618. Decree of C. C. A. affirmed by the Supreme Court (197 U. S., 244).

[b] Syllabus and abstracts of arguments and briefs copyrighted, 1905, by The Banks Law Publishing Co.

Syllabus.

The judgment of this court affirming the decree of the Circuit Court in the Northern Securities case went no further than the decree itself, and while it leaves the Circuit Court at liberty to proceed in the execution of its decree as circumstances may require, it does not operate to change the decree or import a power to do so not otherwise possessed.

General expressions in an opinion which are not essential to dispose of a case are not permitted to control the judgment in subsequent suits.

Nothing in the judgment or opinion of this court in the *Northern Securities* **[245]** *case*, 193 U. S. 197, enlarged the scope of the decree of the Circuit Court so as to make it an adjudication that any of the vendors of railway stocks were entitled to judicial restitution of the stocks transferred by them to the Securities Company, or that the Securtities Company could not distribute the shares of railway stock held by it *pro rata* between its own shareholders.

The transaction between complainants and the Northern Securities Company was one of purchase and sale of Northern Pacific Railway Company stock for shares of stock of the Securities Company and cash and not a bailment or trust.

When a vendor testifies that the transaction was an unconditional sale and that he attached to his negotiations no other conditions than that of price, he is estopped from afterwards denying that this is a statement of fact and claiming that he only swore to a conclusion of law.

Property delivered under an executed illegal contract cannot be recovered back by any party *in pari delicto*, and the courts cannot relax the rigor of this rule where the record discloses no special considerations of equity, justice or public policy.

The fact that the complainants in this case acted in good faith and without intention to violate the law does not exempt them from the doctrine of *in pari delicto*. All the parties having supposed the statute would not be held applicable to the transaction neither can plead ignorance of the law as against the other and the defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed.

Where a vendor after transferring shares of railway stock to a corporation in exchange for its shares becomes a director of the purchasing corporation and participates in acts consistent only with absolute ownership by it of the railway stocks, and does so after an action has been brought to declare the transaction illegal, his right to rescind the contract and compel restitution of his original railway shares, if it ever existed, is lost by acquiescence and laches.

The Northern Pacific system taken in connection with the Burlington system is competitive with the Union Pacific system, and, the entire record considered, to deliver to the complainants, the Northern Pacific stock claimed by them and distribute the balance of the stock ratably between the other Securities Company stockholders, would not only be inequitable but would tend to smother competition and thus contravene the object of the Sherman law and the purposes of the suit brought by the Government against the Northern Securities Company.

It was the duty of the Securities Company under the decree in the Government suit to end a situation which had been adjudged unlawful, and as this could be effected by sale and distribution in cash, or by distribution in kind, the company was justified in adopting the latter method and avoiding the forced sale of several hundred million dollars of stock which would have involved disastrous results.

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EDWARD H. HARRIMAN, Winslow S. Pierce, Oregon Short **[246]** Line Railroad Company and The Equitable Trust Company of New York exhibited their bill against the Northern Securities Company in the Circuit Court of the United States for the District of New Jersey, April 20, 1904, on which, with accompanying affidavits and exhibits, a restraining order was issued, pending an application for an injunction as prayed in the bill. April 26 an amended bill was filed, and the application for a preliminary injunction was heard May 20, 21 and 23 by Bradford, J., holding the Circuit Court.

On the fourth day of June a second amended bill was filed, and on July 15, 1904, Judge Bradford delivered an opinion sustaining the application. 132 Fed. Rep. 464.

The order for injunction was entered August 18, 1904, and an appeal therefrom was prosecuted to the Circuit Court of Appeals for the Third Circuit, which, on January 3, 1905, reversed the order. 134 Fed. Rep. 331.

Thereupon complainants applied to this court for the writ of certiorari, which was granted January 30, and the matter advanced for hearing, and heard March 1 and 2. The affirmance of the decree of the Circuit Court of Appeals was announced March 6, it being added that an opinion would be filed afterwards.

The Northern Pacific Railway Company was the successor through reorganization of the Northern Pacific Railroad Company, and by its charter it was provided that its capital stock might be increased from time to time by a vote of a majority of the stockholders, and that the company might, by a like vote, classify its stock into common and preferred, and might "make such preferred stock convertible into com-

mon stock upon such terms and conditions as may be fixed by the board of directors." On July 1, 1896, by the unanimous vote of its then stockholders, the capital stock was increased to one hundred and fifty-five million dollars, divided into eighty millions of common stock and seventy-five millions of preferred stock, and it was resolved "that such preferred stock shall be issued upon the condition that at its option the com- [247] pany may retire the same, in whole or in part, at par, from time to time, on any first day of January prior to 1917." The plan of reorganization which was adopted provided that as to the new company which it was contemplated should acquire the properties and franchises of the Northern Pacific Railroad Company, and the issue of preferred stock by it, "the right will be reserved by the new company to retire this stock, in whole or in part, at par, from time to time, upon any first day of January during the next twenty years."

All the certificates of stock, whether common or preferred, at that time or subsequently issued, contained this clause: "The company shall have the right at its option, and in such manner as it shall determine, to retire the preferred stock, in whole or in part, at par, from time to time, upon any first day of January prior to 1917."

The reorganization had been managed by J. P. Morgan & Co., and the directory of the Northern Pacific Railway Company were friendly to that firm. During the same period the president of the Great Northern Railway Company was James J. Hill, and its directors were friendly to him.

The two companies were friendly to each other, and in April, 1901, acquired the shares of the Chicago, Burlington and Quincy Railroad Company.

At this time the Union Pacific Railway system included the Union Pacific Railway, the railroad of the Oregon Short Line Railroad Company, and the railroad of the Oregon Railroad and Navigation Company. The Union Pacific Company was practically the owner of the entire capital stock of the Oregon Short Line Railroad Company, and the latter company was the owner of practically the entire capital stock of the Oregon Railway and Navigation Company. The interests in control of the Union Pacific system might

properly be called the Harriman interests. Shortly thereafter, at the instance of the Union Pacific Railway Company and with money furnished by that company, the Oregon Short Line Company purchased Northern Pacific preferred stock to the amount of $41,085,000, [248] and common stock to the amount of $37,023,000, aggregating $78,100,000 of stock, being a majority of the $155,000,000, total capital stock of the Northern Pacific Company as then outstanding. But the preferred stock was subject to retirement at par at the option of the company, and the 370,230 shares of common stock was less than a majority of the total common stock, which majority was held by the Morgan-Hill party.

In October, 1901, complainant Harriman was elected a member of the board of directors of the Northern Pacific Railway Company and James Stillman was reëlected. They were also directors of the Union Pacific Railway Company. They both attended a meeting of the Northern Pacific board on November 13, 1901, and Harriman was chosen a member of the executive committee. At this meeting resolutions were adopted providing for and resulting in the retirement of the preferred stock on January 1, 1902, by the payment of $100 cash for each and every share to each and every holder of record on that day.

These resolutions declared that the company thereby determined to exercise its right to retire the preferred stock; provided that for the purpose of raising the funds necessary to do so, the company should issue its negotiable bonds for $75,000,000, convertible at par into shares of the common stock of the company at par; authorized the making of a contract for the sale of all of such bonds at par and accrued interest, the contract to contain a provision giving to the holder of every share of the common stock the opportunity to receive from the contract purchaser, at par and interest, such bonds to an amount equal to seventy-five eightieths of the par amount of said common stock at such time owned by such holder, and arranged for the retirement from and after December 31, 1901, of the $75,000,000 preferred stock, by the payment to each and every holder of record thereof on January 1, 1902, of $100 cash for each and every share.

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On November 15, the executive committee of the Northern [249] Pacific Company authorized the execution of a contract with the Standard Trust Company of New York for the sale and delivery of the convertible certificates for $75,000,000 provided for in the resolutions.

The preferred stock was subsequently taken up in accordance with the plan resolved upon.

The Northern Securities Company was incorporated under the laws of New Jersey in November, 1901, its articles of association having been filed at Trenton on the thirteenth day of that month, with a capital stock of $400,000,000, divided into 4,000,000 shares of the par value of $100 each, and its objects being certified to be:

"(1.) To acquire by purchase, subscription or otherwise, and to hold as investments any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, Territory or country.

"(2.) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

"(3.) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

"(4.) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve or en- [250] hance the value of any such bonds or other securities or evidences of indebtedness or stock.

"(5.) To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

"The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

"The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage and convey real and personal property out of this State."

On the fourteenth day of November, 1901, fifteen gentlemen, including complainant Harriman and two other directors of the Union Pacific, James J. Hill, president of the Great Northern, and two members of J. P. Morgan & Co., were elected directors of the Northern Securities Company. Complainant Harriman took his seat at the board and an

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executive committee of five was elected, of which he was one.

November 15 resolutions were passed authorizing the purchase of the Northern Pacific stock held by Harriman and Pierce, as follows:

"The president stated that he now had an opportunity of acquiring $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock, of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable, as to $82,491,871, in the fully paid-up and non-assessable shares of this company at par, and, as to the remaining $8,915,629, in cash.

"On motion, and by affirmative vote of all the directors present, it was—

"*Resolved*, That the president be, and hereby he is, authorized in behalf of this company, to purchase said stock—namely $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, [251] payable as to $82,491,871 thereof in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to $8,915,629 in cash; and that the officers of this company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company.

"*Resolved*, That the president be, and hereby he is, authorized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of four per cent per annum, on the sum receivable for such preferred stock.

"*Resolved*, That the president be, and hereby he is, authorized in behalf of this company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the board of directors of the Northern Pacific Railway Company, passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company.

"*Resolved*, That the president be, and hereby he is, authorized, in case of the purchase by this company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

"*Resolved*, That the president be, and hereby he is, authorized to borrow, on such terms as he may arrange, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, [252] and to do all acts and things, which he may deem needful in the premises."

Complainant Harriman and his co-directors of the Union Pacific were not present at this meeting, but were present at the next meeting of the board on November 19, at which the minutes of the meeting of November 15 were read and on motion were approved.

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At a subsequent meeting of the executive committee, in which Mr. Harriman participated, the form of the company's permanent stock certificate, being the usual form, was unanimously approved.

In the meantime, and on November 18, Harriman and Pierce had delivered their Northern Pacific stock to the Northern Securities Company and that company had delivered to them the 824,000 shares of its stock and $8,915,629 in cash.

The Northern Pacific stock certificates received from Harriman and Pierce were surrendered by the Securities Company to the Northern Pacific Railway Company. The certificates for the 370,230 shares of common stock were exchanged for 370,230 shares of common stock issued in the name of the Northern Securities Company. The certificates for the 410,580 shares of preferred stock were surrendered to the Northern Pacific Railway Company for retirement, and paid for and retired as provided, the transaction resulting in the receipt by the Northern Securities Company of certificates for 347,090 shares of new common stock. This made 717,320 shares, and the Securities Company also acquired 820,270 shares, from a large number of separate individual owners. And from a large number of stockholders of the Great Northern 1,181,242 shares of the stock of the latter company.

At a meeting of the board of directors of the Northern Securities Company on January 22, 1903, at which complainant Harriman was present, the sale by the company of 75,000 shares of its own stock for cash was approved. The second amended bill says $7,522,000 "was issued for cash used for the purchase of other property and for corporate purposes."

[253] From the organization of the Securities Company until the affirmance of the decree in the Government suit, hereafter mentioned, complainants continued to exercise the right of holders of 824,000 shares of stock in the Securities Company; received their share of dividends, and gave their proxy to vote at the annual meetings of 1902 and 1903.

July 17, 1902, Harriman and Pierce and the Oregon Short Line Company pledged the 824,000 shares of Northern Securities Company stock to the Equitable Trust Company,

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the Short Line Company executing a trust indenture, which contained this clause:

"The deposit and pledge hereunder of said shares of stock, or of any other securities which shall become subject to this indenture, shall not prevent the consolidation, union or merger with any other corporation of the Securities Company, or of any other corporation by which said securities shall have been issued, or the sale of its property or the distribution of its assets. In any such case the trustees shall receive such amounts of stock, bonds or other securities, or money, or of either or all of them, as the holders of the pledged shares of stock of the Securities Company or other pledged securities, as the case may be, shall be entitled to receive and upon receipt thereof shall surrender the deposited stock certificates or other securities."

March 10, 1902, a bill was exhibited in the Circuit Court of the United States for the District of Minnesota by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, to restrain the violation of the act of Congress of July 2, 1890, 26 Stat. 209, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which resulted April 9, 1903, in a decision in favor of complainants, 120 Fed. Rep. 721, and a decree as follows:

"That the defendants above named have heretofore entered **[254]** into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employés, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election

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for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or [255] any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which the said Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

The case was brought to this court, and March 14, 1904, the decree was affirmed. 193 U. S. 197.

March 22, 1904, the board of directors of the Northern Securities Company adopted the following preamble and resolutions:

"Whereas, In the course of its business, this company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

"Whereas, In a suit brought by the United States against this company, the said railway companies and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company; and

"Whereas, This company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

[256] "Whereas, This company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay:

"*Resolved*, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

"*Resolved*, That the board of directors of this company hereby declares it advisable that article (Fourth) of this company's certificate of incorporation be amended, so as to read as follows:

"Fourth. The capital stock of this company is hereby reduced to three million nine hundred and fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of

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outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the shares held by him.

"Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

"The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof and all matters pertaining to the surrender and retirement [257] of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

"*Resolved*, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this company and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice was accordingly given that the meeting of the stockholders would be held on April 21, and a copy of the resolutions and an explanatory letter were sent to the Attorney General of the United States. Early in April the three principal complainants in the present suit presented to the Circuit Court for the District of Minnesota their petition for leave to intervene in the suit of the United States against the Northern Securities Company, setting up substantially the same grounds as in this suit, and seeking similar relief. This application was heard at St. Paul, April 12 and 13. The Government appeared by the Attorney General, and filed a declaration that it was satisfied with the relief granted. April 19, 1904, the court rendered its decision, denying leave to intervene. 128 Fed. Rep. 808.

Up to April 18, 1904, the Securities Company had issued 86,945 certificates of stock and there had been 16,000 transfers registered on the books of the company. At the closing of the transfer books on that day there were 3,953,971 shares of stock outstanding in the hands of 2,531 separate holders.

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[258] The meeting of the stockholders of the Northern Securities Company was duly held April 21, 1904; and at that meeting the stock of the company was reduced ninety-nine per centum, and the proposed pro rata distribution of the stock of the Northern Pacific Railway Company and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Northern Securities Company, was assented to. Two million nine hundred and forty-four thousand seven hundred and forty shares were represented and all voted for the plan adopted by the directors.

As has been stated, the second amended bill was filed after the hearing on the application for the preliminary injunction, and it was therein alleged, among other things, that the Northern Securities Company was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several States; that the said company was to "acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns."

"That prior to the incorporation of said Northern Securities Company your orator Oregon Short Line Railroad Company, had acquired and at the time of the incorporation and organization of said Securities Company owned $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the defendant Northern Pacific Railway Company represented by certificates issued to and registered in the name of your orators Harriman and Pierce; and that after [259] the incorporation of the said Northern Securities Company had been resolved upon as

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aforesaid, your orators Harriman, Pierce and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by said Oregon Short Line Railroad Company as aforesaid, and to receive in exchange therefor certificates of said Northern Securities Company representing an interest therein of $82,491,871 par value and $8,915,629 in cash, and in pursuance of said agreement your orators Harriman and Pierce, acting for your orator Oregon Short Line Railroad Company did, on or about the eighteenth day of November, 1901, transfer and deliver to said Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid and received in exchange therefor certificates of said Northern Securities Company representing an interest in $82,491,871 par value and said cash. * * *

"That at the time of such exchange, on said eighteenth of November, 1901, it was agreed between said Harriman and Pierce and said defendant Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for $34,709,062 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of the certificates for said preferred stock; that said Northern Securities Company [260] caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for

said common stock so originally received from your orators Harriman and Pierce and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid."

"Your orators are advised by counsel and, therefore, aver that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner but simply a custodian of the shares of stock of said railway company acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said anti-trust act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns."

The prayer of the bill was "that it be decreed that said proposed plan of distribution is illegal and contrary to law and in violation of the rights and equities of your orators, and that the complainants are entitled to the return and transfer to them by the defendant Northern Securities Company of the shares of common stock of said Northern Pacific Railway Company which were so delivered by said Harriman and Pierce and the shares of common stock into which the preferred stock of the Northern Pacific Railway Company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by your orators and such sum in cash as may be just; and that the said defendant, Northern Securities Company, its directors, officers and agents, may be ordered and directed to endorse **[261]** the certificates now held by it for said stock of the Northern Pacific Railway Company to your said orator Oregon Short Line Railroad Company or in blank, and deliver the same to your orator The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by it to be held subject to its rights and lien as trustee aforesaid; and that the defendant Northern Securities Company, its directors, officers, agents and employés be perpetually enjoined and

restrained from in any manner parting with, disposing of, transferring, assigning or distributing any part of said stock of the Northern Pacific Railway Company so received from your orators Harriman and Pierce as aforesaid, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to your orators in exchange for its own stock so issued as aforesaid and said cash; and that your orators have such other or further or general relief against said Northern Securities Company as shall be proper and just under the circumstances of the case.

"Your orators further pray that the defendant Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing said stock of the Northern Pacific Railway Company or any part thereof during the pendency of this suit or any certificates now representing the same."

The proofs embraced the pleadings and decrees in the suit of *United States* v. *Northern Securities Company;* the *ex parte* affidavits of Harriman, Hill, and others; the deposition of Harriman taken before the Interstate Commerce Commission at Chicago in January, 1902; the deposition of Harriman taken in the suit of *Minnesota* v. *Northern Securities Company* in December, 1902; extracts from the minutes of proceedings of the board of directors of the Northern Pacific Railway Company, and of the executive committee and board of directors of the Northern Securities Company.

[262] *Mr. William D. Guthrie*, with whom *Mr. D. T. Watson*, *Mr. R. S. Lovett*, *Mr. Maxwell Evarts*, *Mr. John F. Dillon*, *Mr. R. V. Lindabury* and *Mr. Bainbridge Colby* were on the brief, for petitioners:

As to the power of the court to enter final judgment; this case does not fall under *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, but under the exceptions in *Mast, Foos Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 494, and see *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 63.

The Northern Securities Company, having been organized for an illegal purpose and having obtained possession of the

railway stocks in pursuance of such purpose, could not thereby acquire the title to and ownership of the stocks.

The whole transaction was illegal, *ultra vires* and void from the beginning to the end. It was, legally speaking, a nullity—"an aggregate of nothings." *Scovill* v. *Thayer*, 105 U. S. 150; *Ashbury Ry. Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Oregon Ry. Co.* v. *Oregonian Ry. Co.*, 130 U. S. 1, 22; *Penna. Co.* v. *St. L., A. &c. R. R. Co.*, 118 U. S. 290.

The contract is void; the objection is not only that the corporation ought not to have made it, but that it could not make it, that the contract cannot be ratified or confirmed by the stockholders, because it could not have been authorized by them, and that no performance can give the unlawful agreement any validity by way of estoppel or otherwise, or be the foundation of any right. *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60; *McCormick* v. *Market Bank*, 165 U. S. 538, 550; *California Bank* v. *Kennedy*, 167 U. S. 362, 368; *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138. In fact any contract made in violation of a statute is void, *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 410; *Miller* v. *Ammon*, 145 U. S. 421, 426; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 548, and it is vain to contend that any right can be acquired under such a contract. *Montgomery* v. *United States*, 15 Wall. 395, 399; *Desmare* v. *United States*, 93 U. S. [263] 605, 612; *Sprott* v. *United States*, 20 Wall. 459, 461; *United States* v. *Lapène*, 17 Wall. 601, 602, 603; *United States* v. *Grossmayer*, 9 Wall. 72, 76; *The Ouachita Cotton*, 6 Wall. 521, 532; and cases cited in *Bank of the United States* v. *Owens*, 2 Pet. 527, 541.

Where the purpose and consideration of a contract have failed by reason of illegality resulting in corporate disability to perform, the vendor may rescind and is entitled to restitution of his title. *Chapman* v. *Douglas County*, 107 U. S. 348; *Am. Table Works* v. *Boston Machine Co.*, 139 Massachusetts, 5. When property is transferred for an illegal purpose which has been terminated, prevented or abandoned, the holder must return the property on demand. *Louisiana* v. *Wood*, 102 U. S. 294; *Parkersburg* v. *Brown*, 106 U. S. 487, 503. To deny a remedy to reclaim it, is to give effect to

the illegal contract. *Davis* v. *Old Colony Railroad*, 131 Massachusetts, 258, 275; *White* v. *Franklin Bank*, 22 Pick. (Mass.) 181; *La Caussade* v. *White*, 7 D. & E. 535; *Nat. Bank & Loan Co.* v. *Petrie*, 189 U. S. 423; *Sittel* v. *Wright*, 122 Fed. Rep. 434; *Railroad Co.* v. *Railroad Co.*, 66 N. H. 100. The contract having been declared invalid no rights were acquired thereunder. Cases *supra* and *Jacksonville &c. Ry. Co.* v. *Hooper*, 160 U. S. 514, 524; *Dwight* v. *Brewster*, 1 Pick. 50, 55. As to invalidity of contracts entered into in violation of statutes see *Langdon* v. *Branch*, 37 Fed. Rep. 449, 463; *State* v. *Standard Oil Co.*, 49 Ohio St. 137, 183; *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268; *People* v. *N. R. S. R. Co.*, 121 N. Y. 582; *Cameron* v. *Havemeyer*, 25 Abb. N. C. 438, 446; *Unckles* v. *Colgate*, 148 N. Y. 529; *State* v. *Distilling Co.*, 29 Nebraska, 700.

The question of ownership of stock was involved and decided in the Government suit. 193 U. S. 197, 227; 307, 325, 353, 362. The decree authorized the *return* of the stock, and as it also decided that the combination was illegal it is vain to contend that any rights were acquired under the contract. *Montgomery* v. *United States*, 15 Wall. 395.

The extent and effect of the decision of any court, as *res* [264] *adjudicata* or as a judicial precedent, must be ascertained, not merely from the decree or mandate, but also from the pleadings and the opinions delivered by the court. It is likewise proper to refer to the evidence before the court and to the arguments of counsel whenever necessary in order to determine exactly what points the court has ruled upon. The court is always at liberty to refer to its own records. *Dimmick* v. *Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Butler* v. *Eaton*, 141 U. S. 240. Every question directly presented by the issues and discussed and passed upon in the opinions is as much a part of the decision and judgment of the court as if it had been expressly recited in its decree or mandate. So, the mandate of this court is always to be read in the light of its opinion, and it has never been the practice to recite in the mandate any of the points decided, but simply to declare the ultimate conclusion of affirmance, reversal, dismissal or qualification of the decree below. *Last Chance Min. Co.* v.

Tyler Min. Co., 157 U. S. 683, 690; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256; *In re Potts*, 166 U. S. 263; *Baker* v. *Cummings*, 181 U. S. 117, 126; *Nat. Foundry &c. Co.* v. *Oconto Water Supply Co.*, 183 U. S. 216, 234; *Northern Securities Co.* v. *United States*, 193 U. S. 332; *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143.

As stockholders, the complainants were clearly not strangers to a litigation which involved the right of the corporation to carry out the objects for which it was organized and which affected the title to all its property, received from them. As depositors, they were represented by their custodian, agent or trustee as to its right to hold and the legality of its custodianship. All identified in interest and in privity with one of the litigating parties are concluded by a judgment and entitled to invoke its effect. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396. Even if the decision in the Government suit does not constitute *res adjudicata* in the strict technical sense, it undoubtedly should have been regarded as a controlling judi- **[265]** cial precedent on the same facts sufficient to establish *prima facie* all that the complainants were called upon to show on the motion for a preliminary injunction. *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 59–63; *American Bell Telephone Co.* v. *National Imp. Telephone Co.*, 27 Fed. Rep. 663, 664; *Kerr* v. *New Orleans*, 126 Fed. Rep. 920, 924.

A stockholder is so far an integral part of the corporation that he is considered privy to any legal proceedings touching its status and powers. *Sanger* v. *Upton*, 91 U. S. 56. See also, *Hawkins* v. *Glenn*, 131 U. S. 319, 329; *Glenn* v. *Liggett*, 135 U. S. 533, 444; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 337; 3 Cook on Corporations, 5th ed. § 750; Herman on Estoppel and Res Judicata, 154, 165; *Hale* v. *Hardon*, 95 Fed. Rep. 747, 759; *Hendrickson* v. *Bradley*, 85 Fed. Rep. 508, 516; *Wilson* v. *Seymour*, 76 Fed. Rep. 678, 681; *National Foundry & Pipe Works* v. *Oconto Water Co.*, 68 Fed. Rep. 1006; *Secor* v. *Singleton*, 41 Fed. Rep. 725. As the Securities Company was the custodian or trustee of the railway shares deposited with it, it represented the complainants as its *cestui que trustent* and they are bound by

the decree. *Kerrison* v. *Stewart*, 93 U. S. 155, 160; *Graham* v. *Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161, 179; *McCampbell* v. *Mason*, 151 Illinois, 500, 508; *McElrath* v. *Pittsburg and Steubenville Railroad Co.*, 68 Pa. St. 37, 40, 41.

In the Government suit certain stockholders of different railroad companies were made defendants as of their respective classes. The judgment therefore bound the whole. *Smith* v. *Swormstedt*, 16 How. 288, 303.

The court below was in error in holding that the form and not the legal effect of the transaction was controlling.

The assertion of a legal conclusion under such circumstances never operates to estop a party from showing the real facts. *Sturm* v. *Boker*, 150 U. S. 312, 336; *Mutual Life Ins. Co.* v. *Phinney*, 178 U. S. 327, 342; *Towle* v. *White*, 29 L. T. N. S. 78; *Heryford* v. *Davis*, 102 U. S. 235, 243, 244, 246; *Chicago Railway Co.* v. *Merchants' Bank*, 136 U. S. 268, 280; *McGourkey* **[266]** v. *Toledo & Ohio Railway*, 146 U. S. 536, 569; *McNamara* v. *Culver*, 22 Kansas, 661, 668; *Pugh* v. *Davis*, 96 U. S. 332, 336.

The bill and proofs in the Government suit were all to effect that the Northern Securities Company was organized to effectuate an illegal *holding* corporation.

In the case of an illegal trust and combination entered into and adjudged to be in violation of an act of Congress, particularly where, at the very inception of any such scheme, its legality is at once publicly challenged by the National Government, justice and sound public policy will be promoted by decreeing the restoration of the *status quo*, and not permitting distribution on the basis of alleged rights acquired under and by virtue of the illegal contract and in disregard and defiance of the pending litigation.

If Mr. Hill and his associates are to be judged as other men are judged and are to be presumed to have contemplated and intended the consequences of their own acts, there can be no escape for them from the conclusion that the present proposed plan of distribution is a willful and deliberate attempt to circumvent the decree in the Government suit, and was, in fact, all along, the alternative intended as part of their original unlawful scheme.

The Circuit Court in Minnesota did not intend to pass upon or to prejudice or prejudge the merits of a controversy which it declined to consider or decide.

There has been no equitable estoppel created for the benefit of the Northern Securities Company by what the company did or continued to do during the pendency of the Government suit and in defiance of the serious claim therein made, either as to sale of stock, all of the purchasers having notice of the situation, or by the receipt of dividends on the Northern Securities stock by the complainants. *L. & N. Railroad Co.* v. *Kentucky*, 161 U. S. 677, 691; *Scoville* v. *Thayer*, 105 U. S. 143, 151; *Central Transportation Co.* v. *Pullman Car Co.*, 139 U. S. 24, 60; *Tieton* v. *Cofield*, 93 U. S. 163. Illegal acts cannot be given validity by assenting to them or acting under **[267]** them. If so, a statute could be abrogated by simply contracting to do the prohibited act. Cases *supra* and *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86; *Veeder* v. *Mudgett*, 95 N. Y. 295, 310.

The Northern Securities Company claims that because it now holds possession by virtue of an illegal contract between parties *in pari delicto*, the complainants and all other depositors can be allowed no standing in any court of law or equity to reclaim their property. This contention cannot be sustained. Its result obviously would be that the company might dispose of and distribute at will all the property it held without legal accountability to any one. *Yarmouth* v. *France*, 19 Q. B. D. 647, 653; *Northrup* v. *Graves*, 19 Connecticut, 548, 554; 2 Stephen Cr. Law, 4; *McMullen* v. *Hoffman*, 174 U. S. 639, 669. Complainants acted in good faith and belief that the Northern Securities Company was not an illegal combination. As to what Congress itself contemplated by the statute is uncertain. See Cong. Rec., 51st Cong., 1st Sess., vol. 21, Pt. 3, pp. 2460, 3146, 4089.

Where the illegal purpose cannot be continued and must necessarily be abandoned, the innocent owner of property transferred does not forfeit his legal rights so that he has become outlawed, and cannot maintain an action to recover his property, and the other party may retain the property free from accountability and convert it to his own use or dispose of it as he sees fit, and the one in possession is protected in appropriating the property by a maxim of equity. *Nat. Bank & Loan Co.* v. *Petrie*, 189 U. S. 423.

The rule as to parties *in pari delicto* contemplates the existence of a *delictum*, that is, a wrongful act knowingly done, an intentional "transgression against positive law." Parties are not *in pari delicto* when there is concededly no intentional wrongdoing or crime. Even in criminal cases, satisfactory proof of a mistake of the law, honestly held in consequence of a reasonable, but erroneous, construction of a doubtful statute, often operates to prevent a conviction. *Queen* v. **[268]** *Tolson*, 23 Q. B. D. 168, 171; *Taylor* v. *Newman*, 4 Best & S. 89; *Regina* v. *Allday*, 8 C. & P. 136; *Rex* v. *Twose*, 14 Cox C. C. 327; *Reg.* v. *Sleep*, 8 Cox C. C. 472; *Regina* v. *Tinkler*, 1 F. & F. 513; *Rider* v. *Wood*, 2 E. & E. 338; *Buckmaster* v. *Reynolds*, 13 C. B. (N. S.) 62; *United States* v. *Conner*, 3 McLean, 573; *United States* v. *Pearce*, 2 McLean, 14; *Halsted* v. *State*, 41 N. J. L. 552, 591; *Cutter* v. *State*, 36 N. J. L. 125; *Stone* v. *United States*, 167 U. S. 178, 188; *Hedden* v. *Iselin*, 31 Fed. Rep. 266; *Iowa* v. *Sheeley*, 15 Iowa, 404; *Commonwealth* v. *Bradford*, 9 Metc. (Mass.) 268; *State* v. *Hause*, 71 N. Car. 518; *Dotson* v. *State*, 6 Coldw. (Tenn.) 545.

As to whether the rule applicable to parties *in pari delicto* applies where the parties have acted in good faith and under a mutual mistake as to the law, see *Spring Co.* v. *Knowlton*, 103 U. S. 49; *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393; *City of Detroit* v. *Detroit City Ry. Co.*, 60 Fed. Rep. 161, and *Pullman Palace Car Co.* v. *Central Transp. Co.*, 65 Fed. Rep. 158.

Relief will be granted from the consequences of a mistake of law, whenever the mistake is clearly proved or *admitted* and, by reason of such mistake, the party against whom relief is sought would otherwise secure an unfair advantage. *Moses* v. *Macferlan*, 2 Burrows, 1005, 1012; *Farmer* v. *Arundel*, 2 W. Bl. 824; *Bingham* v. *Bingham*, 1 Ves. Sen. 126; Belt's Supp. 79; *Bize* v. *Dickason*, 1 D. & E. 285; *Earl of Beauchamp* v. *Winn*, L. R. 6 H. L. 223; *Re Saxon Life Assurance Society*, 2 J. & H. 408; *Jones* v. *Clifford*, L. R. 3 Ch. D. 779; *Allcard* v. *Walker* [1896], 2 Ch. 369, 381;

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Griswold v. *Hazard*, 141 U. S. 260, 284; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 60; *Snell* v. *Insurance Co.*, 98 U. S. 85; *Hunt* v. *Rousmanier*, 8 Wheat. 174, 215; *S. C.*, 1 Pet. 1, 17; *State* v. *Paup*, 13 Arkansas, 129, 138; *Griffith* v. *Sabastian County*, 49 Arkansas, 24, 34; *Northrop* v. *Graves*, 19 Connecticut, 548, 554; *Stedwell* v. *Anderson*, 21 Connecticut, 139, 144; *Culbreath* v. *Culbreath*, 7 Georgia, 64; *Underwood* v. *Brockman*, 4 Dana (Ky.), 309, 317; *Ray & Thornton* v. *Bank*, 3 B. Mon. (Ky.) 510; *Stockbridge Iron Com-* **[269]** *pany* v. *Hudson Iron Company*, 102 Massachusetts, 45; *Lowndes* v. *Chisholm*, 2 McCord Ch. (S. C.) 455; *Mortimer* v. *Pritchard*, Bailey Eq. (S. C.) 505; *Hopkins* v. *Mazyck*, 1 Hill Ch. (S. C.) 242; 250; *MacKay* v. *Smith*, 27 Washington, 442.

When an illegal contract is sought to be specifically enforced or when damages are claimed for its breach, undoubtedly the sound rule is that the difference between *malum prohibitum* and *malum in se* is immaterial. *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 412.

But the distinction between *malum prohibitum* and *malum in se* has been often recognized by the courts when considering the right to recover property transferred under an illegal contract, upon disaffirmance or termination of the illegal transaction, under circumstances which result in a failure of consideration. Where the transaction involves moral turpitude, such as the giving of a bribe, or facilitating the commission of an immoral act or a heinous crime, the party is so clearly culpable and deserving of punishment that the courts will refuse to lend him any assistance against another party to the immoral transaction, but will leave both parties where their own immoral conduct has placed them. Where, however, the act involves no moral turpitude, but is merely *malum prohibitum* as distinguished from *malum in se*, relief has often been granted by restoring the *status quo* so far as practicable. *Pratt* v. *Short*, 79 N. Y. 437, 445. For distinction between *malum prohibitum* and *malum in se* see *Stock Yards* v. *Railroad Co.*, 196 U. S. 217; *Spring Co.* v. *Knowlton*, 103 U. S. 49; *McCutcheon* v. *Merz Co.*, 71 Fed. Rep. 787, 789; *Parkersburg* v. *Brown*, 106 U. S. 487; *Bank* v. *Townsend*, 139 U. S. 67, 75.

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In this case the transaction was not *malum in se* all the parties believed they were not violating the law. The transaction was not forbidden by the common law. *In re Greene*, 52 Fed. Rep. 104, 111; *Mogul Steamship Company* v. *McGregor, Gow & Co.*, 23 Q. B. D. 598, 619, 626; [1892] A. C. 25; *United States* v. *Freight Association*, 166 U. S. 290, 334; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 572. It was **[270]** also apparently legal according to the law of New Jersey where it occurred. New Jersey Corporation Act, revision of 1896, §§ 49, 51; Dill. on Corp. 88, 93; *Trenton Potteries Co.* v. *Oliphant*, 58 N. J. Eq. 507, 524; *Ansboro* v. *United States*, 159 U. S. 695. The transaction was at most *malum prohibitum*. *Tappenden* v. *Randall*, 2 B. & P. 467, 470; *Ex parte Bulmer*, 13 Vesey, 313; *White* v. *Franklin Bank*, 22 Pick. (Mass.) 181; *Lowell* v. *Boston and Lowell Railroad Corporation*, 23 Pick. (Mass.) 24, 32; *Washington Gas Co.* v. *Dist. of Columbia*, 161 U. S. 316, 327; *Hanauer* v. *Doane*, 12 Wall. 342; *Douglass* v. *Kavanaugh*, 90 Fed. Rep. 373.

Where money or property has been deposited with a trustee or stakeholder the doctrine of *in pari delicto* does not apply. A mere custodian as was the Securities Company cannot take advantage of the illegality of the transaction but must return the property to the owners. *Brooks* v. *Martin*, 2 Wall. 70, 80; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 500; *Block* v. *Darling*, 140 U. S. 234; *Pointer* v. *Smith*, 7 Heisk. (Tenn.) 137, 144; *Railroad* v. *Railroad*, 66 N. H. 100, 131; *Newbold* v. *Sims*, 2 S. & R. (Pa.) 317; *Jeffrey* v. *Ficklin and Bennett*, 3 Arkansas, 227, 236; *Barrett* v. *Neil*, Wright (Ohio), 472; *Skinner* v. *Henderson*, 10 Missouri, 205; *Walker* v. *Chapman, Lofft*, 342; *Wassermann* v. *Sloss*, 117 California, 425; *Morgan* v. *Groff*, 4 Barb. (N. Y.) 524; *Barnard* v. *Taylor*, 23 Oregon, 416, 422; *S. C.*, 18 L. R. A. 859; *Kiewert* v. *Rindskopf*, 46 Wisconsin, 481; *Douville* v. *Merrick*, 25 Wisconsin, 688; *Bone* v. *Ekless*, 5 H. & N. 925; *Wright* v. *Stewart*, 130 Fed. Rep. 905, 921; *Dauler* v. *Hartley*, 178 Pa. St. 23; *Mallory* v. *Oil Works*, 86 Tennessee, 598, 606; *Dwight* v. *Brewster*, 1 Pick. (Mass.) 50, 55; *Sampson* v. *Shaw, Executor*, 101 Massachusetts, 145, 151; *Morgan* v. *Beaumont*, 121 Massachusetts, 7; *Clarke, Harrison & Company* v. *Brown*, 77 Georgia,

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606; *Shannon* v. *Baumer*, 10 Iowa, 210; *Taylor* v. *Bowers*, 1 Q. B. D. 291; *In re Cronmire, ex parte Waud* [1898], 2 Q. B. 383; *Kinsman* v. *Parkhurst*, 18 How. 289.

The contention of the Northern Securities Company that the illegal contract had been executed, and that this precluded **[271]** any relief to the complainants, is fallacious and cannot be sustained. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 357.

A universally recognized exception to the rule concerning parties *in pari delicto* is that the courts will permit the recovery of property delivered and held under an illegal contract which has been terminated *in fieri*, when the public interests will be advanced thereby. *Starke's Exrs.* v. *Littlepage*, 4 Rand. (Va.) 368; *O'Conner* v. *Ward*, 60 Mississippi, 1025, 1037; 5 Thompson on Corp. § 6410; 2 Pomeroy's Eq. § 941; Story's Eq. Jur. § 298.

These complainants can follow the common Northern Pacific stock obtained by the Northern Securities Company by the conversion of the preferred stock. Where specific property belonging to another is changed by a custodian, bailee, trustee or agent into other property or funds, the original owner is entitled to follow it as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail. *National Bank* v. *Insurance Co.*, 104 U. S. 54, 68. See also *Silsbury* v. *McCoon*, 3 N. Y. 379, 390; *McLarren* v. *Brewer*, 51 Maine, 402, 404.

The real nature of the transaction was not changed by the conversion of stock. It was not an independent subscription for bonds.

The issue of the convertible certificates, the retirement of the preferred stock, and the conversion of the convertible certificates into common stock, are shown to have taken place all on the same day as part of one transaction and the securities are traceable. This was the only way it could be done under the laws of Wisconsin and the corporate powers of the Northern Pacific Railway Company. *Weidenfeld* v. *Northern Pacific Ry. Co.*, 129 Fed. Rep. 305; Laws Wisconsin, 1895, ch. 244, § 10; *Scovill* v. *Thayer*, 105 U. S. 143; *Hamor* v. *Taylor-Rice Engineering Co.*, 84 Fed. Rep. 392; *Trevor* v. *Whitworth*, L. R. 12 App. Cas. 409, 416.

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There is no merit in the fierce attack made on behalf of the **[272]** Securities Company upon the motives of the complainants in instituting this suit and the announcement that if complainants prevailed and recovered their property, the so-called Union Pacific Railroad System would secure control of the Northern Pacific Railway Company nor should this consideration influence the court, change the rules of law, and produce a different result than if this feature did not exist

This court will not consider the motives of parties in instituting legal proceedings to protect their alleged legal or equitable rights. *Dickerman* v. *Trust Co.*, 176 U. S. 181, 190; *South Dakota* v. *North Carolina*, 192 U. S. 286, 311. There is an uncontradicted statement in the record that the roads are not parallel and competitive. And see also *Louisville and Nashville* v. *Kentucky*, 161 U. S. 677, 698. The real competitive lines are the Great Northern and the Northern Pacific and it has been the motive of those in control of the Great Northern to stifle competition.

If the railway shares deposited are not to be returned but to be regarded as assets of the Securities Company then the corporation should sell the stocks and make the distribution in cash. *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50, 63; *Kean* v. *Johnson*, 9 N. J. Eq. 401, 408, 409; *Coler* v. *Tacoma Railway and Power Co.*, 64 N. J. Eq. 117, 125; *S. C.*, 54 Atl. Rep. 413. It is so in the case of a partnership. Lindley on Part., 555, and much stronger are the reasons for such course in the case of a corporation. 4 Thompson on Corp. § 4548; 2 Cook on Corp. § 671. As to § 54, Corporation Act of New Jersey, Revision of 1896, see *Beals* v. *Hale*, 4 How. 37, 54.

Mr. D. T. Watson also for petitioners:

This court, in the Government case decided that the Securities Company was not the lawful purchaser or absolute owner of the capital stock of the Northern Pacific Railway Company assigned to it by appellants, but held it as custodian for the appellants. 193 U. S. 325, 334, 346, 353, 361, 365, 390, 400. The decree authorized the return of the stock to the original **[273]** stockholders of the constituent companies. The Securities Company cannot hold the railway

stock and prevent giving relief to complainants under the doctrine of *in pari delicto*.

By the affirmance of this court the decree of the Circuit Court became the decree of this court and binding upon all parties and privies and other courts. *In re Potts*, 166 U. S. 265; *Durant* v. *Essex County*, 101 U. S. 555; *Sandford &c. Co., Petitioner*, 160 U. S. 247. The opinion of this court is part of the record and may be freely resorted to to determine what this court has decided. *Foundry Co.* v. *Water Co.*, 183 U. S. 217; *Baker* v. *Cummings*, 181 U. S. 124; *Mining Co.* v. *Mining Co.*, 157 U. S. 683, 690; *So. Pac. Co.* v. *United States*, 183 U. S. 519, 532; *United States* v. *Norfolk Railway Co.*, 114 Fed. Rep. 686; *Russell* v. *Russell*, 129 Fed. Rep. 434; *West* v. *Brashear*, 14 Pet. 342; *DeSollar* v. *Hanscome*, 158 U. S. 221; *Cromwell* v. *County of Sac*, 94 U. S. 359; *Strong* v. *Grant*, 2 Sup. Ct. D. C. 222; *Fulton* v. *Pomeroy*, 111 Wisconsin, 668; Barton's Suit in Equity, 150; Equity Rule, 86; *Putnam* v. *Day*, 22 Wall. 66.

As parties by representation in the Government case, complainants are entitled in their own right to plead or give in evidence against, and as binding upon, the Securities Company, the conclusions in that case on the same questions which arise in this—even if the cause of action, parties, testimony and measure of relief in the two suits are different. *Cromwell* v. *County of Sac*, 94 U. S. 352; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *So. Pac. R. R. Co.* v. *United States*, 168 U. S. 48; Black on Judgments, 609, 614; *Burlen* v. *Shannon*, 99 Massachusetts, 202; *Railway Co.* v. *Schutte*, 103 U. S. 143; *Duchess of Kingston Case*, 20 Howell's State Trials, 355.

The appellants, as parties by representation in the Government case, are entitled in their own right to set up and assert the decree in that case as against the Northern Securities Company in this case. Story Eq. Pl. § 372; 2 Daniel's Ch. Pl. & Pr. 1539; *Wilton's Appeal*, 97 Pa. 393; *Griffin* v. *Spence*, 69 Georgia, 397.

[274] It is not necessary that all the parties to the Government suit should be the same in the subsequent litigation. *Thompson* v. *Roberts*, 24 How. 240; *Smith* v. *Kernochen*, 7 How. 217; *Wilson* v. *Buell*, 117 Indiana, 315, 318; Wells on

Res Adjudicata, § 35; *Lawrence* v. *Hunt*, 10 Wend. 80; Freeman on Judgments, § 154; 1 Greenleaf, § 523; *Green* v. *Bogue*, 158 U. S. 478, 502.

Where there are several grounds of recovery or defense on which the decree may have been rested, it will be conclusive on the specific findings, which led up to the proposition, on which the court decided the case, and what that ground was may be determined by evidence *aliunde* where the decree itself is silent on it. *Russell* v. *Place*, 94 U. S. 606; *DeSollar* v. *Hanscome*, 158 U. S. 216; *Flint Nat. Bk.* v. *Covington*, 129 Fed. Rep. 798; *Hawes* v. *Water Co.*, 5 Sawyer, 287; *Corcoran* v. *Ches. Canal Co.*, 94 U. S. 741.

The former opinion and decree of this court is conclusive even on this court when the same case comes back here, and certainly so where that former opinion and decree is set up as conclusive in another litigation where the parties are not all the same, and where the complainant in the former case, the United States, is not a party to the second. *Roberts* v. *Cooper*, 20 How. 467, 481; *Barney* v. *Winona &c. R. R. Co.*, 117 U. S. 231; *United States* v. *Camon*, 184 U. S. 574; *Thompson* v. *Maxwell &c. Co.*, 168 U. S. 456; *Yazoo &c. Ry. Co.* v. *Adams*, 180 U. S. 7; *Great Western Tile Co.* v. *Burnaham*, 162 U. S. 343; *Chaffin* v. *Taylor*, 116 U. S. 567; *Clark* v. *Keith*, 106 U. S. 464; *Supervisors* v. *Kenniott*, 94 U. S. 498; *Tyler* v. *Maguire*, 17 Wall. 283.

The appellants were by representation parties and privies in the Government case, as stockholders of the Securities Company, as of class represented by Morgan, Hill and others, as *cestuis que trust*, and as stockholders of the Northern Pacific Railway they are therefore in their own right entitled to set up the findings and conclusions of this court in that case as *res adjudicata* in any subsequent litigation between them- **[275]** selves and the Northern Securities Company so far as regards the issues raised and decided in that case. 3 Cook on Corp. § 750; *Hendrickson* v. *Bradley*, 85 Fed. Rep. 516; *Foundry Co.* v. *Water Co.*, 68 Fed. Rep. 1007; *Wilson* v. *Seymour*, 76 Fed. Rep. 681; Herman on Estoppel, 154–165; *Secor* v. *Singleton*, 41 Fed. Rep. 725; *Gt. West. Tel. Co.* v. *Purdy*, 162 U. S. 329; *Hawkins* v. *Glenn*, 131 U. S. 319; *Glenn* v. *Williams*, 60 Maryland, 93, 116; *Hancock*

Bank v. *Farmers*, 176 U. S. 640; *Sanger* v. *Upton*, 91 U. S. 56; *Whitman* v. *Bank*, 176 U. S. 560; *Flash* v. *Conn*, 109 U. S. 371; *Hall* v. *Hardon*, 95 Fed. Rep. 759; *Fruit Co.* v. *Railroad Co.*, 89 Fed. Rep. 24; *McElrath* v. *P. & S. R. Co.*, 68 Pa. St. 40; *Shaw* v. *Railroad Co.*, 105 U. S. 605; *Kerrison* v. *Stewart*, 93 U. S. 160; *Vetterlein* v. *Barnes*, 124 U. S. 169; *Beals* v. *Railway Co.*, 133 U. S. 290; *Kent* v. *Lake Superior Co.*, 114 U. S. 90; *Manson* v. *Duncannon*, 166 U. S. 542; *Smith* v. *Swormstedt*, 16 How. 288; *McIntosh* v. *Pittsburg*, 112 Fed. Rep. 705; *Willoughby* v. *Chicago &c. R. R. Co.*, 50 N. J. 609.

Complainants in this case are entitled to set up and plead as *res adjudicata* the findings, conclusions and decree of this court in the Government case as hereinbefore enumerated, even if the cause of action in the Government case was different from the cause of action in the present case.

The decision in the Government case caused the present litigation. This case is the child of that parent. The parties to the present case, the appellants and the Northern Securities Company, were parties to the Government case, and in the same capacity.

The subject matter of the present litigation is 717,320 shares of the capital stock of the Northern Pacific Railway Company, and this identical capital stock was the stock which the complainants assigned to the Northern Securities Company for the purpose of carrying out the combination.

The averments of the bill and answers in the Government case distinctly raised, *inter alia*, as material numerous questions upon which the controversy turned, questions which **[276]** are in substance, the same as are now restated in somewhat different form.

These stocks in the two railroad companies which, as averred in the bill in the Government case, and as found by this court, were transferred by Hill, Morgan and other stockholders to the Securities Company in pursuance of, and to perfect the illegal combination to restrain trade and commerce, included the stock owned by the Oregon Short Line Railroad Company, and held in the name of Harriman and Pierce as trustees, being the identical stock in controversy in this case.

This court had before it in the Government case all the testimony which was before the Court of Appeals in the present case as to the manner in which, and the purpose for which, the Securities Company acquired the Oregon Short Line stock in the Northern Pacific Railway Company, and this included the evidence of Mr. Harriman.

Not only did the pleadings sharply raise the issues in the Government case which are also in this case,—and this court discussed these issues and decided them,—but the evidence in the Government case, including all of Mr. Harriman's, supported the conclusions of this court on those issues.

The so-called permissive portion of the decree certainly did authorize the return by the Securities Company to the individual stockholders who assigned to the Securities Company the identical stock so assigned. If it was Northern Pacific stock, then Northern Pacific stock was to be returned.

The St. Paul opinion of Judge Thayer misconstrued the St. Louis decree as the St. Louis court did not make, as the controlling question in the case, the distinction between the real, substantial ownership and the mere holding of the railroad stocks as custodian that this court did.

The Court of Appeals erred in deciding that this court did not even "incidentally" consider the question of ownership and deciding this case as if the Government case had not arisen.

The equities of the case are with complainants.

All parties fully believed this plan to be lawful and really **[277]** beneficial to commerce, but this court adjudged it was a violation of the Sherman Act, and made a decree which restrained the Securities Company from carrying out the scheme and rendered the railway stock worthless in its possession. This necessitated a dissolution of the Securities Company, as the Supreme Court foresaw.

Evidently, the scheme having failed, this put every one in *statu quo*, *ante* as to the transfer to the Securities Company of their respective stocks—and this could only be done by retransferring to each his stock, the Securities Company still holds it—each still holds his Securities Company stock. The retransfer is simple. If there be strangers who came in afterwards and who have equities, do what is fair to them.

Argument for respondent.

Whoever bought stock after March 10, 1902, had notice *pendente lite* and is concluded by the decree. *Tilton* v. *Cofield*, 93 U. S. 163. Hill, Morgan and Company are taking the property and seeking shelter behind either one of two innocent holders. They control the Securities Company and therefore owe complainants good faith but having induced complainants to put their stock into the Securities Company now they intend to avail of the situation to make money and secure control of the railway companies for themselves.

The Securities Company cannot compel complainants to accept Great Northern stock in lieu of their Northern Pacific. The stockholders of a corporation upon dissolution cannot be compelled to accept a distribution of their share of the assets in kind. *Post* v. *Beacon &c. Co.*, 84 Fed. Rep. 369, 375; *Mason* v. *Pewabic Mining Co.*, 132 U. S. 50, 58.

As to when the Circuit Court of Appeals may, on an appeal from an interlocutory decree, enter a final one, see *Forsythe* v. *Hammond*, 166 U. S. 512; *Smith* v. *Vulcan Iron Works*, 165 U. S. 524; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 494; *Britt* v *Peckham Motor Co.*, 189 U. S. 58, from which it appears that the present case is not one where the Circuit Court of Appeals on an appeal from an interlocutory order granting a **[278]** preliminary injunction, could enter what is practically a final decree, and finally dispose of the case on the merits.

The necessity for a hearing in the ordinary way where each side could put in all its proofs, cross-examine witnesses, compel the attendance of hostile witnesses and the production of all books and papers, is not only apparent from the complications in this case, but is further shown by the inaccuracy which the Circuit Court of Appeals fell into in finally considering and passing on the case merely on an interlocutory hearing and upon *ex parte* affidavits.

Mr. Elihu Root, with whom *Mr. Francis Lynde Stetson* was on the brief, for respondent:

Everything in the record, by mere recital and without argument, shows that in fact and by intent of both parties, there was a sale of the Northern Pacific stock to the Securities Company in consideration of a stockholder's interest

Argument for respondent.

in that company, and a large sum of money—*i. e.*, the issue to Harriman and Pierce of 824,918 shares of the stock and the payment to them of $8,915,629 in cash.

The complainants are estopped from asserting that the Securities Company is a trustee or bailee. They have publicly held out the Securities Company to be the owner of the railway stocks, and have induced innocent third persons to acquire interests in the corporation in reliance thereupon.

But whether the Securities Company be a vendee or a custodian, the complainants are not entitled to recover the Northern Pacific stock. The transaction was in contravention of public policy and a penal statute, and their demand for the return of the stock by them delivered for such illegal purpose, is barred by the rule *In pari delicto potior est conditio defendentis et possidentis*. The complainants cannot avoid the bar of the rule, if the Securities Company be regarded as vendee. The complainants and the Securities Company are *in pari delicto*.

Neither can the complainants avoid the operation of the rule by treating the Securities Company merely as custodian, **[279]** to hold a deposited stock, to collect dividends, etc. The Securities Company is *in pari delicto* with the complainants. It was an active party to the illegality.

The complainants assisted in placing the control of the railway companies in the hands of the Securities Company, and in maintaining that status until the decree in the Government suit was affirmed by the Supreme Court. This executed the illegal purpose to such a degree as to bar the assertion of any right to withdraw the property deposited.

Property delivered under an illegal contract cannot be recovered back by any party *in pari delicto;* certainly not in any case where the contract has been executed in whole or in part. *Scott* v. *Brown*, L. R. [1892] 2 Q. B. 724; *Hill* v. *Freeman*, 73 Alabama, 200; *Thornhill* v. *O'Rear*, 108 Alabama, 299; *Inhabitants &c.* v. *Eaton*, 11 Massachusetts, 368; *Atwood* v. *Fisk*, 101 Massachusetts, 353; *Myers* v. *Meinrath*, 101 Massachusetts, 366; *Horton* v. *Buffington*, 105 Massachusetts, 399; *Cranson* v. *Goss*, 107 Massachusetts, 439; *Traders' Bank* v. *Steere*, 165 Massachusetts, 389; *White* v. *Hunter*, 23 N. H. 128; *Ellicott* v. *Chamberlin*, 38 N. J. Eq.

604; *Hope* v. *Linden Assn.*, 29 Vroom, 627; *Allebach* v. *Hunsicker*, 132 Pa. St. 139; *Moore* v. *Kendall*, 52 Am. Dec. 145; *Cohn* v. *Heimbauch*, 86 Wisconsin, 176; *Bank of U. S.* v. *Owens*, 2 Pet. 527; *Vandalia case*, 145 U. S. 393; *Central Co.* v. *Pullman Co.*, 139 U. S. 24; *Equitable Society* v. *Wetherill*, 127 Fed. Rep. 946; Pomeroy's Equity Juris, § 939; Addison on Contracts: Domat.

After delivery of the property for an accepted consideration, the contract has ceased to be executory, even though it was entered into with the expectation of a continuity of benefits no longer susceptible of complete realization. *Kearley* v. *Thomson*, L. R. 24 Q. B. D. 742; *Herman* v. *Jeuchner*, L. R. 12 Q. B. D. 561; *Harse* v. *Pearl L. Co.*, L. R. [1904] 1 K. B. 558; *Vandalia case*, 145 U. S. 393; *Equitable Society* v. *Wetherill*, 127 Fed. Rep. 946; *McIntosh* v. *Wilson*, 81 Iowa, 339; *Atwood* v. *Fisk*, 101 Massachusetts, 353; *Bruer* v. *Kansas Ins. Co.*, 100 Mo. App. 540; *Ellicott* v. *Chamberlin*, 38 N. J. **[280]** Eq. 604; Pollock, Principles of Contract, 364; *Miller* v. *Larson*, 19 Wisconsin, 463; *Martin* v. *Wade*, 37 California, 168.

The indisposition of the court to grant relief is not limited to the cases in which the plaintiff is endeavoring to enforce the contract; a party exhibiting the contract merely to denounce it as illegal will be denied judicial assistance. *Taylor* v. *Chester*, L. R. 4 Q. B. 309; *Brindley* v. *Lawton*, 53 N. J. Eq. 259; *Hope* v. *Linden Association*, 29 Vroom, 627; *Herman* v. *Jeuchner*, L. R. 12 Q. B. D. 561; *Kearley* v. *Thomson*, L. R. 24 Q. B. D. 742; *Harse* v. *Pearl Co.*, L. R. [1904] 1 K. B. 558; *Hill* v. *Freeman*, 73 Alabama, 200; *Watkins* v. *Nugen*, 45 S. E. Rep. 262; *McIntosh* v. *Wilson*, 81 Iowa, 339; *Atwood* v. *Fisk*, 101 Massachusetts, 353; *Myers* v. *Meinrath*, 101 Massachusetts, 366; *Bagg* v. *Jerome*, 7 Michigan, 145; *White* v. *Hunter*, 23 N. H. 128; *Ellicott* v. *Chamberlin*, 38 N. J. Eq. 604; *Markley* v. *Village*, 51 N. E. Rep. 28; *Moore* v. *Kendall*, 52 Am. Dec. 145; *Equitable Life Assurance Society* v. *Wetherill*, 127 Fed. Rep. 946.

In all such cases the defendant's possession is a sufficient answer to the plaintiff's demand; both because such possession stands as the equivalent of a title in the defendant, and because to discourage such transactions, courts will be deaf

to the clamor of a complainant *in pari delicto*. *Myers* v. *Meinrath*, 101 Massachusetts, 366; *Horton* v. *Buffington*, 105 Massachusetts, 399; *Bagg* v. *Jerome*, 7 Michigan 145; *Smith* v. *Bean*, 15 N. H. 577; *Watkins* v. *Nugen*, 45 S. E. Rep. 262; *McIntosh* v. *Wilson*, 81 Iowa, 339; *Traders' National Bank* v. *Steere*, 165 Massachusetts, 389; Harris, Sunday Laws, § 169.

The condition of the possessor is so much better than that even of the original owner, that the possessor can recover the property not only from a stranger but from such original owner, if by chance the latter has been able to repossess himself of the property. *Kinney* v. *McDermott*, 55 Iowa, 674; *Smith* v. *Bean*, 17 N. H. 577; *Thompson* v. *Williams*, 58 N. H. 248; *Cohn* v. *Heimbauch*, 86 Wisconsin, 176.

[281] The distinction between *mala in se*, and *mala prohibita* has been abandoned, but were this otherwise, there is authority for regarding as *malum in se* any act contravening public policy and a penal statute. *Irwin* v. *Curie*, 171 N. Y. 409, 415; *Gibbs* v. *Gas Co.*, 130 U. S. 396; *McMullen* v. *Hoffman*, 174 U. S. 639; *Equitable Society* v. *Wetherill*, 127 Fed. Rep. 946.

The doctrine of *locus pœnitentiæ* is available only to those who seasonably seek to make restitution and to withdraw from their illegal executory contract. Laches is a fatal vice. *Vandalia case*, 145 U. S. 393; *Union T. Co.* v. *Illinois Co.*, 117 U. S. 434; *In re Great Berlin S. Co.*, 26 Ch. D. 616; *Hardwood* v. *Railroad Co.*, 17 Wall. 80; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Grimes* v. *Sanders*, 93 U. S. 55, 62; *Haywood* v. *Nat. Bank*, 96 U. S. 611, 617; *McLean* v. *Clapp*, 141 U. S. 429, 432; *Hoyt* v. *Latham*, 143 U. S. 553, 567; *Townsend* v. *Vanderworker*, 160 U. S. 171; *Ward* v. *Sherman*, 192 U. S. 168; *Rugan* v. *Sabin*, 53 Fed. Rep. 415, 418; *Kinney* v. *Webb*, 54 Fed. Rep. 34; *Boston R. R.* v. *New York R. R.*, 13 R. I. 264; *Kitchen* v. *St. Louis Ry. Co.*, 69 Missouri, 224; *Peabody et al.* v. *Flint*, 6 Allen, 56; *Dunphy* v. *Travelers' Assn.*, 16 N. E. Rep. 426; *Graham* v. *Birkenhead*, 2 McN. & G. 156.

The rigor of the rule against the complainant is never relaxed out of consideration for him, but only when neces-

sary to promote equity and justice. *Pullman Co.* v. *Central Co.*, 171 U. S. 138; *Spring Co.* v. *Knowlton*, 103 U. S. 49.

In cases presenting no such special considerations of equity, justice or public policy, a party even to an unexecuted illegal contract cannot recover back money paid or property delivered thereunder. *Scott* v. *Brown*, L. R. [1892] 2 Q. B. 724; *In re Great Berlin S. Co.*, 26 Ch. D. 616; *McIntosh* v. *Wilson*, 81 Iowa, 339; *Bruer* v. *Kansas Ins Co.*, 100 Mo. App. 540; *Thompson* v. *Williams*, 58 N. H. 248; *Markley* v. *Village*, 51 N. E. Rep. 28; *Storz* v. *Finkelstein*, 46 Nebraska, 477.

As to Northern Pacific preferred stock retirement see *Hackett* v. *Northern Pacific Ry. Co.*, 36 Misc. 583.

[282] *Mr. John G. Johnson*, with whom *Mr. John W. Griggs* and *Mr. W. P. Clough* were on the brief, also for respondent:

On appeal from an interlocutory decree granting a special injunction in a suit for establishing title to property, if the record fully and fairly discloses the case on the point of title, the Appellate Court not only may, but rightfully should, determine the question of the injunction upon the merits of plaintiff's claim. The action of the Circuit Court of Appeals in this case was controlled by that rule, and proceeded upon it. 1 High on Injunction, 3d ed. § 7; *Knoxville* v. *Africa*, 47 U. S. App. 74; *Bissell Co.* v. *Goshen Co.*, 43 C. C. A. 47; *Shinkle* v. *Louisville & Nashville*, 62 Fed. Rep. 690; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485.

If, up to the time of argument of the appeal in the Circuit Court of Appeals, plaintiffs had been entitled to a stay of the *pro rata* plan of distribution, until opportunity could be given for fair argument and advisement upon the law points involved in their claim, such right was exhausted by their opportunity to be heard in the Circuit Court of Appeals.

In the Circuit Court of Appeals, therefore, the whole case for an injunction, *pendente lite*, was thrown back upon the first ground of the Circuit Court, viz., "grave and difficult" questions of fact, for ultimate determination.

The bill claims two distinct parcels of stock, one of which complainants never owned.

Plaintiffs' claims are self-contradictory and can be established, if at all, only under rules of common law. Equity rules cannot be invoked in their support.

The facts constituting title to the stock in controversy necessarily consist of, and are limited to, the things said and done, and mutually intended, by Harriman and Pierce on the one part, and the Securities Company on the other. As all material facts in regard to those sayings, doings and mutual intentions appear in this record, the entire case, on both sides, relating to title, must be here and can be disposed of.

[283] The Union Pacific owns the Oregon Short Line. The latter owns the Oregon Railway and Navigation Company.

As to effect of acquisition of control of the stock of a competing road made by a railway company, and by the stockholders of a railway company see the *Pearsall case*, 161 U. S. 646; *Kentucky* v. *Louisville & Nashville*, 161 U. S. 676.

Plaintiffs in effect ask the court to place control of the Northern Pacific system of railways in the hands of the Union Pacific Railroad Company. Of the relative geographical positions of the Union Pacific and the Northern Pacific Railway systems, and of the public laws of the several States on the subject of railway combinations, as well as of the Federal laws on the same subject, the court will take notice without proofs.

The burden of proof is on plaintiffs to show, by proper evidence, that the sale to Securities Company was different from what, on its face, it appears to have been. No such proof was tendered.

Plaintiffs really found their claims on what they assert to have been adjudicated in the Government suit, and not on what was actually done and intended by the parties. The plaintiffs were strangers to that suit.

For the assumed adjudication in their favor, plaintiffs rely not on the decree, but upon the opinion of Mr. Justice Harlan which does not, however, mean what plaintiffs claim, and their alternate theory, that the title of Securities Company was subject to a condition, since broken, is unsupported by fact, law or adjudication.

Where there has been a transfer of property, illegal from

any cause, and possession has been delivered to the person to whom the title under the transfer was intended ultimately to go, the transaction has become executed on the part of the transferrer, and he cannot thereafter repudiate it and reclaim the property because of the illegality.

This rule governs under all forms of illegality; whether in doing something which the laws positively prohibit, or something which they merely omit to allow. *Thomas* v. *Railroad* **[284]** *Co.*, 101 U. S. 71, 83; *Vandalia case*, 145 U. S. 393, 399, 408; *Central Co.* v. *Pullman Co.*, 139 U. S. 24.

When complainants had transferred the Northern Pacific shares to the Securities Company, and the latter had made payment of the price therefor by handing over to them the cash and the certificates for its own stock, coming to them, nothing remained executory between the parties save the implied mutual obligations concerning the Northern Securities stock resulting from the relation of corporation and stockholder, thus created.

Mr. Thomas Thacher also submitted a brief for respondent:

The injunction *pendente lite* can be justified only upon the theory that it is a necessary incident to the granting of such final relief as the complainants appear to be entitled to. The right to such final relief must appear; if not, the injunction was error. If such right did not appear, the question of granting or denying the injunction was not addressed to the discretion of the court. If, upon the record, it does not appear that the complainants are entitled to recover this stock the order appealed from was erroneous and should be reversed. *Brooklyn Club* v. *McGuire*, 116 Fed. Rep. 783; *Home Ins. Co.* v. *Nobles*, 63 Fed. Rep. 643; *Central Stock Yards Co.* v. *L. & N. R. R. Co.*, 112 Fed. Rep. 823; *Stevens* v. *M., K. & T. Ry. Co.*, 106 Fed. Rep. 771; *Amelia Milling Co.* v. *Tennessee C. I. & R. Co.*, 123 Fed. Rep. 811.

In some cases "a probable right" is deemed enough. *New Memphis Gas Co.* v. *Memphis*, 72 Fed. Rep. 952; *Indianapolis Gas Co.* v. *Indianapolis*, 82 Fed. Rep. 245; *Reduction Works* v. *California Co.*, 94 Fed. Rep. 694; *Georgia* v. *Brailsford*, 2 Dallas, 402; or a "*prima facie* right" *Charles* v. *Marion*, 98 Fed. Rep. 166; *Cosmos Exploration Co.* v.

Grey Eagle Oil Co., 104 Fed. Rep. 20; *Utah N. & C. R. R. Co.* v. *Utah N. & C. Ry. Co.*, 110 Fed. Rep. 879. As to preservation of *status quo* see *Allison* v. *Corson*, 88 Fed. Rep. 581; *Denver & R. G. R. R. Co.* v. *United States*, 124 Fed. Rep. 156; *Haddon* v. *Dooley*, **[285]** 74 Fed. Rep. 429; *Cartersville Light Co.* v. *Cartersville*, 114 Fed. Rep. 699; *Cohen* v. *Delavina*, 104 Fed. Rep. 946; *Newton* v. *Levis*, 79 Fed. Rep. 715; *West. U. Tel. Co.* v. *Pennsylvania R. R. Co.*, 123 Fed. Rep. 33.

On appeals from injunction orders the court will not only consider the merits but dismiss the bill, if it can see that the complainant is not entitled to final decree. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518; *Mast, Fooz & Co. case*, 177 U. S. 485; *Castner* v. *Coffman*, 178 U. S. 168; *Knoxville* v. *Africa*, 77 Fed. Rep. 501; *Bissell Co.* v. *Goshen Co.*, 72 Fed. Rep. 545.

If the argument of the complainants, therefore, still rests upon the theory of *res adjudicata*, that is upon the effect of the decrees in the Government suit, or upon any other theory concerning which the facts are substantially undisputed, this court, finding such theory unsound, will not simply reverse the injunction order, but dismiss the bill.

It was not the legal effect of the decree in the Government suit that title to the stocks of the Northern Pacific Railway Company and the Great Northern Railway Company, which the Securities Company now holds, never passed to the last-named company. See opinions 193 U. S. 197, 321, 324, 327, 334, 344, 357.

It does not follow as matter of law, from the facts shown by the record, including the decree, that title to these stocks did not pass to the Securities Company. The transaction was not void because illegal. *Harris* v. *Runnels*, 12 How. 79; *Mining Co.* v. *National Bank*, 96 U. S. 641; *National Bank* v. *Mathews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Logan County Bank* v. *Townsend*, 139 U. S. 67, 76; *Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240, 251; *Scott* v. *Deweese*, 181 U. S. 202, 211; *Burck* v. *Taylor*, 152 U. S. 634, 648; *Frits* v. *Palmer*, 132 U. S. 282; *McBroom* v. *Investment Co.*, 153 U. S. 318; *Jarvis Trust Company* v.

Willhoit, 84 Fed. Rep. 514; *Central Trust Co.* v. *Columbus Ry. Co.*, 87 Fed. Rep. 815; *Terminal Co.* v. *Trust Co.*, 82 Fed. Rep. 134; *Chattanooga S. R. Co.* v. *Evans*, 66 Fed. Rep. 809, 815.

[286] The Sherman Anti-Trust Act expressly contemplates that contracts may be made in violation of the statute under which property will be owned.

Nor was the transaction void because *ultra vires*.

The law of New Jersey as declared by its courts is that an executed *ultra vires* transaction is not void. *Cam. & Atl. R. R. Co.* v. *May's Landing &c. R. R. Co.*, 48 N. J. L. 530, 567.

The place of the transaction in this case was New York, and the New York law is to the same effect as that of New Jersey—that an executed *ultra vires* transaction stands as valid. *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62; *Woodruff* v. *Erie Ry. Co.*, 93 N. Y. 609; *Rider Life Raft Co.* v. *Roach*, 97 N. Y. 378; *Bath Gas Light Co.* v. *Claffy*, 151 N. Y. 24; *Vought* v. *Eastern Bldg. &c. Assoc.*, 172 N. Y. 508.

In the Federal courts, with respect to the passing of title, the law is the same. See National Bank cases above referred to.

Even if the transaction in which the Oregon Short Line Railroad Company parted with the stock was void because illegal or *ultra vires*, nevertheless the complainants could not recover. *Equitable Life Assurance Society* v. *Wetherill*, 127 Fed. Rep. 947; *Smith* v. *Bean*, 15 N. H. 577; *Myers* v. *Meinrath*, 101 Massachusetts, 366; *Vandalia case*, 145 U. S. 393; *Higgins* v. *McCrea*, 116 U. S. 671; *White* v. *Barber*, 123 U. S. 392; *Horton* v. *Buffington*, 105 Massachusetts, 399.

The transaction has never been abandoned. The Securities Company claims the ownership which was thus acquired and proposes to exercise the rights of such ownership by distributing the stocks as surplus assets among its stockholders.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

In applying to this court for the writ of certiorari counsel for complainants insisted that the Circuit Court of Appeals had practically disposed of the entire controversy on the

[287] merits, although its decree only reversed the order of the Circuit Court granting the preliminary injunction. We accepted that view and granted the writ, in the circumstances, notwithstanding the decree was not final. In our opinion the record presented the whole case to that court, in such wise, that it might properly have been finally disposed of in terms by its decree, in accordance with the well settled rule upon that subject. *Mast, Foos & Co.* v. *Stover Manufacturing Co.*, 177 U. S. 485, 495; *Castner* v. *Coffman*, 178 U. S. 168, 183; *Mayor &c. of Knoxville* v. *Africa*, 77 Fed. Rep. 501.

In *Western Union Telegraph Company* v. *Pennsylvania Railroad Company et al.*, 195 U. S. 540, 547, the Circuit Court had granted a preliminary injunction, 120 Fed. Rep. 981, which was reversed by the Circuit Court of Appeals. 123 Fed. Rep. 33. The telegraph company moved that the decree be modified so as to direct the dismissal of the bill. The motion was denied, and the telegraph company took an appeal to this court. Subsequently the Circuit Court *sua sponte* entered an order dismissing the bill, and the telegraph company appealed therefrom to the Circuit Court of Appeals. 195 U. S. 547. We then granted a certiorari, and, considering both appeals together, affirmed the decree of dismissal.

In the present case we granted the certiorari, at the instance of complainants, before the case had gone back to the Circuit Court, and shall do what the Circuit Court of Appeals might have done, that is, finally dispose of the case by our direction to the Circuit Court.

Complainants deny that the Securities Company became the owner of the Northern Pacific Railway shares, and assert to the contrary that the company held the shares as a trustee or a bailee for complainants.

And the principal ground on which this contention is rested is that it was so adjudicated by the Circuit Court for the District of Minnesota in the Government suit, by the decree of April 9, 1903, affirmed by this court.

It may be said in passing that complainants were not parties **[288]** of record to that suit, and that they were not parties by representation, if the effect of the transfers as between

the parties thereto had been in issue and the vital conflict between complainants and the corporation, now set up, then existed, which would destroy the community of interest on which the rule of representation is founded. And, on the other hand, in that suit the Northern Securities Company, at a time when complainant Harriman was a director, answered that: "Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and, so long as it remains the property of the defendant, will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders and officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts or controls to any extent any use of the same which might lawfully be exercised by any other owner of said stocks."

But we are of opinion that the Circuit Court did not determine the quality of the transfer as between the defendants themselves, nor was that the purpose of the Government proceedings.

The decree of April 9, 1903, adjudged that defendants had theretofore entered into a combination or conspiracy in restraint of trade and commerce; that all stock of either of the railway companies then held or owned by the Securities Company was acquired and held in virtue of such combination; and enjoined the Securities Company and the two railway companies from receiving, or permitting the exercise of, any control by the Securities Company over either railway, or any exercise of the voting power of the railway shares, and the payment or reception of dividends upon the railway shares held by the Securities Company; and the Securities Company was forbidden from acquiring further stock of either of the railway companies.

And it was provided that nothing should be construed as [289] prohibiting the Securities Company from returning and transferring the railway shares to the original railway stockholders who had delivered their shares to the Securities Company for shares of its stock; or to such person or persons as might be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the railway companies.

This did not involve a decision that any original vendor of the railway shares was entitled to a judicial restitution thereof, and such was the view of the Circuit Court itself, for in its opinion of April 19, 1904, the court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential.

"In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to compel stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession, and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade.

"The Government was satisfied with the relief obtained, and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that [290] company would be able, and likewise disposed, to make a disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested.

"It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for the stock in the two railway companies; but this provision was purely permissive. It did not command that the stock should be so returned, or exclude other methods of disposition of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the

decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which had become final by affirmance, and make an [291] order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The decree of April 9, 1903, was affirmed by the judgment of this court, which, of course, went no further than the decree itself. We did, indeed, by our judgment leave the Circuit Court at liberty "to proceed in the execution of its decree as the circumstances may require," but this did not operate to change the decree or import a power to do so not otherwise possessed.

Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.

This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. *Cohens* v. *Virginia*, 6 Wheat. 264, 399; *Carroll* v. *Carroll's Lessees*, 16 How. 275. But we do not think that the opinion of Mr. Justice Harlan is open to the construction put upon it. In speaking of the situation as between the Government and the defendants, the Securities Company is sometimes referred to as the custodian of the shares and sometimes as the absolute owner, but in the sense that in either view the combination was illegal. For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce.

Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was.

[292] Treating the question as an open one, it seems to

us indisputable that, as between these parties, the transaction was one of purchase and sale. The situation is thus well put by Dallas, J.:

"The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was 'to purchase said stock * * * at an aggregate price of $91,407,500, payable, as to $82,491,871 thereof, in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to $8,915,629, in cash.' It is obvious that this resolution contemplated a 'purchase,' and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company. The price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock, for which corporate certificates in the ordinary form were delivered and accepted. * * * The complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock which it thereby pledged."

And the Securities Company sold 75,000 shares of its stock for $7,522,000 cash, "used," as stated in the bill, "for the purchase of other property and for corporate purposes."

But assuming that the transaction was in form, and at least *prima facie* in substance, one of purchase and sale, it is denied that the equitable title vested because, as alleged in the second amended bill, there was an agreement by the promoters of the Securities Company, carried out by that [293] company, that the latter should "acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." And here again we concur in the views of the Circuit Court of Appeals as expressed by Judge Dallas.

"The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale; and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan & Co. to dispose of the

Northern Pacific stock held by the Oregon Short Line Company, and that 'they further stated that, upon the organization of the proposed holding company,' not that it would take as custodian or trustee, but that 'they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line, and pay therefor in the stock of the holding company.' These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which, by executed contract of purchase, it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and [294] to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and admittedly that payment was made."

Complainants' counsel say, in respect of Mr. Harriman's testimony that the transaction was an unconditional purchase and sale, that he only swore to his opinion on a question of law. This will hardly do when applied to testimony as to what was said and done in conference with the alleged promoters of the Securities Company. When Mr. Harriman testified that he attached to his negotiations in the sale of Northern Pacific stock no other condition than that of the price, and that the transaction was completed, how can complainants be permitted to deny that this was a statement of fact? And how can the establishment of the contract and its terms as embodied in the resolutions of November 15, 1901, approved at the succeeding meeting by the vote of Mr. Harriman, and which appeared to be, and were testified to by Mr. Hill, President of the Securities Company, as constituting the only contract which was made and authorized, be overthrown in the absence of any evidence to the contrary?

The consideration received by complainants consisted of money and Northern Securities stock certificates. Those certificates were in common form, and each was a muniment of the holder's title to a proportionate interest in the corporate estate vested in the corporation. By the provisions of the corporation act of New Jersey, and its certificate of incorporation and distribute its assets. Complainants sub- and to hold, and at any time to sell, the shares of other corpo-

rations. And under that act it had power, in the discretion of its directors and of the holders of two-thirds of its capital stock, at any time, on notice, to dissolve and to wind up the corporation and distribute its assests. Complainants subjected themselves to this power in accepting the shares of the [295] Northern Securities Company, and their unqualified transfer of their railway stock was inconsistent with any obligation of the Securities Company to retain the railway shares for any particular period.

In acquiring the Securities stock, complainants acquired the ordinary rights of stockholders in New Jersey business corporations, including the right to receive dividends, and to share in the distribution of the assets of the corporation on its dissolution, or of any surplus of assets on reduction of its capital stock. In view of the decree of the Circuit Court for the District of Minnesota in the Government's suit the continued ownership of the railway shares became useless to the stockholders of the Securities Company, and accordingly the directors decided to reduce the capital stock and distribute the surplus of assets created by that reduction, and the resolutions to that end were ratified by a vote of more than two-thirds of the Securities shares.

By the transfer of the Northern Pacific shares and the payment therefor as agreed the contract was executed, and the implied obligations resulting from the relation of corporation and stockholder alone remained executory. And when the Securities Company resolved to distribute these railway shares ratably among all its stockholders, it did this in performance of its contract with them and not in repudiation of it. It is the complainants who are seeking the determination and repudiation of the contract. Their final contention in that regard is that they are entitled to a decree rescinding the contract of purchase and sale, and directing the return of the railway shares parted with by them thereunder, because of the illegality of the transaction as adjudged in the Federal courts.

And this in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party *in pari delicto*. "The general rule, in equity, as at law," said Mr. Justice Gray in *St. Louis, Vandalia &*

Terre Haute Railroad Company v. *Terre Haute & Indianapolis* **[296]** *Railroad Company*, 145 U. S. 393, "is *In pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas* v. *Richmond*, 12 Wall. 349, 355; *Spring Co.* v. *Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298. * * *

"When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas* v. *Richmond*, *supra; Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 284."

That was a suit in equity by the maker of an unauthorized lease of a railway and franchises, against the lessee, to enforce an attempted repudiation of the lease by the former, on the ground of the illegality. The lease was for nine hundred and ninety-nine years, of which but a few years had elapsed at the date of the attempted rescission.

The illegality of the lease and the consequent breach of public duty were manifest, but the right of the lessor, therefore, to maintain the suit was denied by this court.

In the present case complainants seek the return of property delivered to the Securities Company pursuant to an executed contract of sale on the ground of the illegality of that contract, but the record discloses no special considerations of equity, justice or public policy, which would justify the courts in relaxing the rigor of the rule which bars a recovery.

The Circuit Court decrees put at rest any question that the **[297]** ratable distribution resolved upon was in violation of public policy.

And it is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman Law and the purposes of the Government suit.

The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition.

While the superior equities, as against complainants' present claim, of the many holders of Securities shares who purchased in reliance on the belief that they thereby acquired a ratable interest in all of the assets of the Securities Company, are too plain to be ignored.

The illegal contract could not be made legal by estoppel, but the ownership of the assets, unaffected by a special interest in complainants, could be placed beyond dispute on their part by their conduct in holding the Securities Company out to the world as unconditional owner.

And, without repeating in detail what has been already set out, it is plain that right of rescission of the executed contract of November 18, 1901, even if rescission could have otherwise been sustained, had been lost by acquiescence and laches at the time this bill was filed.

Since the transfer of that date Securities stock had passed into the hands of more than 2,500 holders, many of them in Great Britain, France and other parts of Europe; nearly a year after the filing of the Government bill 75,000 shares were sold for cash, complainant Harriman concurring; some months after, Harriman and Pierce and the Oregon Short Line Company pledged their 824,000 shares to the Equitable Trust Company; notwithstanding the decree of April 9, 1903, they **[298]** stood upon their rights as shareholders; and it was not until after March 22, 1904, when defendant's board of directors resolved upon a ratable distribution that complainants undertook to change an election already so pronounced as to be irrevocable in itself in view of the rights of others.

We regard the contention that complainants are exempt from the doctrine *in pari delicto* because the parties acted in good faith and without intention to violate the law as without merit. With knowledge of the facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other, and defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed.

Perhaps it should be noticed that the bill sought the return of two parcels of Northern Pacific common stock, the 370,230 shares delivered to the Securities Company, November 18, 1901, and the 347,090 shares received December 27, 1901, from the Northern Pacific Company on the retirement of preferred stock.

Early in 1901 the Hill-Morgan party held a majority of the common stock, and had asserted the intention to retire the preferred stock, "without," as Mr. Harriman testified, "affording the holders of the preferred stock the right to participate in any new securities that might be issued."

With full knowledge of that intention the proceedings of the two companies followed in November, 1901, and the absolute and unconditional sale and purchase, as we hold the transaction to have been.

We find no evidence of any express agreement that complainants should be entitled to the new common stock, and it was certainly not the natural increase of the old stock, but the result of the exercise of the right of subscription. The purchase by the Securities Company was on its own account and not in trust, and cannot be disturbed because of illegal purpose at the clamor of parties *in pari delicto*. And there is **[299]** here no offer of the restoration of the *status quo*, if that were practicable.

Doubtless it became the duty of the Securities Company to end a situation that had been adjudged unlawful, and this could be effected by sale and distribution in cash, or by distribution in kind, and the latter method was adopted, and wisely adopted, as we think, for the forced sale of several hundred millions of stock would have manifestly involved disastrous results.

In fine, the title to these stocks having intentionally been passed, the former owners or part of them cannot reclaim the specific shares and must be content with their ratable proportion of the corporate assets.

Decree affirmed; cause remanded to Circuit Court with a direction to dismiss the bill.

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[236] BOARD OF TRADE OF THE CITY OF CHICAGO *v.* CHRISTIE GRAIN AND STOCK COMPANY.[a]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

L. A. KINSEY COMPANY *v.* BOARD OF TRADE OF THE CITY OF CHICAGO.[b]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Nos. 224, 280. Argued April 20, 24, 25, 1905.—Decided May 8, 1905.

[198 U. S., 236.]

The Chicago Board of Trade collects at its own expense quotations of prices offered and accepted for wheat, corn and provisions in its exchange and distributes them under contract to persons approved by it and under certain conditions. In a suit brought by it to restrain parties from using the quotations obtained and used with-

[a] In the Christie case an injunction was granted by the Circuit Court of the United States for the Western District of Missouri, July 5, 1902 (116 Fed., 944), but it was not based in any way upon the anti-trust law, and therefore the decision is not reprinted. On final hearing, March 19, 1903, the court considered the matter from the standpoint of the anti-trust law and adhered to its original conclusions (121 Fed., 608). See p. 233. The decree was reversed by the Circuit Court of Appeals, Eighth Circuit (125 Fed., 161) but not upon any ground related to the antitrust law. That decision not reprinted. The action of the Circuit Court of Appeals was reversed by the Supreme Court, and the injunction was allowed (198 U. S., 236).

[b] In the Kinsey case an injunction was denied the board of trade by the Circuit Court for the District of Indiana, July 14, 1903 (125 Fed., 72). The decree was reversed by the Circuit Court of Appeals, Seventh Circuit, April 12, 1904, with direction to enter a decree in appellant's favor (130 Fed., 507). Antitrust law not discussed by either court. Those decisions not reprinted. Affirmed by the Supreme Court (198 U. S., 236).

Argument for Board of Trade.

out authority of the Board, defendants contended that as the Board of Trade permitted, and the quotations related to, transactions for the pretended buying of grain without any intention of actually receiving, delivering or paying for the same, that the Board violated the Illinois bucket shop statute and there were no property rights in the quotations which the court could protect, and that the giving out of the quotations to certain persons makes them free to all. *Held*, that

Even if such pretended buying and selling is permitted by the Board of Trade it is entitled to have its collection of quotations protected by the law, and to keep the work which it has done to itself, nor does it lose its property rights in the quotations by communicating them to certain persons, even though many, in confidential and contractual relations [237] to itself, and strangers to the trust may be restrained from obtaining and using the quotations by including a breach of the trust.[a]

A collection of information, otherwise entitled to protection, does not cease to be so because it concerns illegal acts, and statistics of crime are property to the same extent as other statistics, even if collected by a criminal who furnishes some of the data.

Contracts under which the Board of Trade furnishes telegraph companies with its quotations, which it could refrain from communicating at all, on condition that they will only be distributed to persons in contractual relations with, and approved by, the Board, and not to what are known as bucket shops, are not void and against public policy as being in restraint of trade either at common law or under the Anti-Trust Act of July 2, 1890.

THE facts are stated in the opinion.

Mr. Henry S. Robbins for petitioner in No. 224 and respondent in No. 280:

It is not a good defense to these suits that most of the transactions, out of which the quotations arise are gambling transactions. The violation by a plaintiff of a criminal statute of one State does not debar him from maintaining suits to protect his property in a Federal court in another State. Penal laws do not reach, in their effect, beyond the jurisdiction of where they were established. *Commonwealth* v. *Green*, 7 Massachusetts, 50, 674; *Logan* v. *United States*, 144 U. S. 263, 303; *State* v. *Pelican Ins. Co.*, 127 U. S. 265, 289; *The Antelope*, 10 Wheat. 66, 123; *Folliott* v. *Ogden*, 1 H. Blacks. 123, 135; *Fuller* v. *Berger*, 120 Fed. Rep. 274. And see also *City of Chicago* v. *Stock Yards*, 164 Illinois, 224, 238; *Bateman* v. *Fargason*, 4 Fed. Rep. 32; *Ansley* v. *Wilson*, 50 Georgia, 421; *Langdon* v. *Templeton*, 66 Vermont, 173; 1 Pom. Eq. § 399.

[a] Syllabus copyrighted, 1905, by The Banks Law Publishing Co.

Argument for Board of Trade.

Petitioner's misconduct, if any, respecting the transactions upon its exchange, prejudicially affects these respondents only as it does the public at large.

The general dissemination of these quotations is conceded to be highly beneficial to legitimate commerce. Respondents' answer so admits. So the Illinois Supreme Court has also held. *Stock Exchange* v. *Board of Trade*, 127 Illinois, 153.

[238] The Board of Trade's conduct with respect to the quotations, is not at all reprehensible. It gives them to all persons desiring them for lawful purposes, and only withholds them, as it lawfully may, from bucket shops.

As to the Illinois bucket shop law, see *Soby* v. *People*, 134 Illinois, 66. It does not apply to exchanges.

Market news, whose dissemination is helpful to commerce, is not to be deemed infected with illegality or beyond judicial protection, because the owner of this news maintains an exchange, where parties to most of the *transactions* it records do not contemplate actual delivery. The existence of a property right in news depends upon its source, rather than the character or utility of the news itself. *Brooks* v. *Martin*, 2 Wall. 79; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 499.

As matter of fact it is not true that most of the trades, whose prices these quotations record, are gambling transactions.

As to the principle and legality of the systems of offsetting or elimination of trades which will be found in most commercial exchanges, see *Clews* v. *Jamieson*, 182 U. S. 461; *Lehman* v. *Feld*, 37 Fed. Rep. 852; *Irwin* v. *Wilbur*, 110 U. S. 499; *Bibb* v. *Allen*, 110 U. S. 500.

The Board of Trade should not be held responsible for what gambling there is upon its exchange, and on that account be deprived of its right to sue to protect its property in its quotations.

There is a property right in the quotations which equity will protect by injunction.

Both in England and this country market news thus distributed as are these quotations, is a species of property,

which a court of equity will protect by injunction. *Exchange Tel. Co.* v. *Gregory*, L. R. (1896), 1 Q. B. 147; *Dodge Co.* v. *Construction Co.*, 183 Massachusetts, 62; *Kiernan* v. *Manhattan Tel. Co.*, 50 How. Pr. 194; *Nat. Tel. News Co.* v. *West. Un. Tel. Co.*, 119 Fed. Rep. 294; *Illinois Com. Co.* v. *Cleveland Tel. Co.*, 119 Fed. Rep. 301; *Cleveland Tel. Co.* v. *Stone*, 105 **[239]** Fed. Rep. 594; *Board of Trade* v. *Hadden-Krull Co.*, 103 Fed. Rep. 902; *S. C.*, 109 Fed. Rep. 705; this case below 116 Fed. Rep. 944.

Board of Trade quotations are a species of property. *Stock Exchange* v. *Board of Trade*, 127 Illinois, 153.

That this market news is too evanescent to derive any protection from the Copyright Act, a perusal of that statute will show. *Nat. Tel. News Co.* v. *West. Un. Tel. Co.*, *supra*; *Clayton* v. *Stone*, 2 Payne, 382; *S. C.*, Fed. Cas. 2872.

As to the protection of literary property, apart from the statutory provisions of copyright law, see *Millar* v. *Taylor*, 4 Burr, 2303; *Donaldson* v. *Becket*, 4 Burr, 2408; *Wheaton* v. *Peters*, 8 Pet. 591; *Holmes* v. *Hurst*, 174 U. S. 82; *Tompkins* v. *Halleck*, 133 Massachusetts, 32; *Palmer* v. *DeWitt*, 47 N. Y. 532. See other cases applying the same principle to dramas, exhibition of paintings, etc. *Macklin* v. *Richardson*, Ambl. 694; *Crowe* v. *Aiken*, 2 Biss. 208; *S. C.*, Fed. Cas. No. 3441; *Albert* v. *Strange*, 2 DeG. S. & M. 652; *Turner* v. *Robinson*, 10 Irish Ch. 121. And in the case of lectures. *Abernethy* v. *Hutchinson*, 1 Hall. & Tw. 28; *Caird* v. *Simes*, L. R. (1887) 12 H. L. 326. See also *Bartlette* v. *Chittenden*, 4 McLean, 300; *S. C.*, Fed. Cas. No. 1082.

The contracts between the Board of Trade and the telegraph companies are not illegal and are not in restraint of trade under the common law or any state or Federal statute, and as to duty of the Board to give out the quotations see *Stock Exchange* v. *Board of Trade*, 127 Illinois, 153; and *contra*, *Ladd* v. *F. C. P. & M. Co.*, 53 Texas, 172; *Delaware R. R. Co.* v. *Central Co.*, 45 N. J. Eq. 50; *State* v. *Ass'd Press*, 159 Missouri, 424; *Re Renville*, 46 App. Div. N. Y. 37; *Central Exch.* v. *Board of Trade*, 196 Illinois, 396; *Smith* v. *West. Un. Tel. Co.*, 84 Kentucky, 664; *Bryant* v. *West. Un. Tel. Co.*, 17 Fed. Rep. 825; *Bradley* v. *West. Un. Tel. Co.*, 9 Con. Law Bull. 223; 27 Am. & Eng. Ency. of Law, 2d ed., 1039, 1094; Gray on Telegraphs, 19; Rev. Stat. Missouri, 1889, § 2338; Bucket Shop Statute of Illinois; *State* v. *Bell Tel. Co.*, 23 Fed. Rep. **[240]** 539; *Am. Tel. Co.*, v. *Conn. Tel. Co.*, 49 Connecticut, 352; *Sullivan* v. *Post. Tel. Co.*, 123 Fed. Rep. 411; *Wilson* v. *N. Y. Comm. Tel. Co.*, 3 N. Y. Supp. 633. Nor is it a violation of the Sherman Act, or illegal at common law to impose restrictions as to use of quotations. *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454; *Mitchell* v. *Reynolds*, 1 Poere Williams, 181; *Elliman* v. *Carrington*, L. R. 1901, 2 Ch. Div. 275; *Fowle* v. *Park*, 131 U. S. 88; *Bement* v. *Nat. Harrow Co.*, 186 U. S. 70; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 338; *Hopkins* v. *United States*, 171 U. S. 578, 600; *Anderson* v. *United States*, 171 U. S. 604, 615; *United States* v. *Joint Traffic Association*, 171 U. S. 558; *Alexander* v. *State*, 86 Georgia, 246.

The anti-bucket shop acts were in force when the Sherman Act was passed. They promote public welfare. They were passed in the exercise of the State's police power. Doubtless that power must yield, when necessary, to the paramount power of Congress to regulate commerce; but this court should not, in the absence of clear language, assume that Congress intended by this act to nullify these state statutes, if indeed it lawfully might do so. *Sherlock* v. *Alling*, 93 U. S. 99; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Patterson* v. *Kentucky*, 97 U. S. 501; *Nashville Ry.* v. *Alabama*, 128 U. S. 96; *Hennington* v. *Georgia*, 163 U. S. 299.

Is it not a more reasonable construction of this act that Congress did not intend to cover this subject or invade this field at all, and that States may still, under their police power, prevent the transmission of quotations into a State for use there in a bucket shop?

Mr. James H. Harkless and *Mr. W. H. Rossington*, with whom *Mr. Chester H. Crum*, *Mr. Charles S. Crysler*, *Mr. Clifford Histed*, *Mr. Charles Blood Smith* and *Mr. J. S. West* were on the brief, for respondent in No. 244.

Mr. Lloyd Charles Whitman and *Mr. E. D. Crumpacker*, with whom *Mr. Jacob J. Kern*, *Mr. John A. Brown* and

[241] *Mr. Peter Crumpacker* were on the brief, for the petitioner in No. 280:

The quotations are not property and cannot be impressed with a right of property by the Board of Trade. *Sayre* v. *Moore*, 1 East. Rep. 361; *Jefferys* v. *Boosey*, 4 H. L. Cas. 815; *Crowe* v. *Aiken*, 2 Bissell, 214; *Thompson* v. *Hubbard*, 131 U. S. 151; *Iolanthe Case*, 15 Fed. Rep. 442; *West. Pub. Co.* v. *Lawyers Coöp. Co.*, 64 Fed. Rep. 364; *Stowe* v. *Thomas*, Fed. Cas. No. 13514, and cases cited by counsel for Board of Trade.

The Board of Trade has no property right or interest in or to the knowledge of the quotations, as they arise from the transactions of its members on the exchange. Cases cited *supra* and *Keene* v. *Wheatley*, Fed. Cas. No. 7644.

The right of property to mental or literary effort rests fundamentally upon the creative faculty which must have been exercised by the claimant or one through whom his title is derived.

Nothing can be the object of property which has not a corporeal substance. *Wheaton* v. *Peters*, 8 *Pet.* 591; nor be the object of property which is not capable of sole and exclusive enjoyment. *Millar* v. *Taylor*, 4 Burr, 2361; 2 Kent's Com. 320; Webster; Bouvier, sub. "Property"; Shouler's Personal Property, § 2; 1 Blackstone, 138; *Jones* v. *Van Zandts*, 4 McLean, 603. To be property it must be capable of distinguishable proprietary marks. *Jefferys* v. *Boosey*, 4 H. L. Cas. 869. The Board of Trade cannot alter the essential nature of the quotations. Its sole right of property is confined to the records themselves.

It has no property interest in quotations made up of transactions on its floor when the transactions are not based upon *bona fide* contracts of purchase and sale of the commodity dealt in. The cases in 127 Illinois and 103, 109 and 119 Fed. Rep., cited by counsel for the Board, are not determinative of this case.

The transactions on which the quotations are based are so **[242]** tainted with illegality that the Board cannot have a property right in them.

As to the illegality of transactions, where there is no intention of delivery of the commodity bought and sold, see *Counselman* v. *Reichert*, 103 Iowa, 430; *First Nat. Bank* v. *Oskaloosa Co.*, 66 Iowa, 41. As to methods of the Board of Trade see *Central Stock Exchange* v. *Board of Trade*, 196 Illinois, 396; *Higgins* v. *McCrea*, 116 U. S. 671. The testimony shows that no deliveries are intended in ninety-five per cent of the transactions. The members of the Board occupy the relation of bucket shops to their customers and the Board is a bucket shop to the non-members. As to substitution of trade see *Clews* v. *Jamieson*, 182 U. S. 461, 471.

As to how transactions between members are to be determined as to the element of wager see *Irwin* v. *Williar*, 110 U. S. 499; *Melchert* v. *Am. Union Tel. Co.*, 11 Fed. Rep. 193; *Bernard* v. *Backhaus*, 9 N. W. Rep. 585, 596; *Dows* v. *Glaspel*, 60 N. W. Rep. 60; *Whitesides* v. *Hunt*, 97 Indiana, 191; *Edwards* v. *Hoeffinghoff*, 38 Fed. Rep. 639; *Embrey* v. *Jamieson*, 131 U. S. 336; *Mohr* v. *Miseni*, 49 N. W. Rep. 862; *Pickering* v. *Chase*, 79 Illinois, 328.

The Board of Trade does not come into court with clean hands. It is violating the Illinois anti-bucket shop act of 1887. 1 Starr & Curtis Ann. Stat. 1304. That act was construed in *Soby* v. *People*, 134 Illinois, 68; *Weare Commission Company* v. *People*, 111 Ill. App. 116, affirmed 209 Illinois, 528. And see as to the protection of gambling transactions. *Beard* v. *Milmine*, 88 Fed. Rep. 868; *Schultze* v. *Holtz*, 82 Fed. Rep. 448.

The court will not protect trade-marks used to deceive the public or if the owner cannot otherwise come into court with clean hands. *Lawrence Co.* v. *Tennessee Co.*, 31 Fed. Rep. 776, 784; *Krauss* v. *Peebles*, 58 Fed. Rep. 585, 594; *Simonds* v. *Jones*, 82 Maine, 302; *Joseph* v. *Macowsky*, 96 California, 518; *Holman* v. *Johnson*, Cowp. 341; *Fetridge* v. *Wells*, 4 Abb. Pr. 144; *Hall* v. *Coppell*, 7 Wall. 542, 599.

[243] The Board cannot restrict the publication; if it publishes the quotations it must publish for all. *Ladd* v. *Oxnard*, 75 Fed. Rept. 703; *Gottsberger* v. *Aldine Book Co.*, 33 Fed. Rep. 381; *Keene* v. *Wheatley*, Fed. Cas. No. 7644.

The Board realizes the full avails of its property when it sells the quotations to the telegraph companies and the de-

livery to those companies is necessarily a publication to the world. *Bryant* v. *West. Un. Tel. Co.*, 17 Fed. Rep. 825, is not applicable; the distinction between restricted and general publication does not extend to matter of this kind. *Pierce & Bushnell* v. *Werckmeister*, 18 C. C. A. 431; *Tribune* v. *Ass'd Press*, 116 Fed. Rep. 126.

Assuming there ever was a right of property in the Board to these quotations they have by usage become impressed with a public use and the Board is estopped from discriminating with reference to such use. *Exchange* v. *Board of Trade*, 127 Illinois, 153; *Commission Co.* v. *Live Stock Exchange*, 143 Illinois, 239; *Board of Trade* v. *Central Exchange*, 196 Illinois, 396; *Munn* v. *Illinois*, 94 U. S. 126, and Rose's notes thereto; *State* v. *Gas Co.*, 34 Ohio St. 572; *Lindsey* v. *Anniston*, 104 Alabama, 261; *People* v. *King*, 110 N. Y. 418; *Rushville* v. *Gas Co.*, 132 Indiana, 575; *Zanesville* v. *Gas Co.*, 47 Ohio St. 1; *White* v. *Canal Co.*, 22 Colorado, 198; *Water Works Co.* v. *Schotter*, 110 U. S. 347; *Railroad Co.* v. *Wilson*, 132 Indiana, 517; *B. & O. Tel. Co.* v. *Bell Telephone Co.*, 23 Fed. Rep. 539; *Cotting* v. *Stock Yards Co.*, 183 U. S. 79. The conditions exacted of the public in the contract with the telegraph companies are unreasonable and tend to create a monopoly. *Kalamazoo &c. Co.* v. *Sootsma*, 84 Michigan, 194; *Railroad Co.* v. *Langlois*, 24 Pac. Rep. 209; *Lindsey* v. *Anniston*, 104 Alabama, 261; *Lough* v. *Outerbridge*, 143 N. Y. 277; *Railroad Co.* v. *Bowling Green*, 57 Ohio St. 345. Such contracts also violate the Sherman Anti-Trust Act. *Carter-Crume Co.* v. *Peurrung*, 86 Fed. Rep. 439. The business of telegraphing these quotations is interstate commerce. *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *West. Un. Tel. Co.* v. *Texas*, [244] 105 U. S. 460; *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *Addyston Pipe Case*, 175 U. S. 241; *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 210; *Brown* v. *Maryland*, 12 Wheat. 447; *Mobile* v. *Kimball*, 102 U. S. 691; *Bowman* v. *Chicago R. R. Co.*, 125 U. S. 490; *Ferry Co.* v. *Pennsylvania*, 114 U. S. 203; *Hopkins* v. *United States*, 171 U. S. 578, 590.

Mr. Julien T. Davies, *Mr. Abram I. Elkus* and *Mr. Garrard Glenn* by leave of the court, submitted a brief in behalf

of Edwin Hawley and Frank H. Ray, solely on the nature of a wagering contract.

Contracts for purchase and sale of a commodity, not to be delivered but only to be performed by advancing and paying differences, are void at common law in the absence of statute. *Irwin* v. *Williar*, 110 U. S. 499; *Ball* v. *Davis*, 1 N. Y. St. Rep. 517; *Flagg* v. *Gilpin*, 17 R. L. Ired. 1, 10; *Rumsey* v. *Berry*, 65 Maine, 575; *Gregory* v. *Wendell*, 39 Michigan, 337; *Mohr* v. *Meisen*, 47 Minnesota, 228; *Brua's Appeal*, 55 Pa. St. 294; *Cunningham* v. *Bank*, 71 Georgia, 400; *Cothran* v. *Ellis*, 125 Illinois, 496.

The form of the contract is immaterial and the test is the actual intent of the parties at the time of making the contract. *Irwin* v. *Williar*, 110 U. S. 499; *Higgins* v. *McCrea*, 116 U. S. 671; *Embrey* v. *Jemison*, 131 U. S. 336; *Pierce* v. *Rice*, 142 U. S. 28; *Story* v. *Salomon*, 71 N. Y. 420; *Peck* v. *Doran-Wright Co.*, 57 Hun. 343; *Kenyon* v. *Luther*, 4 N. Y. Supp. 498; *Cover* v. *Smith*, 82 Maryland, 586; *Lester* v. *Buel*, 49 Ohio St. 240; *Rumsey* v. *Berry*, 65 Maine, 570; *Gregory* v. *Wendell*, 39 Michigan, 337; *Flagg* v. *Baldwin*, 38 N. J. Eq. 219; *Sharp* v. *Stalker*, 63 N. J. Eq. 596.

This intent may be proven by the circumstances surrounding the transactions and such proof is received with great liberality. *Kenyon* v. *Luther*, 4. N. Y. Supp. 498; *Ball* v. *Davis*, 1 N. Y. St. Rep. 517; *Dwight* v. *Badgely*, 60 Hun, 144; *Peck* v. *Doran-Wright Co.*, 57 Hun, 343; *Yerkes* v. *Salomon*, 11 Hun, 471; *Mackey* v. *Rausch*, 39 N. Y. St. Rep. 232; *In re* [245] *Green*, Fed. Cas. No. 5751; *Cobb* v. *Prell*, 15 Fed. Rep. 774; *In re Chandler*, Fed. Cas. No. 2590; *Mohr.* v. *Meisen*, 47 Minnesota, 228; *Kirkpatrick* v. *Bonsall*, 57 Pa. St. 155; *Lowrey* v. *Dillmann*, 59 Wisconsin, 197; *Carroll* v. *Holmes*, 24 Ill. App. 453; *Hill* v. *Johnson*, 38 Mo. App. 383; *Croner* v. *Spencer*, 92 Missouri, 499; *Cothran* v. *Ellis*, 125 Illinois, 496.

Mr. Justice Holmes delivered the opinion of the court.

These are two bills in equity brought by the Chicago Board of Trade to enjoin the principal defendants from using and distributing the continuous quotations of prices on sales of grain and provisions for future delivery, which are collected

by the plaintiff and which cannot be obtained by the defendants except through a known breach of the confidential terms on which the plaintiff communicates them. It is sufficient for the purposes of decision to state the facts without reciting the pleadings in detail. The plaintiff was incorporated by special charter of the State of Illinois on February 18, 1859. The charter incorporated an existing board of trade, and there seems to be no reason to doubt, as indeed is alleged by the Christie Grain and Stock Company, that it then managed its Chamber of Commerce substantially as it has since. The main feature of its management is that it maintains an exchange hall for the exclusive use of its members, which now has become one of the great grain and provision markets of the world. Three separate portions of this hall are known respectively as the Wheat Pit, the Corn Pit, and the Provision Pit. In these pits the members make sales and purchases exclusively for future delivery, the members dealing always as principals between themselves, and being bound practically, at least, as principals to those who employ them when they are not acting on their own behalf.

The quotation of the prices continuously offered and accepted in these pits during business hours are collected at the plaintiff's expense and handed to the telegraph com-
[246] panies, which have their instruments close at hand, and by the latter are sent to a great number of offices. The telegraph companies all receive the quotations under a contract not to furnish them to any bucket shop or place where they are used as a basis for bets or illegal contracts. To that end they agree to submit applications to the Board of Trade for investigation, and to require the applicant, if satisfactory, to make a contract with the telegraph company and the Board of Trade, which, if observed, confines the information within a circle of persons all contracting with the Board of Trade. The principal defendants get and publish these quotations in some way not disclosed. It is said not to be proved that they get them wrongfully, even if the plaintiff has the rights which it claims. But as the defendants do not get them from the telegraph companies authorized to distribute them, have declined to sign the above-mentioned contracts, and deny the plaintiff's rights

altogether, it is a reasonable conclusion that they get, and intend to get, their knowledge in a way which is wrongful unless their contention is maintained.

It is alleged in the bills that the principal defendants keep bucket shops, and the plaintiff's proof on that point fails, except so far as their refusal to sign the usual contracts may lead to an inference, but if the plaintiff has the rights which it alleges the failure is immaterial. The main defense is this. It is said that the plaintiff itself keeps the greatest of bucket shops, in the sense of an Illinois statute of June 6, 1887, that is, places wherein is permitted the pretended buying and selling of grain, etc., without any intention of receiving and paying for the property so bought, or of delivering the property so sold. On this ground it is contended that if under other circumstances there could be property in the quotations, which hardly is admitted, the subject matter is so infected with the plaintiff's own illegal conduct that it is *caput lupinum*, and may be carried off by any one at will.

It appears that in not less than three-quarters of the transactions in the grain pit there is no physical handing over of
[247] any grain, but that there is a settlement, either by the direct method, so called, or by what is known as ringing up. The direct method consists simply in setting off contracts to buy wheat of a certain amount at a certain time, against contracts to sell a like amount at the same time, and paying the difference of price in cash, at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A has sold to B five thousand bushels of May wheat, and B has sold the same amount to C, and C to D and D to A. Substituting D for B by novation, A's sale can be set against his purchase, on simply paying the difference in price. The Circuit Court of Appeals for the Eighth Circuit took the defendant's view of these facts and ordered the bill to be dismissed. 125 Fed. Rep. 161. The Circuit Court of Appeals for the Seventh Circuit declined to follow this decision and granted an injunction as prayed. 130 Fed. Rep. 507. Thereupon writs

of certiorari were granted by this Court and both cases are here.

As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be [248] touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This court has upheld sales of stock for future delivery and the substitution of parties provided for by the rules of the Chicago Stock Exchange. *Clews* v. *Jamieson*, 182 U. S. 461.

When the Chicago Board of Trade was incorporated we cannot doubt that it was expected to afford a market for future as well as present sales, with the necessary incidents of such a market, and while the State of Illinois allows that charter to stand, we cannot believe that the pits, merely as places where future sales are made, are forbidden by the law. But again, the contracts made in the pits are contracts between the members. We must suppose that from the beginning as now, if a member had a contract with another member to buy a certain amount of wheat at a certain time and another to sell the same amount at the same time, it would be deemed unnecessary to exchange warehouse receipts. We must suppose that then as now, a settlement would be made by the payment of differences, after the analogy of a clearing house. This naturally would take place no less that the

contracts were made in good faith for actual delivery, since the result of actual delivery would be to leave the parties just where they were before. Set-off has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be frequent, as the number of persons buying and selling was comparatively small.

The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties, and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says. There is no doubt, from the rules of the Board of Trade or the evidence, [249] that the contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired.

Purchases made with the understanding that the contract will be settled by paying the difference between the contract and the market price at a certain time, *Embrey* v. *Jemison*, 131 U. S. 336, *Weare Commission Co.* v. *People*, 209 Illinois, 528, stand on different ground from purchases made merely with the expectation that they will be satisfied by set-off. If the latter might fall within the statute of Illinois, we would not be the first to decide that they did when the object was self-protection in business and not merely a speculation entered into for its own sake. It seems to us an extraordinary and unlikely proposition that the dealings which give

its character to the great market for future sales in this country are to be regarded as mere wagers or as "pretended" buying or selling, without any intention of receiving and paying for the property bought, or of delivering the property sold, within the meaning of the Illinois act. Such a view seems to us hardly consistent with the admitted fact that the quotations of prices from the market are of the utmost importance to the business world, and not least to the farmers; so important indeed, that it is argued here and has been held in Illinois that the quotations are clothed with a public use. It seems to us hardly consistent with the obvious purposes of the plaintiff's charter, or indeed with the words of the statute invoked. The **[250]** sales in the pits are not pretended, but, as we have said, are meant and supposed to be binding. A set-off is in legal effect a delivery. We speak only of the contracts made in the pits, because in them the members are principals. The subsidiary rights of their employers where the members buy as brokers we think it unnecessary to discuss.

In the view which we take, the proportion of the dealings in the pit which are settled in this way throws no light on the question of the proportion of serious dealings for legitimate business purposes to those which fairly can be classed as wagers or pretended contracts. No more does the fact that the contracts thus disposed of call for many times the total receipts of grain in Chicago. The fact that they can be and are set-off sufficiently explains the possibility, which is no more wonderful than the enormous disproportion between the currency of the country and contracts for the payment of money, many of which in like manner are set off in clearing houses without any one dreaming that they are not paid, and for the rest of which the same money suffices in succession, the less being needed the more rapid the circulation is.

But suppose that the Board of Trade does keep a place where pretended and unlawful buying and selling are permitted, which as yet the Supreme Court of Illinois, we believe, has been careful not to intimate, it does not follow that it should not be protected in this suit. The question whether it should be involved several elements which we shall take up in turn.

In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. Compare *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 249, 250. The plaintiff does not lose its rights by communicating the results to persons, even if many, in confidential relations **[251]** to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach. *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q. B. D. 147; *F. W. Dodge Co.* v. *Construction Information Co.*, 183 Massachusetts, 62; *Board of Trade* v. *C. B. Thomson Commission Co.*, 103 Fed. Rep. 902; *Board of Trade* v. *Hadden-Krull Co.*, 109 Fed. Rep. 705; *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed. Rep. 294; *Illinois Commission Co.* v. *Cleveland Tel. Co.*, 119 Fed. Rep. 301.

The publications insisted on in some of the arguments were publications in breach of contract, and do not affect the plaintiff's rights. Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough.

If then the plaintiff's collection of information is otherwise entitled to protection, it does not cease to be so, even if it is information concerning illegal acts. The statistics of crime are property to the same extent as any other statistics, even if collected by a criminal who furnishes some of the data. The Supreme Court of Illinois has recognized in the fullest terms the value and necessity of the knowledge which the plaintiffs control. It must have known, even if it did not have the evidence before it, as to which we cannot tell from the report, what was the course of dealing on the exchange. Yet it was so far from suggesting that the plaintiff's work was unmeritorious that it held it clothed with a public use.

New York & Chicago Grain & Stock Exchange v. *Board of Trade*, 127 Illinois, 153.

The defendants lay hold of the declaration in the case last cited and say, with doubtful consistency, that this information is of such importance that it is clothed with a public use, and that, therefore, they are entitled to get and use it. In the case referred to it was held that the plaintiff, which had been re- [252] ceiving the continuous quotations, was entitled still to receive them on paying for them and submitting to all reasonable requirements in relation to the same. Perhaps the right of the plaintiff would have been more obvious if it had demanded an opportunity on reasonable conditions of collecting the information for itself, especially if the legislature had seen fit to provide by law for its doing so. But it is not necessary to consider whether we are bound by that decision, or, if not, should follow it, since in these cases the claim is not qualified by submission to reasonable rules or an offer of payment. It is a claim of independent rights and a denial that the plaintiff has any right at all. The Supreme Court of Illinois gave no sanction to such a claim as that.

Finally it is urged that the contracts with the telegraph companies violate the act of July 2, 1890, c. 647, 26 Stat. 209. The short answer is that the contracts are not relied on as a cause of action. They are stated simply to show that the only communication of its collected facts by the plaintiff is a confidential communication, and does not destroy the plaintiff's rights. But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law. *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Fowle* v. *Park*, 131 U. S. 88; *Elliman* v. *Carrington*, [1901] 2 Ch. 275. It was argued that the true purpose is to exclude all persons who do not deal through members of the Board of Trade. Whether there is anything in the law to hinder these regulations being made with that intent we shall not consider, as we do not regard such a general scheme as shown by the contracts or proved. A scheme to exclude bucket shops is shown and

proclaimed, no doubt—and the defendants, with their contention as to the plaintiff, call this an attempt at a monopoly in bucket shops. But it is simply a restraint on the acquisition for illegal purposes of the fruits of the plaintiff's work. *Central Stock & Grain Exchange* v. [253] *Board of Trade*, 196 Illinois, 396. We are of opinion that the plaintiff is entitled to an injunction as prayed.

Decree in No. 224 *reversed. Decree in No.* 280 *affirmed.*

MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE DAY dissent.

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[753] TIFT ET AL. *v.* SOUTHERN RY. CO. ET AL.

(Circuit Court, W. D. Georgia, S. D. June 28, 1905.)

[138 Fed., 753.]

CARRIERS—FREIGHT CHARGES.—The general rule is that, the greater the tonnage of the commodity transported, the lower should be the rate of freight charges for such transportation.

INTERSTATE COMMERCE COMMISSION—CONCLUSIVENESS OF FINDINGS.—Explicit law, the settled policy of the government, the practical principles of reason and justice require that, save for controlling reasons of law or fact, the national courts should not discredit or disparage the conclusions of the interstate commerce commission.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, §§ 138–145.]

SAME—FINDINGS OF FACT.—The findings of fact set forth in the report of the commission are in all judicial proceedings deemed prima facie evidence as to each and every fact found.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, §§ 138–145.]

PRIMA FACIE EVIDENCE.—Prima facie evidence of a fact is such as, in judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose. Mr. Justice Story, in *Kelly* v. *Jackson*, 6 Pet. 631, 8 L. Ed. 523.

INTERSTATE COMMERCE COMMISSION—REPORT—PRESUMPTIONS—BURDEN OF PROOF.—The act to regulate commerce creates a rule of presumption in favor of the commission's report, which on its introduction in evidence changes the burden of proof, and casts it upon that party against whom the report is made.

RULES OF EVIDENCE—LEGISLATIVE CONTROL.—The Legislature, subject only to the limitations of evidence expressly enshrined in the Constitution, has entire control over the rules of evidence, and by statutory enactments may alter, change, or create them anew.

Syllabus.

CARRIERS—FREIGHT CHARGES.—The reasonableness of a rate of charge for transportation is eminently a question for judicial investigation. Justice Blatchford, in *Chicago, M. & St. Paul R. R.* v. *Minnesota*, 10 Sup. Ct. 702, 134 U. S. 418, 33 L. Ed. 970.

SAME—REASONABLENESS.—It is no longer open to question that the interstate commerce commission is an expert tribunal empowered by law to determine in the first instance the reasonable or unreasonable character of the rate charged for transportation in interstate commerce.

SAME—RATE ASSOCIATION.—The character of the Southeastern Freight Association, the effect of its concert of action and agreements as to freight rates in the territory to which it extends, considered and discussed.

SAME—ADVANCE OF RATES—[AGREEMENTS IN RESTRAINT OF TRADE.]—When a number of railroads, acting under articles of organization, by concert of agreement and action advance the rates upon shipments of a particular class throughout all the territory to which their organization and influence with similar organizations extend, and when they actually advance such rates and exact the same of shippers, it is of no consequence that they have a stipulation in such articles that each and all members can at will and at any time withdraw from the agreement. [Such a combination is in restraint of trade. See pp. 746, 747.]

[754] SAME—REASONABLE COMPENSATION.—Reasonable compensation for the service actually rendered is all that a common carrier is permitted to exact. Justice Brewer, for the Circuit Court of Appeals of the Eighth Circuit, in *Chicago & N. W. R. R. Co.* v. *Osborne*, 3 C. C. A. 347, 52 Fed. 914; *Smyth* v. *Ames*, 18 Sup. Ct. 418, 169 U. S. 466, 42 L. Ed. 819.

SAME—UNREASONABLE INCREASE.—Where a vast increase of lumber traffic had resulted in large increase of net revenue to the carrier, the service was inexpensive, required neither rapidity of movement nor specially equipped cars, shippers were obliged to furnish and pay for equipment, railroads were neither to load nor unload, the commodity was neither fragile nor perishable, the risk of damage was inappreciable, the industry affords a tonnage second in magnitude to only one other transported by the carrier, an arbitrary increase to points of principal destination of two cents a hundred pounds is unreasonable and unlawful. This is especially clear where the particular traffic is practically destroyed immediately after the advance is made.

SAME—REGULATION OF CHARGES.—Railroads have no legal right to graduate their charges in proportion to the prosperity which attends industries whose products they transport.

SAME—INJUNCTION—REPAYMENT OF UNLAWFUL EXACTIONS.—In this case the conclusions of the court agree with the conclusions of the interstate commerce commission. The enforcement of the advance will be enjoined, and, general counsel for respondents having stipu-

Opinion of the Court.

ated in judicio they would repay to the shippers the sum total of the increased exactions in case such increase should be held illegal, a reference will be had to ascertain the amount thus due the complainants respectively, and decree will be rendered therefor.
(Syllabus by the Court.)

In Equity.

Ellis, Wimbish & Ellis, for complainants.

Ed. Baxter, for respondents.

John I. Hall, for Georgia Southern & F. Ry. Co.

Dorsey, Brewster & Howell, Dessau, Harris & Harris, C. B. Northrop, and *Merrel P. Callaway*, for Southern Ry. Co.

Lawton & Cunningham, for Central of Georgia Ry. Co.

Kay, Bennett & Conyers, for Atlantic Coast Line Ry. Co.

Louis F. Garrard, for Macon & Birmingham Ry. Co.

King, Spalding & Little, for Louisville & Nashville R. Co.

Brown & Randolph, for Seaboard Air Line Ry.

Claude Walker, for Nashville, C. & St. L. Ry. Co.

Mason, Hill & McGill, for Southeastern Freight Ass'n.

SPEER, District Judge.

An adequate statement of the issues in this case is given in the report of the interstate commerce commission which appears in the record. The Southeastern Freight Association is a combination of common carriers. In the preamble of its organic agreement it is stated that its purposes are set forth in the "following articles." A critical scrutiny of the articles will disclose its machinery, but we fail to discover any express statement of its purpose. It is, however, plainly enough to fix and control the rates to be charged by each and all of its members for the railway transportation of freight. Most of the railways constituting its membership are actively engaged in interstate commerce, and all of them may be. The territory to which this association extends **[755]** its dominating control comprehends the states of Virginia, North Carolina, South Carolina, Georgia, Florida, and those portions of Tennessee and Alabama east of a line extending from Chattanooga via Birmingham, Selma and

Montgomery to Pensacola. In that territory, with all of its varied products, with an area and population vaster than many empires of which we have an account, as regards every interest dependent upon the transportation of commodities, the action of the association is more authoritative than the firman of the Sultan or the ukase of the Czar. A most important industry of this association's dominion is the manufacture of lumber. The tonnage of this product is enormous. The cotton plant is indigenous to much of this territory, but while in the year 1903 the railroads whose rates are arranged through the Southeastern Freight Association transported 1,274,727 tons of cotton, in the same year, of lumber, they moved 9,808,463 tons, or nearly eight times as much. Indeed, in tonnage thus transported lumber was not approached by any other product, and was only exceeded by bituminous coal. This tonnage has been steadily increasing. In 1901 it had been little more than six and a half millions, and two years later, as we have seen, it was nearly ten millions of tons. The vast income from moving this tonnage, an immense proportion of which was the product of the forests and mills of Georgia, poured into the treasuries of the defendant companies. That it was remunerative is not in dispute. It is charged in the bill that it was very profitable. In the answer it is admitted that it was profitable. The remunerative rates for which this product was transported could scarcely have been denied in view of the fact that the rates themselves had been advanced pari passu with the increase of tonnage. For their convenience, the rate makers have divided their territory into what are termed "groups." From group 2 of the Southern Railway there has been an increase of 3 cents a hundred pounds on lumber since May, 1894, 2 cents since September, 1899. From May, 1894, to September, 1899, the rate to Cairo from that group was 13 cents. This was increased to 14 cents from September, 1899, to June, 1903. From other groups, generally speaking, since 1894, the increase has amounted to four cents a hundred pounds. From all the groups the present rates to Cincinnati, Louisville, and Evansville are greater than they have been since 1891. The rate to Cincinnati from most of the groups is now four

cents higher than it was in 1892, and from the Georgia group on the Southern Railway, to Cincinnati, Louisville, and Evansville and all Ohio river points the rates are three cents higher than they have been since 1891. This steady and marked increase of rates for the transportation of this freight, coincident with the phenomenal increase of the tonnage carried, seems abnormal. "The general rule," said the interstate commerce commission in its valuable report in this case, "is this: The greater the tonnage of an article transported, the lower should be the rate. No rule is more firmly grounded in reason or more universally recognized by carriers." While these conditions were existing, while the respondent railroads were engaged in the transportation of the largest annual ton- [756] nage of lumber theretofore known, in April, 1903, the Southeastern Freight Association and other similar associations having conferred upon the subject, the defendant companies, acting in concert, announced that they would forthwith put into effect an increase of two cents a hundred pounds in the rate on lumber to points on the Ohio river and beyond. This announcement brought the intelligence of this additional levy upon their products to the owners of every mill in Georgia, in Florida, in Alabama, in Mississippi, in Louisiana, and in Arkansas. On the lumbermen at work in the immediate domain of the Southeastern Freight Association estimated on the tonnage of that year the assessment amounted to $132,000. It is perhaps not surprising that these men immediately sought protection through the courts.

On the 17th of April, 1903, the original bill was filed. The complainants are H. H. Tift, W. S. West, J. Lee Ensign, J. S. Betts & Co., Garbutt Lumber Company, Alapaha Lumber Company, Southern Pine Company, and all other members of the Georgia Sawmill Association (a voluntary association, not a party). The averments, in brief, are that the defendant companies had published, and were to immediately put into effect, an increase of two cents a hundred pounds in the rate on lumber from Georgia points to points of delivery on the Ohio river and beyond; that the threatened advance was unjust and excessive, and would re-

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sult in irreparable injury. An injunction was sought upon the ground that the contemplated action of defendants was in violation of the act of Congress to regulate commerce. A temporary restraining order was issued, with the usual rule calling upon the respondents to show cause why the injunction sought by the bill should not be granted. A general demurrer denying the jurisdiction of the Circuit Court of the United States as such, and as a court of equity, was interposed. Respondents also filed a response to the rule. A hearing was had upon the demurrer, and also upon the evidence submitted by both parties. By interlocutory decree entered on the 16th day of May, 1903, it was held that the court had jurisdiction to grant the relief sought, if finally satisfied of the righteousness of complainants' demand; that the demurrer be overruled; that the bill, with amendments, be retained in the files of the court; and that the temporary injunction be dissolved. The reasons which moved the court to take this action were stated in the opinion that day filed. Among them was the statement that the increase of rates had not been actually imposed. The decree concluded with the following clause:

"In case the respondents shall enforce the rates complained of and the complainants shall make proper application to the interstate commerce commission to redress their alleged grievances, the court will entertain a renewed application on the record as made, and such appropriate additions thereto as may be proposed by either party for enjoining the enforcement of such rates pending the investigation by the commission, unless otherwise dissolved, and on presentation to the court of the report of the commission such other action be taken as will be conformable to law and the principles of equity."

Upon the dissolution of the restraining order, to wit, on the 22d of June, 1903, the respondents at once made the advanced rates effective. On the day following the complainants presented to the [757] interstate commerce commission their complaint and their prayer that the advance be declared to be excessive, unjust, and unreasonable. Subsequently complainants again sought from this court an injunction to restrain the enforcement of the rates pending the action of the commission. Upon this application a full rehearing of the controversy was had. This involved an exhaustive discussion of the jurisdictional questions and the facts as well. The conclusions of the court may be found

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in 123 Fed. 789–796. Action upon the application of complainants was withheld. The reasons for this course, as stated on page 796 of the opinion, are as follows:

"The complainants, it appears, have appealed to the commission. * * * The respondents are all solvent—probably all of them highly prosperous—railway corporations. It will be easily competent for the complainants to keep careful account of all the charges claimed to be unreasonable and excessive exacted by the defendants on shipments of lumber to the territory described in the bill. If their contention shall be maintained, it will be competent for the court in its final decree to direct the respondents, or either of them, to make restitution of the sums thus exacted. Indeed, the learned special counsel for the respondents, by his statement made in judicio, binds his clients to promptly repay to the complainants all such sums in case they shall finally prevail. Nor is it likely that in the interval which shall remain before the commission will act there will ensue any serious impairment of the business of complainants, or either of them. It is easily conceivable that a case or cases of this general character might be presented on which it would seem obligatory on the court to grant an immediate injunction. Such injunctions, however, should not be granted save in cases of grave and compelling exigency. Judicial action should be conservative, and rarely is such conservatism more plainly required than when vast commercial operations involved in interstate transportation will be arrested or disturbed by incautious orders. In this case the duty to grant the extraordinary order sought does not now seem imperative. The court, therefore, in view of the record and of the considerations mentioned, will withhold further judicial action upon the application until properly apprised of the action of the interstate commerce commission. When we shall have received the valuable assistance in the performance of the grave duty before us which must be expected from the conclusions of that authoritative and eminent body, such other and further action will be taken on this application as the law and the principles of equity will seem to direct."

It will thus be seen that the court did not deny the injunction prayed for. It merely withheld action to await the report of the commission. This has now been submitted. After hearing and considering the voluminous evidence, that body, on February 7, 1905, made its report. The report sustains in toto the contentions of the complainants, and declares that the advance in rates complained of was unreasonable, unjust, and violative of the act to regulate commerce. The report was, however, not unanimous. The honorable chairman, Mr. Knapp, and Commissioner Fifer expressed their dissent as follows:

"In the view we take of this case, the conclusions of our associates are not justified by the facts and circumstances appearing in the record, or otherwise entitled to consideration. Holding that the rates complained of have not been shown to be in violation of law, we respectfully dissent from the foregoing report and opinion."

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It is regrettable that the dissenting commissioners did not more fully record the grounds of their dissent. It might then be possible for the court to inquire to what extent the dissent was supported by **[758]** "facts and circumstances appearing in the record," or by facts and circumstances not so appearing, and which, therefore, do not appear to the court. The order of the commission seeking to make effective their conclusions declares the rates and charges complained of to be excessive, unreasonable, unjust, and in violation of the provisions of the act to regulate commerce. "It is further ordered that the defendants, the Southern Railway Company, Atlantic Coast Line Railway Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railroad Company, Seaboard Air Line Railway, Central of Georgia Railway Company, Georgia Southern & Florida Railway Company, and the Macon & Birmingham Railway Company, be, and each of them is hereby, notified and required to cease and desist on or before the 1st day of April, 1905, from further maintaining or enforcing said unlawful advance of two cents per one hundred pounds, and the said unlawful rates and charges resulting therefrom, for the transportation of lumber as aforesaid."

A certified copy of the opinion and order of the commission has been duly filed. This is accompanied by an application for an injunction pendente lite and for final decree granting the relief prayed in the original bill. Counsel for the respective parties, with meritorious purpose to avoid delay and to obtain a speedy hearing on the merits, entered into a stipulation that the evidence taken before the interstate commerce commission shall stand as the evidence in this court, subject, however, to the right of either party to apply to the court for leave to introduce such additional evidence as the court may think proper for a just decision of the case. On the hearing additional evidence, mainly in the form of affidavits, was submitted by the respective parties. It is agreed that the testimony thus submitted shall have the same force and effect as if it had been regularly taken in accordance with the rules in equity. With equally meritorious purpose counsel for the respective parties agreed

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that this should stand for and be the hearing for final decree in equity. Counsel for the respective parties have been fully heard. The hearing was concluded on the 22d inst. On account of the gravity of the questions involved and the tremendous record, we have taken time for consideration.

The effect of the commission's report was strongly controverted in the argument. Counsel for the complainants insisted that it must be accepted by the court as true, unless it was wholly without evidence to support it. On the other hand, it was insisted that it was only prima facie correct, and "tipped the judicial scale only by a hair's breadth." Our view is that it would be violative of explicit law, the settled policy of government, and the most practical principles of reason and justice for the courts of the nation, save for controlling reasons of law or fact, to discredit or disparage the conclusions of the interstate commerce commission. The act to regulate commerce (paragraph 14), declares that the "findings of fact set forth in the report of the commission shall in all judicial proceedings be deemed prima facie evidence as to each and every fact found." In paragraph 16 this provision is distinctly reiterated. **[759]** Nor are we in any doubt as to the import of the expression "prima facie evidence." In *Kelly* v. *Jackson*, 6 Pet. 631, 8 L. Ed. 523, Mr. Justice Story declares that "prima facie evidence of a fact is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." The authority of this case has been uniformly recognized. Rose's Notes on U. S. Reports, vol. 3, p. 301. It follows that the report of the commission declaring these advanced rates to be excessive and violative of the act to regulate commerce has such evidential effect that, had complainants been content to introduce the report and to rest their case without further evidence, it would have entitled them to the decree unless the respondents by preponderant and controlling evidence should rebut and disprove its findings. *Lilienthal's Tobacco* v. *United States*, 97 U. S. 268, 24 L. Ed. 901. In other words, the act of Congress creates a rule of presumption in favor of the commission's report, which, on its introduction, changes the burden of proof, as in this case, from the complainants to the respond-

ents. "There is not the least doubt, on principle," says the author of the recent work Wigmore on Evidence, "that the Legislature has entire control over such rules, as it has over all other rules of procedure in general, and evidence in particular, subject only to the limitations of evidence expressly enshrined in the Constitution." 2 Wigmore on Evidence, par. 1354, cl. 3. Elsewhere in the same comprehensive and valuable work, vol. 1, par. 7, it is stated: "Apart from the constitutional rules to protect against statutory changes the Legislature has the power to alter or create any rule of evidence."

The wisdom of according to the report of the commission this important effect is as little open to question. The administration of justice, says Webster, "is the chiefest concern of man upon earth." Within the scope of that function of government there is, perhaps, no single topic of greater magnitude or moment than controversies which arise in trade and commerce. Said Sir Walter Raleigh, "Whosoever commands the trade of the world commands the riches of the world, and consequently the world itself." In a material sense, and in our astonishing civilization, nothing is more important than the transportation of commodities sold or interchanged, and in transportation the stability and reasonable character of the rates charged therefor is scarcely less important than transportation itself. The three grand departments of government, legislative, executive, and judicial, are with steady and swerveless purpose enacting or enforcing laws to safeguard the rights of the general public, and as well as that portion engaged in the business of transportation. The shippers are appealing to government to protect them against unwarrantable exactions by the carriers. Appeal may be made by the carriers to protect their interests from unremunerative rates to which they may be restricted by state or other local authorities. In either case complaint is heard and redress is given. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Chicago, etc., Ry.* v. *Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; Rose's Notes on U. S. Re- **[760]** ports, vol. 11, p. 946 et seq. It is no longer doubtful that "the question of the reasonableness of a rate of charge

for transportation is eminently a question for judicial investigation." Justice Blatchford, in *Chicago & St. Paul Ry.* v. *Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970. To this end, in part, the government has created the interstate commerce commission. It is a tribunal to hear, investigate, and report on the reasonableness of rates, and to attempt the correction of inequalities and injustice therein. Said the Supreme Court in *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 675, 20 Sup. Ct. 219, 44 L. Ed. 309, "That body, in the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon the questions of fact of the character here arising." In view of these considerations and precedents, it can, we think, be no longer open to question that the interstate commerce commission is the expert tribunal empowered by law to determine, in the first instance, the reasonable or unreasonable character of the rates charged for transportation in interstate commerce. Said Judge Taft, for the Circuit Court of Appeals, in *East Tennessee, V. & G. R. R. Co.* v. *Interstate Commerce Commission*, 99 Fed. 64, 39 C. C. A. 425:

"It has been suggested that the traffic managers are much better able by reason of their knowledge and experience to fix rates and to decide what discriminations are justified by the circumstances than the courts. This cannot be conceded so far as it relates to the interstate commerce commission, which, by reason of the experience of its members in this kind of controversy, and their great opportunity for full informaton, is in a sense an expert tribunal."

We may repeat what was stated by this court in *Commission* v. *Louisville & Nashville R. R. Co.*, 118 Fed. 626:

"The righteous orders of the great commission which has been primarily intrusted by Congress with the tremendous duty should in all proper cases be respected and enforced by the courts of the country. While, on occasion, the railway or other corporation may suffer a temporary diminution of revenues from an order of this character, the interest of the public, and in the end the interest of the corporation itself, is conserved. In all such cases the general welfare must control. 'Salus populi est suprema lex.'"

It is proper to observe, however, that the court has considered the entire record, and has formed its conclusions not only from the report of the commission, but from all the evidence submitted to that body and stipulated into the case here, and from the additional evidence submitted de novo on this hearing.

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A highly significant feature of this case is the fact that the rates complained of are the result of concert of action on the part of the members of the Southeastern Freight Association. This organization, as we have seen, embraces as members all of the defendants except the Nashville, Chattanooga & St. Louis Railroad and the Louisville & Nashville Railroad Company. But the latter, as colessee of the Georgia Railroad, while not nominally, is also essentially, a member. The association was a proper, though perhaps not a necessary, party. It might well desire to be heard with regard to the relating charges against its character and conduct. While in the original bill there was a prayer that this association should be declared an illegal combination in restraint of interstate trade, [761] and that the defendant railway companies be enjoined from prosecuting the purposes of such illegal combination through the medium of the freight association, counsel for the complainants in argument properly abandon that prayer. While this is true, it is also true that the methods of the association, and the conduct of its members in this particular case, were placed before the commission, and are fully before the court. In reply to the contention on the part of the respondents that they acted independently each for itself, and not through the agency of the Southeastern Freight Association, the commission finds:

"The proof shows conclusively that the advance was the outcome of concert of action and previous understanding between the companies. Through their authorized official representatives, they conferred with each other repeatedly as to the making of the advance; recognized the fact that, because of competition in common markets between the lumber producing districts served by them, the advance should be from all those districts or none; and, finally, they all promulgated the advance to take effect at exactly the same date and for exactly the same amount. This concurrence of action was not only between the railway companies, parties defendant in this case, and in relation to rates from Georgia shipping points, but was participated in by the lumber-hauling roads serving the territories both west and east of the Mississippi in Arkansas, Louisiana, Mississippi, Alabama, and Florida."

The commission concludes that it is its duty to consider this joint, or concert of, action of the defendants as bearing upon the reasonableness and validity of the advanced rate which results. It holds that the element of competition is eliminated. In the absence of legitimate competition, destroyed, as we shall presently see, by methods obviously illegal, the

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commission presumes that the advance rates are higher than legitimate competition would produce. In other words, the marked increase of charges for transportation of that commodity which, save one other, affords the largest tonnage of freight to the respondent roads, did not originate from a normal or reasonable exigency of the respondents' business. On the contrary, it was an arbitrary exaction, imposed by a combination of railroad agents made in restraint of the natural movement of the product in the lumber trade. This combination or concert of action on the part of the respondent railroads is plainly violative of that provision of the interstate commerce law which forbids pooling. This was enacted, among other things, for the purpose of securing competition. Pooling may be as well effected by a concert in fixing in advance the rates which in the aggregate would accumulate the earnings of naturally competing lines, as by depositing all of such earnings to a common account and distributing them afterwards. That such an association and concert of action between agents of naturally competing lines is destructive of competition is equally unanswerable. To entertain any other view is to ignore reiterated decisions of the Supreme Court of the United States and many rulings of the Circuit Courts and of the state courts. Perhaps the leading cases on this subject are *United States* v. *Freight Association*, 166 U. S. 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Joint Traffic Association Case*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. In the first case the court had under considera- [762] tion the legality of the Trans-Missouri Freight Association. The agreement of that body may differ in form, but its substantial purpose was the same as that of the Southeastern Freight Association. It avowedly was the "mutual protection to the railroads by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." After argument by many of the most eminent counsel in the country, and after exhaustive consideration, the court held that the anti-trust law prohibiting contracts, combinations, and conspiracies in restraint of trade or commerce among the several states or with foreign countries apply to and cover common carriers by railroad, and a contract between them in restraint of such

trade or commerce is prohibited even though the contract is entered into between competing railroads only for the purpose of thereby effecting traffic rates for the transportation of persons and property. It was further held that, in order to maintain such a contention the complainant is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce if such restraint is the necessary effect, and concluded that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce. The court then proceeds to declare that the agreement of the association does in fact constitute such a restraint in violation of the law. It is proper to state that four judges, three of whom are not now on the bench of the court, dissented from this conclusion; but the opinion of the majority is, of course, controlling. In the subsequent case of *United States* v. *Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, the court, after full consideration, reaffirmed its holding in the Trans-Missouri Case. It further declares that Congress, with regard to interstate commerce, and in the course of regulating it in the case of railway corporations, has power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition. The tremendous significance of these findings is shown by the multitude of cases in which the doctrines announced have been utilized and reaffirmed. See Rose's Notes on U. S. Reports, vol. 12, p. 958 et seq.; also supplement to same publication, vol. 3, p. 795. Perhaps the most noted case on this subject is that of the *Northern Securities Company* v. *United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. There it was held that a contract by which a majority of stock of two companies who owned parallel interstate railroads is transferred to a corporation organized for the purpose of holding and voting the same and receiving dividends and dividing the same pro rata among the stockholders of the two companies, violates the anti-trust law. Such is the superabundance of authority upon this subject that further citation will be superfluous. It may be pardonable to recall that one of the pioneer cases on this important topic was that of

Rowena Clarke v. *Central R. R. & Banking Company of Georgia* (C. C.) 50 Fed. 338, 15 L. R. A. 683 et seq., heard in this district. This case was decided in 1892. Commenting upon similar conditions, it was there observed:

[763] "It is not difficult to perceive that a combination of corporations which produces a condition so inequitable cannot be sanctioned by the law. We believe that transactions of this character are within the spirit, if not within the letter, of the act of Congress known as the 'Sherman Anti-Trust Law' (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). It is certainly, as we have seen, obnoxious to the law of Georgia, and it was certainly as obnoxious to the common law."

This decision was made 13 years ago. The principles then announced, which were challenged in many influential quarters, are now imbedded in the country's jurisprudence and in the legislation of the national Congress. It was insisted with great earnestness by the learned special counsel for the respondents that because the various members of the association expressly stipulated in the articles of organization that each and all members could at will and at any time withdraw from the agreement to fix rates, it was not a combination in restraint of trade. This view seems wholly untenable. That is merely a recitation of a privilege which any party to an unlawful enterprise inherently enjoys. Confederates or conspirators who unite to do an unlawful act or to do a lawful act in an unlawful way may jointly or severally abandon the project. The law affords them the locus-pœnitentiæ. If, however, the object of the conspiracy is accomplished, its character is not to be determined in view of the consideration that the conspirators might have repented, but with an eye single to the fact that they did not repent. Besides, it is indisputable that the agreements of the association were made to be kept, and not to be broken. Good faith between the members, not to mention a powerful compulsory force behind them, obliged that the agreements be kept, and the fact is, as the commission finds, they were kept.

The cardinal error to which the railroads have been committed in this important controversy is the apparent belief that they have the right, by abitrarily increasing freight rates, to divert at any time to their own treasuries a share of the profits of successful industries or occupations. It

was not contended that the antecedent rates were unremunerative. As before stated, they were conceded to be profitable. That additional revenue was needed to meet increased expenses was the motive of the advance was testified by Vice President Culp of the Southern Railway Company. To quote his language: They "looked about to see where" they could best, but without injury, get that additional revenue, and one of the commodities which they thought would "bear an advance" was lumber. But the courts have more than once decisively corrected this assumption on the part of railway officials. It is true that the business of railway transportation is usually carried on by private capital invested in corporations. It is, however, business of a quasi public nature. As we have seen, there is no doubt that within the limitations of the Constitution it is subject to governmental control. These facts prohibit the agents of the railway from charging, like the owners of other property, any price they may choose to exact for the use of the railroad. The law does not fail to regard the enormous franchises which have been granted to the railroads by the public, their corporate powers, the right to avail themselves of **[764]** the right of eminent domain, the right to protection against exorbitant restrictions or exactions from local authority, and other similar considerations. These views are very plainly set forth in the opinion of Justice Brewer sitting with the Circuit Court of Appeals of the Eighth Circuit in the case of *Chicago & N. W. R. R. Co.* v. *Osborne*, 52 Fed. 914, 3 C. C. A. 347. The conclusion of the learned justice is that reasonable compensation for the service actually rendered is all that the railroad is permitted to exact. Five years after the decision just cited was made the Supreme Court of the United States had before it the same question. This was in the case of *Smyth* v. *Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. This was a case of great importance. The opinion was happily unanimous. It was argued for the appellant by Mr. John L. Webster and by Mr. Churchill, Attorney General of the state of Nebraska, and with them appears the famous name of William J. Bryan. For the appellees there appeared J. M. Woolworth and that renowned leader of the American bar, the late Mr. James C.

Carter. The case would be additional authority for the jurisdiction of this court in equity to prevent a multiplicity of suits, if such additional authority was needed; but the great duty which fell upon the court was to determine the rule for fixing the reasonableness or unreasonableness of transportation rates. The state of Nebraska had attempted to determine this by fixing an arbitrary maximum for the transportation of interstate commerce. This the court held it could not do. But in holding this it announced certain principles which the controlling officerrs of railroads, charged as they are with such vital duties to the commerce and welfare of the country, might well take to heart. "The railroad," said the court, "is a public highway, none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the guaranties for the protection of its property." It may not "fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the service rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders."

After careful consideration of the extensive record, there seems to have been an utter absence of excuse or justification for the concerted action of the railroads which advanced the rates on lumber throughout the South. The vast increase of the lumber traffic had resulted in large increase of net revenue for those roads. The service was inexpensive. It required neither rapidity of movement nor specially equipped cars, and such simple equipment as was needed the shippers were obliged to furnish and pay for. The railroads **[765]** were required neither to load nor unload the cars.

This was done by the consignor and consignee. The lumber carried was neither fragile nor perishable, and the risk therefore from loss or damage was inappreciable. Mr. Tift, the principal witness for the complainants, and one of the largest lumber men of the state, testified that for 30 years he had not been compelled to present a claim for damage on lumber shipped from his mill. Nor were there any exigencies in the financial condition of the principal defendants which called for so vast a contribution to their treasuries from an industry whose product forms such a large part of their tonnage, and which is so indispensable to the public welfare. On this subject we may, perhaps, with propriety quote literally the figures and findings of the commission. On page 573 of the report it is said:

"The financial condition of the principal defendants appears to have steadily improved for a number of years up to and including the year 1903, in which the advance in rates complained of was made. They were comparatively prosperous at the date of and for years prior to the advance.

"The Southern Railway Company has declared dividends for each year from 1897 to 1903, both inclusive, ranging from $543,000 * * * in 1897, up to $4,500,000 (7½ per cent. on $60,000,000 of preferred stock) in 1903. That road also reports surpluses of from $464,013 in 1898 to $2,100,897 in 1902.

"The Louisville & Nashville Railroad Company has declared dividends for each year from 1899 to 1903, both inclusive, ranging from $1,848,000 (about 3½ per cent. on $54,912,520 of common stock) in 1899, up to $3,000,000 (5 per cent. on $60,000,000 of common stock) in 1903. That road also reports surpluses of from $40,204 in 1899 to $2,987,195 in 1903.

"The Atlantic Coast Line Railroad Company has declared dividends for each year (except year 1900) from 1894 to 1903, both inclusive, ranging from $318,399 in 1894 (5½ per cent. on $7,021,950 of common stock), up to $1,714,075 (5 per cent. on $1,744,100 of preferred stock and 5 per cent. on $36,650,000 of common stock) in 1903. The surpluses reported by that road are from $86,875 in 1894 to $1,293,983 in 1903. In 1900 no dividend was declared, but there was a surplus reported of $2,152,406.

"The Nashville, Chattanooga & St. Louis Railway Company declared dividends ranging from $100,000 in 1899 (being 1 per cent. on $10,000,000 of common stock) to $400,000 in 1895, 1896, 1897, and 1898, being 4 per cent. on $10,000,000 of common stock. For each year from 1900 to 1903 that road reported surpluses ranging from $566,907 in 1900 to $823,480 in 1903.

"The Georgia Southern & Florida Railway Company declared dividends for each year from 1897 to 1903 ranging from $27,360 (being 4 per cent. on $684,000 of preferred stock) in 1897 up to $99,240 in 1901 (being 5 per cent. on $684,000 of preferred stock and 6 per cent. on $1,084,000 of preferred stock) in 1903. For each of the years 1902 and 1903 it declared a dividend of $77,560. The surpluses reported from 1896 to 1903 range from $9,657 to $107,060 in 1896. The surplus for 1901 was $24,105, for 1902 $41,448, and for 1903 $77,968.

"The Seaboard Air Line Railway Company has declared no dividends, but reports surplus of $252,676 for 1901, $769,331 for 1902, and $754,431 for 1903. The Central of Georgia Railway Company declared no dividends, but reports surpluses for each of the years 1899 to 1903, both inclusive, ranging from $58,888 in 1899 to $203,506 in 1903. The Macon & Birmingham Railway Company has declared no dividends, and reports a deficit for each of the years from 1894 to 1903, both inclusive, ranging from $29,099 in 1902 to $93,715 in 1894. The deficit reported for 1901 was $34,313, for 1902 $29,099, and for 1903 $45,949."

It is true, as insisted, that the operating expenses of the railroads have grown larger, and the percentage of operating expenses to gross earnings has increased. But it is also true that both gross **[766]** and net earnings have steadily increased. The statement made in argument that the gross earnings of the Southern Railway have increased from $25,353,686 in 1899 to $42,313,248 in 1903 does not seem to have been challenged. In the same year the net earnings, it seems, had increased from more than eight millions to more than twelve and a half millions, and the net earnings per mile have increased more than one thousand dollars. While these figures are most encouraging, and will afford gratification to all those who are broad-minded enough to rejoice in the prosperity of the railroads, which do so much for the welfare of the country and the advancement of its civilization, it is also true that this is probably an understatement of the real earnings of this great corporation. It was insisted by Mr. Baxter in his very able argument for the respondents that every expenditure of a railway, no matter how permanent the improvement, must be charged to the expense account of operation. This accomplished lawyer is accustomed to speak authoritatively with regard to the matters intrusted to his care. His statement in judicio may be regarded as binding upon all of the respondent companies, and, if accepted, when we consider the vast material improvements which have been made in the southern railways it will be difficult to estimate the marvelous prosperity which they now enjoy. It is true counsel for the railroads insist that their net revenue did not increase in proportion to their gross earnings, but, in the nature of things, this is not to be expected in any business. A manufacturing enterprise of extensive character may make 10 per cent. by the product of its mill. It may double its capacity and double

its output, but it may look in vain for a double increase in net earnings. How needless, then, was the exaction upon the great lumber industry of the South, which has occasioned this costly litigation with all of its lamentable consequences. The hardship upon the complainants was incontestable. The findings of the commission show that under the old rates they had built up a prosperous trade in the Northwest. Under the new rates this practically ceased. When the court, with what was thought to be caution conservative of the rights of all parties, retained the bill, but declined to continue the injunction, and gave complainants the opportunity to avail themselves of their right to appeal to the commission, this business was practically prostrate. Unhappily, but no doubt necessarily, there was a delay of 19 months before the commission made its finding. In the meantime, for well-known causes of a political nature, there had been a great and enthusiastic revival in the business, enterprise, and confidence of the country. A great demand for yellow pine lumber had grown up in all sections. Builders felt themselves obliged to have it, whatever the price, and whatever the rate, and large shipments were made on the advance rates. This is plainly enough shown by the numerous supplemental affidavits offered by the complainants and received as evidence. This, however, was in no sense ascribable to the action of the Southeastern Freight Association in imposing this rate, but was despite that action. It in no sense relates to the reasonableness or unreasonableness of the rate. And it should not be [767] forgotten that while the business of the lumbermen was recuperating the treasuries of the railroads were all the while receiving a proportionate increment from the unreasonable increase of rates which they had imposed. They have no right to graduate their charges in proportion to the prosperity which comes to industries whose products they transport. With equal reason they might demand an increase of rates for the transportation of cotton with every increase in the value of our great staple. Indeed, to concede the principle for the fixation of rates upon which the railroads through the medium of the Southeastern Freight Association have acted in this case would concede their power to

levy for no better service augmentation of tolls for every increase of profit in every line of endeavor won by the enterprise, sagacity, and industry of the American people. It is superfluous to add that a government of laws, and not of men, will never tolerate such domination and control of the trade, manufactures, and commerce of the people. These views relate exclusively to the facts before the court in this case as proven incontestably by the evidence and as found by the interstate commerce commission. Here is no attempt to discredit the incalculable services which are hourly rendered the country by the railways. In nothing do we share the animus or purposes of that sinister, sefish, and insincere agitation which would excite, if it could, the masses of the people to hatred and injustice toward corporations. Such a propaganda provokes in the justly balanced mind, and particularly in the mind trained for the administration of law, and for the protection of property and personal rights, disapprobation, and, indeed, abhorrence. With sincere enthusiasm the judge of this court has elsewhere testified to the wonderful material blessings bestowed upon our once prostrate Southland by our great railway systems in "economies of operation, in constant, if gradual, reduction of rates, in increased facilities and more expensive accommodations, in more uniform service for longer distances without change of cars, in abolition of short disjointed lines under different management, in augmentation of shipping facilities, in physical perfection of the properties and consequent safety to the public, in the steady increase in value of all the securities of these great highways of Southern commerce. * * * And with what result? Where formerly asthmatic engines attached to unsafe and noisome trains through the solitudes of an impoverished country like a wounded snake dragged their slow length along, now we behold on massive rails of gleaming steel, on roadbeds of granitic ballast, successive sections of long freight trains sturdily steaming through a prosperous land, smiling with luxuriant crops, beautiful with neat and happy homes, the chimneys of great factories giving employment to thousands, almost marking the miles; or the admiration

kindles and the pulse leaps as the limited express laden with its human freight glances by on its mission of progress and civilization." In nothing do we abate that enthusiastic approval of the services of the railways to the people; but not more than any other human agency is railroad management infallible. The patriotic and proper solution of every controversy involving the vast ques- [768] tions of transportation is simply the trial of each case on its particular facts, and with an eye single to the merits of the one party or the other. In interstate commerce this is exclusively a duty of the national tribunals, and the laws regulating such commerce are within the exclusive power of Congress.

Innumerable are the cases in which the railroads themselves successfully invoke the identical principles here announced for their own protection against intemperate and injurious local legislation restrictive of their just powers and destructive of the just rights of their stockholders. Such was the case of *Smyth* v. *Ames*, *supra*. Such was the case of *Chicago, etc., Ry.* v. *Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970. See, also, *Central R. R.* v. *Macon* (C. C.) 110 Fed. 871; *Iron Mountain R. R.* v. *Memphis*, 96 Fed. 122, 37 C. C. A. 410; *Milwaukee, etc., Co.* v. *Milwaukee* (C. C.) 87 Fed. 577; *Ball* v. *Rutland* (C. C.) 93 Fed. 516; *Cleveland City Ry.* v. *Cleveland* (C. C.) 94 Fed. 409; *Chicago, M. & St. P. Ry.* v. *Tompkins*, 176 U. S. 173, 20 Sup. Ct. 336, 44 L. Ed. 417; *Louisville, etc.*, v. *McChord* (C. C.) 103 Fed. 220. In all of these cases and many others of pertinent character which might be cited, corporations found themselves obliged to resort to the courts to obtain protection against rates which were unreasonably low. The courts of the country will be found prompt to protect them in the righteous exercise of righteous powers. They will be equally prompt in proper cases to protect the public or any individual from unrighteous exactions, particularly when invoked through the agency of unlawful combinations or associations in restraint of trade and commerce, affecting not only the welfare and happiness of the individual, but the thrift and prosperity of entire communities and great commonwealths.

In this case the conclusions of the court as to the issues involved agree with the conclusions of the interstate commerce commission as expressed by their report. A decree enjoining all the respondents against further enforcement of the rates complained of will be at once entered. Order will be taken referring to the standing master the pleadings and evidence, with instruction to ascertain the sum total of the increased rate paid by each of the complainants to either or all of the defendant companies since the rate went into effect and to the end of this litigation, and report such amount to the court, in order that, pursuant to the stipulation made by the respondents in open court, in case the complainants prevail, decree of restitution shall be made. Because of the vast extent of the lumbermen's business, and the great expense and inconvenience which might result to them, to the lumber trade, and the railways from the instantaneous enforcement of this injunction, when respondents may have purpose to appeal from this action, it will be ordered further that the decree now granted shall not take effect until 10 days from this date have elapsed, in order that the respondents or either of them, if they so desire, may seek supersedeas.

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[155] BOBBS-MERRILL CO. *v.* STRAUS ET AL.

(Circuit Court, S. D. New York. July 11, 1905.)

[139 Fed., 155.]

COPYRIGHTS—SALES—RESTRICTION—NOTICE—EFFECT.—Where the publishers of a copyrighted book printed a notice on the page following the fly leaf that the price of the book at retail was $1 net, and that no dealer was licensed to sell it at a less price, and the sale at a less price would be treated as an infringement of the copyright, such notice did not purport to reserve to the publisher any interest in the book, or any right to control it or the action of its owner in the use and disposition thereof, and was insufficient to constitute a license agreement or contract restricting or modifying the absolute title acquired by purchasers.[a]

[156] SAME—INFRINGEMENT.—Where a publisher of copyrighted books voluntarily parted with all control over them by selling the books to purchasers, such purchasers were neither licensees nor agents of

[a] Syllabus copyrighted, 1905, by West Publishing Co.

Statement of the Case.

the publisher, though buying the books for resale, and hence such resale did not constitute an infringement of the copyright, under Rev. St. § 4964 [U. S. Comp. St. 1901, p. 3413], declaring that it is an infringement of a copyright to print or publish a copyrighted book without the consent of the proprietor given in writing, or knowingly to sell or expose for sale a copy or copies of such copyrighted book "when unlawfully printed or imported," though the books so sold each contained a notice that no dealer was licensed to sell it at a less price than that fixed by the publisher, and that a sale at a less price would be treated as an infringement of the copyright.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, §§ 41, 47.]

SAME.—The act of a publisher of a copyrighted book in putting it on the market and selling it does not constitute a license to the purchaser to use and sell the same, which the publisher is entitled to restrict by a notice brought to the attention of the purchaser that the sale of the book at retail for less than the price fixed by the publisher shall be considered an infringement of the copyright.

SAME—COMBINATIONS IN RESTRAINT OF TRADE—INTERSTATE COMMERCE.—Where the publishers and booksellers of the United States organized two membership associations, one known as the "American Publishers' Association," and the other as the "American Booksellers' Association," and together controlled the publication and sale of at least 90 per cent. of all copyrighted books, the objects of which were to compel owners and dealers of such books to purchase them of the members of the combination at an arbitrary price fixed by it, regardless of the actual value of the books as determined by a demand in an open market, or the condition of the books, and to compel all publishers and dealers of such books to come into the combination, be controlled by it, and sell books at prices fixed by it, regardless of the value of the books or of the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books through a system of blacklisting, etc., the effect of which would be to cripple the business of any publisher or bookseller outside of the combination, such agreement was a violation of the Sherman anti-trust law (Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), declaring that every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 13.]

In Equity.

Suit to enjoin the sale at retail of books containing a copyright novel, "The Castaway," at a price less than $1 for each copy of the book. Such sales of such book are alleged to be in violation of the terms of a notice printed in each copy thereof upon the page immediately following the title-page and immediately below the statutory copyright notice. Defendants insist that the books containing such novel have been lawfully printed for sale to the general public, and to be read by the general public, and put upon the market and sold, and that the right of the owners of such books to sell same at such price as they severally may see fit to ask cannot be and is not limited or affected by the notice. They also insist that this suit is to enforce an unlawful combination and agreement, and press other defenses.

Opinion of the Court.

Boardman, Platt & Soley (*W. H. H. Miller, Albert B. Boardman*, and *Henry W. Clark*, of counsel), for complainant.

Spiegelberg & Wise (*John G. Carlisle* and *Edmond E. Wise*, of counsel), for defendants.

[157] RAY, District Judge (after stating the facts as above).

The main facts in this case are not disputed. They may be stated as follows:

(1) The Bobbs-Merrill Company, the complainant, is, and at all times mentioned in the bill of complaint was, a corporation duly organized and existing under the laws of the state of Indiana, engaged in the business of publishing and selling books, and having its principal office in the city of Indianapolis, in the state of Indiana.

(2) The complainant is, and at all times mentioned in the bill of complaint was, the owner and proprietor of a book or novel in one volume, entitled "The Castaway," written by Hallie Erminie Rives.

(3) The allegations contained in paragraphs of the bill of complaint numbered III to VI, inclusive, relating to the complainant's compliance with the copyright laws of the United States, are true. Such paragraphs read as follows:

"III. That your orator is the proprietor of a copyright book or novel in one volume, entitled and known as 'The Castaway.' That the author of said book was Hallie Erminie Rives. That prior to the publication of said book, and prior to the month of May, 1904, the author thereof, said Hallie Erminie Rives, duly sold, assigned, and transferred to your orator all her right, title, interest, and property in and to said book, and your orator thereupon became, and at all times since said sale has been, and still is, the sole and exclusive proprietor and owner thereof.

"IV. That your orator, being then proprietor of said book as aforesaid, and desiring to secure a copyright thereof, before the day of publication of said book duly deposited in the mail within the United

States, to wit, in the city of Indianapolis, in the state of Indiana, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of said book, and duly paid to said Librarian of Congress the fees required by law, to wit, fifty cents, for recording said title, and your orator did also, not later than the day of publication of said book in this or any foreign country, to wit, on the 24th day of May, 1904, deposit in the mail within the United States, to wit, in the city of Indianapolis, in the state of Indiana, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of said book printed from type set within the limits of the United States.

"V. Your orator is informed and verily believes, and therefore avers, that the Librarian of Congress on the 18th day of May, 1904, duly recorded the name and title of said copyright book in pursuance of the statute in such case made and provided.

"VI. That your orator has given due notice and information of its said copyright by inserting and printing in each and every copy of said book published, upon the page immediately following the title-page thereof, the words and figures: 'Copyright 1904. The Bobbs-Merrill Company. May.'"

(4) No copies of "The Castaway" were sold or otherwise issued prior to securing the copyright thereon.

(5) Each and every copy of "The Castaway" printed, published, or issued by complainant contained at the time of such publication and issue the following notice, printed upon the page of the book immediately following the title-page, and just below the statutory copyright notice:

"The price of this book at retal is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.

"THE DOBBS-MERRILL COMPANY."

[158] (6) The defendants in the course of their business procured copies of said book before the commencement of this suit for the purpose of sale at retail. The defendants purchased 90 per cent. of said copies from dealers at wholesale at a reduction from said specified retail price of about 40 per cent., and 10 per cent. of said copies they purchased at retail, paying the full retail price therefor.

(7) Defendants at the time of their purchase of copies of said book knew that said book was a copyright book, and were familiar with the terms of the notice printed in each copy thereof, as described in paragraph 5 of this statement, and knew that this notice was printed in every copy of said book purchased by them.

(8) The wholesale dealers, from whom defendants purchased copies of said book, obtained the same either directly

from the complainant or from other wholesale dealers at a discount from the net retail price, and at the time of their purchase knew that said book was a copyright book, and were familiar with the terms of the notice printed in each copy thereof, as described in paragraph 5 of this statement, and such knowledge was in all wholesale dealers through whom the books passed from the complainant to defendants. But said wholesale dealers were under no agreement or obligation to enforce the observance of the terms of said notice by retail dealers or to restrict their sales to retail dealers who would agree to observe said terms.

(9) The defendants have sold copies of said book at retail at the uniform price of 89 cents a copy, and are still selling, exposing for sale, and offering copies of said book at retail at said price of 89 cents per copy, without the consent of the complainant.

(10) That during the year 1900 a large number of publishers in the state of New York and throughout the states of the United States entered into an agreement for the purpose of maintaining the net retail price of copyrighted books published by any of them as designated by the publisher of each book, and to prevent the sale at retail of any such copyrighted books by any dealer at retail at less than said fixed net retail price. That pursuant to that agreement a membership corporation was formed under the laws of the state of New York under the name of the "American Publishers' Association," which included among its members the complainant herein and a large majority of the publishers of all books, copyrighted or uncopyrighted, in the state of New York and throughout the United States.

(11) That immediately after the incorporation of said American Publishers' Association a resolution was adopted and its members entered into agreements with each other and with the American Publishers' Association, a copy of which is as follows:

EXHIBIT A.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct some of the evils connected with the cutting of prices on copyright books was adopted at the meeting of the American Publishers' Association held February 13, 1901:

"I. That the members of the American Publishers' Association

agree that all copyrighted books first issued by them after May 1, 1901, shall be [159] published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all other of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. That the only exception to the rule of maintaining the retail price shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount.

"V. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VI. That after the expiration of a year from the publication of any such net copyrighted book dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VII. That when the publisher sells at retail a book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"VIII. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"IX. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"X. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which association shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association

pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XI. That the report, when adopted by the board of directors, be submitted to the association and voted upon in accordance with the association's rules, article II, section 1."

(12) That thereafter a voluntary association, called the "American Booksellers' Association," was formed, which was intended to and did include a large majority, to wit, about 90 per cent., [160] both in number and extent of business, of all wholesale and retail book dealers throughout the state of New York and the United States. That the avowed purpose of this association was to cooperate with and assist the American Publishers' Association and its members in the maintenance of the so-called net price or restricted price system for the sale of books at retail, and to supply the American Publishers' Association with the names of booksellers who cut the prices of net price or restricted books at retail, and to refrain from selling such price-cutters, or any individuals, firms, or dealers believed to be price-cutters, any books of any kind, whether copyrighted or uncopyrighted, at wholesale or at retail prices. That said American Booksellers' Association thereafter at its annual convention in June, 1901, adopted the following resolution:

EXHIBIT B.

"*Reform Resolution No. 1.*

"Whereas, the American Publishers' Association has adopted a net price system and entered into an agreement for its maintainance, by which the members of said association will cut off the supply of all their books, net, copyrighted, or otherwise, to any dealer who fails to maintain the net price of any or all books published under the net price system:

"(1) Now, therefore, be it resolved, that this, the American Booksellers' Association, in convention assembled, accept the said net price system, with the distinct understanding that it is the intention of the American Publishers' Association to include fiction under the net price system as rapidly as possible; and

"(2) Furthermore, be it resolved, that all members of the American Booksellers' Association shall give to each of the members of the American Publishers' Association, and to all publishers who co-operate with them in the maintenance of the net price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock, nor to offer for sale, after due notification, the books of any publisher who declines to support the net price system.

"(3) Furthermore, be it resolved, that we instruct our secretary promptly to notify all members of this association that this resolution is applicable and in force with reference to any publisher who shall

have made it manifest that he is unwilling to co-operate with this association, and with the members of the Publishers' Association, in the maintenance of the net price system.

"(4) Furthermore, be it resolved, that this resolution, on being ratified by two-thirds of the members of this association, voting by formal ballot, shall immediately become a law to each and all of the members of this association; and if it shall appear, upon the presentment of any three members of this association, that a member has purchased, put in stock, or offered for sale the books of the publisher who has been formally denounced, such member shall be expelled from membership in this association, and all members of this association shall then and thereafter be restrained from supplying any books to such expelled member at a discount from the usual retail price.

"(5) Furthermore, be it resolved, that all members of this association shall be restrained from furnishing any books at less than the net or usual retail price to any dealer who shall have been denounced by the Publishers' Association for cutting the price of net books, or for otherwise violating the net price system, and who shall have been therefor cut off by the members of the Publishers' Association from the supply of their books.

"(6) Furthermore, be it resolved, that all members of this association shall endeavor to keep in stock and push the sale of net books so long as they are reasonably in demand, provided such discount is allowed by the publishers to the dealers as will yield them a living profit; and they shall maintain [161] the net prices of the same in accordance with the terms of the publishers' agreement for the maintenance of the net price system.

"I [or we] vote for the adoption of Reform Resolution No. 1 as above stated.

"[Signed] Name.....

"Address....."

(13) That thereafter and in pursuance of said agreements neither of said associations nor any of the members thereof, including the complainant, would sell or supply, or sanction the sale or supply, of any books at any price to any dealer in the state of New York, or elsewhere in the United States, whether a member of said associations or not, and whether said books were copyrighted or not, or were published by any of the members of the said American Publishers' Association or not, who did not maintain the arbitrary net retail price on copyrighted books published by the members of the American Publishers' Association, or would resell or was believed to resell such copyrighted books to any dealers who thereafter sold the same at less than the arbitrary price named by the publisher and maintained pursuant to the rules and agreements of the two associations and their members.

(14) That on or about the 8th day of January, 1902, the plan, resolutions, or agreements of the American Publishers'

Association were amended by the addition thereto of the article relating to a certain discount to be allowed from the published price of works of fiction (not net) published by members of the said association, and a change in article 4 relating to discounts to be allowed to libraries, and in article 6, and the omission of article 11 of the original plan. A copy of said resolutions, with the said amended articles indicated by italics, is marked "Exhibit C." Thereafter, on the 27th day of May, 1902, the said plan, resolutions, or agreements were further amended by the addition to article 4 thereof of a paragraph relating to the sending of a work of fiction postpaid, a copy of which said resolutions as so amended is marked "Exhibit D." That thereafter, and on the 15th day of January, 1903, the said plan, resolutions, and agreements were amended by the addition to article 3 of a paragraph relating to the sale of protected books in combination with a periodical, and in article 12 a paragraph was added relating to an agreement to be entered into by all purchasers of books from the members of the Publishers' Association. A copy of said resolutions as amended is marked "Exhibit E." That thereafter, and on or about the 13th day of February, 1903, the said plan, resolutions, or agreements were again amended as to articles 1 and 4, so as to provide for the exclusion at the option of a publisher of certain copyrighted juvenile books from the class of so-called net publications, and the inclusion of such books in the class of copyrighted works of fiction not net. Article 5 was likewise amended so as to grant libraries a discount on certain juvenile books (not net), a copy of which resolutions or agreements as amended is marked "Exhibit F." That thereafter, on the 13th day of January, 1904, the said resolutions or agreements were amended as to articles 1 and 5, so as to apply to all juvenile [162] books, and article 4 thereof was so amended as to provide for the publication and sale of all juvenile books (not net) under the system applying to the publication and sale of copyrighted works of fiction, a copy of which said resolutions or agreements as so amended is marked "Exhibit G."

Opinion of the Court.

EXHIBIT C.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at a meeting held February 8, 1902.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. *That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.*

"V. *The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.*

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of *any copyrighted* books *issued under these regulations* dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable [163] person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to."

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EXHIBIT D.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at meetings held January 8, 1902, and May 27, 1902.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

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"When a work of fiction published under this rule is sent postpaid, the price to the purchaser shall be not less that the minimum price plus the postage.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33⅓ per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

[164] "VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to."

EXHIBIT E.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at meeting held January 15, 1903.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published

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by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected **[165]** books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given. When a work of fiction published under this rule is sent postpaid, the price to the purchaser shall be not less than the minimum price plus the postage.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33⅓ per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

"VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That is shall be the duty of all members of the association to

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report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

EXHIBIT F.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"Plan as Amended to March 4th, 1903.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

[166] "Special attention is called to changes in the following sections: 1, 3 (last paragraph), 4, 5, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction (not juveniles), or any juveniles of the class that may be described as board books, flat picture books, or toy books.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

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"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile board books, flat picture books, or toy books (not net), published after March 1st, 1903, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33⅓ per cent. on fiction and juvenile board books, flat picture books, or toy books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price; and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and, when directed, shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

[167] "X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association through its agents and members aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important centre or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association.

"Dated March, 1903."

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EXHIBIT G.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"*Plan as Amended to January 14th, 1904.*

"The following plan to correct evils connceted with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

"Special attention is called to changes in the following sections: 1, 3 (last paragraph), 4, 5, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction, or any juvenile.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net), published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped, will rarely be given.

[168] "V. The only exceptions to the foregoing rules shall be in the cases of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33⅓ per cent. on fiction and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discounts on net books, nor to any special discount on fiction or juvenile books.

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

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"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price; and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board, the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association through its agents and members aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

(15) That thereafter, and during the month of February, 1904, in an action brought in the Supreme Court of the state of New York, it being a court of competent jurisdiction, wherein the defendants in this action were plaintiffs and the American Publishers' Association and the American Booksellers' Association and such of their respective members as were within the jurisdiction of the said court were made parties defendant, the New York Court of Appeals, being the highest appellate court in the said state, rendered its decision that the combinations and agreements described in paragraphs 10, 11, 12, and 14 of this statement were unlawful and void, and contrary to the statute law and public policy of the state of New York, and more especially of the statute law of said state known as chapter 690, p. 1514, of the Laws of 1899, which said law, for the purposes of this

statement, is made part of the record. The prevailing opinion of the court, to which reference is hereby made for the **[169]** true construction of said decision, reported 177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819, is as follows:

"*Isidore Straus et al., Composing the Firm of R. H. Macy & Company, Respondents*, v. *American Publishers' Association et al., Appellants.*

"Monopolies—An agreement Which in Effect Prevents the Sale of Uncoprighted Books in the State is Illegal under the Anti-Monopoly Act (Laws 1899, c. 690). An agreement between publishers representing ninety-five per cent. of the books published in the United States, and ninety per cent. of the business done in the book trade, that all copyrighted books published by any of them after a specified date should be published and sold at retail at net prices; that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers and jobbers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such prices; and that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been blacklisted, but that all that shall be required to govern his action and to prevent him from selling to such persons shall be that the name has been given to him by the association as one who cuts such net prices—is an agreement which, while purporting to secure to the owner and publisher of copyrighted books the monopoly permitted by federal law, may, and as practically construed by the parties does, operate in fact so as to prevent the sale of books of any kind or at any price to any dealer who resells, or is suspected of reselling, copyrighted books at less than the arbitrary net price, whether such dealer be a member of the association or not. Such an agreement undertakes to interfere with the free pursuit in this state of a lawful business in which a monopoly is not secured by the federal statute, viz., that of dealing in books which are not protected by copyright. It is, therefore, in violation of chapter 690, p. 1514, of the Laws of 1899, enacted to prevent monopolies in articles or commodities of common use, and to prohibit restraint of trade and commerce.

"*Straus* v. *American Publishers' Ass'n*, 83 App. Div. 446, 83 N. Y. Supp. 271, affirmed.

"(Argued January 19, 1904; decided February 23, 1904.)

"Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered July 30, 1903, which reversed an interlocutory judgment of Special Term sustaining demurrer to the complaint.

"Stephen H. Olin and Thaddeus D. Kenneson, for appellants. John G. Carlisle and Edmond E. Wise, for respondents.

"Parker, C. J. Chief Justice Marshall said long ago, in *Grant* v. *Raymond*, 6 Pet. 217, 241, 8 L. Ed. 376: 'To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries," is among those expressly given to Congress. * * * It is the reward stipulated for the advantages derived by the public from the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made, and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield. It receives all which it has contracted to receive. The full benefit of the discovery after its enjoyment by the discoverer for 14 years is preserved, and for his exclusive enjoyment of it during that time the public faith is pledged.' That case and many **[170]** others were considered recently by the United States Supreme Court in *Bement* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, Mr. Justice Peckham writing. After an examination of the cases which may be said to restrict the exceptions which grow out of a proper exercise of the police power of the state, of which *Patterson* v. *Kentucky*, 97 U. S. 501, 24 L. Ed. 1115, is an illustration, he says (186 U. S. 91, 22 Sup. Ct. 755, 46 L. Ed. 1058): 'Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.' That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the *Park & Sons Co. Case*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, upon which defendants apparently rest their claim that the judgment of the Appellate Division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out.

"While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protection which the federal government permits them to enjoy for the reasons stated by Chief Justice Marshall (supra), it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all, if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this state as much as if it related to bluestone (*Cummings* v. *Stone Co.*, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655), or to envelopes (*Cohen* v. *Envelope Co.*, 166 N. Y. 292, 59 N. E. 906); and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible, but probable. But it is not of moment whether such a result is probable or not; for the test to be applied is, what may be done under the agreement? Reference to the complaint makes it clear that the association has undertaken to provide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association; and it appears from the complaint that the practical construction given to this agreement by those operating

together under it is that, if a dealer is suspected of selling copyrighted books at less than the arbitrary net price, it is quite sufficient to exclude him from selling books altogether. The agreement nowhere suggests that it is the object of the association to control the sale of books not protected by copyright. Indeed, the object of the association seems to be merely to protect the copyrighted books. But while the other part of the scheme is apparently sought to be hidden, it is after all uncovered by the clauses authorizing the exclusion of any members of the association, or those who refuse to be bound by its rules, from selling books of any description. The fifteenth paragraph of the complaint alleges 'that during the year 1900 a number of prominent publishers, including defendants, hereinbefore described as publishers, for the purpose of securing to themselves an unreasonable and extortionate profit, and at the same time with intent to prevent competition in the sale of books, and for the purpose of establishing and maintaining the prices of all books published by them, or any of them, and all books dealt in by them, or any of them, and preventing competition in the sale of books, and for the purpose of establishing the public policy and the statutes of the state of New York * * * combined and associated themselves together,' etc. The sixteenth paragraph refers to the method of organization, and the fact of the adoption of a resolution and an agreement to carry out their object, while the seventeenth states the nature of the agreement as follows: 'That [171] as a part of said unlawful scheme and combination the members of said association agreed that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books [the word "copyrighted" is omitted at this point] at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such prices.' It will be seen that, while the leading object of this portion of the agreement apparently is to maintain the retail net price of copyrighted books it operates in fact so as to prevent the sale of books to dealers who sell books of any kind to one who retails copyrighted books at less than the net retail price. And the agreement further provides that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been blacklisted, but that all that shall be required to govern his action and to prevent him from selling to such a person shall be that the name has been given to him by the association as one who cuts such net prices. It has been admitted, and must be, that the agreement may be so worked out as to deprive a dealer from selling any books whatever, thus breaking up his business.

"But it is said that is only intended as a punishment for one who refuses to be bound by the wishes of the owner of the copyrighted book as to its selling price; in other words, that the association inflicts upon him the penalty of a destruction of his business because of his refusal to abide by the rules of the association. It is, of course, of no consequence how this course of action may be described by those who invented it; for, if it be the fact that the combination which agrees to exclude others from an unprotected business violates the statute, then it matters not what excuse may be offered for it. It is the excuse, not the statute, which must give way. The eighteenth paragraph of the complaint contains what purports to be a practical construction given to this agreement by the members of the association. It states: 'That in pursuance of said unlawful combination and agreement said American Booksellers' Association and its members have continuously co-operated with and assisted the American Publishers' Association and the members thereof in establishing and maintaining prices of such books, and preventing competition in the supply and sale of the same, and still continue so to do; and plaintiffs say that in compliance with said agreement neither said associations nor any of the members thereof will sell or supply books at any price to any dealer, whether a member of said association or not, and whether such books are copyrighted or not, or are not published by said American Book Publishers' Association or its members, who resells, or is suspected of reselling, such copyrighted books at less than the arbitrary net price fixed by said unlawful combination, nor will the said association nor any of their members sell or supply any books whatever to any one who resells, or is suspected of reselling, such copyrighted books to any dealer who thereafter sells the same at less than such arbitrary net price.' Here, then, we have a practical construction of the agreement, one put upon it by the parties to it; and it is such a construction as the language employed calls for. And it discloses that the parties who are acting under the agreement assume it to be their right and their duty by virtue of it not to sell or permit to be sold books of any kind or at any price to any dealer 'who resells or is suspected of reselling copyrighted books at less than the arbitrary net price,' whether such dealer be a member of the association or not. The intended effect of this is to prevent any dealer who is even suspected of reselling copyrighted books at less than the net price from obtaining books at any price or on any terms, whether copyrighted or not. And it does not stop there, for the members of the association agree not to supply him any books at any price, whether he resells copyrighted books or not at less than the arbitrary net price, provided he is suspected of selling to any dealer who thereafter sells the same at less than such arbitrary net price. And this means, inasmuch as the members represent 95 per cent. of the publishers and 90 per cent. of the business done in the book trade, that he may be practically driven out of the business if any one chooses to suspect [172] that a dealer to whom he has sold books has resold them at less than the price fixed. The members of the association, therefore, have entered into an agreement which by its terms—as we read it, and as they have construed it in their everyday working under it—undertakes to interfere with the free pursuit in this state of a lawful business in which any member of the community has a right to engage, a business in which a monopoly is not secured by the federal statutes, namely, that of dealing in books which are not protected by copyrights; and hence it is in violation of chapter 690, p. 1514, Laws 1899, which provides: 'Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.'

"The order should be affirmed, with costs.

"Haight, Martin, Vann, and Werner, JJ., concur with Parker, C. J. Gray and Barrett, JJ., read dissenting opinions.

"Order affirmed."

That the judgment upon this decision was duly adopted by the New York Supreme Court and entered on its records.

(16) That thereafter, and on or about the 13th day of March, 1904, the said resolutions or agreements were amended as to article 3 so as to cover copyrighted books only, and so as to provide for the placing of the seller's name on the cut-off list of the association only under certain changed conditions. A copy of such resolutions as amended, with the words stricken out by said amendment indicated by brackets, and the words thereby added in italics, are hereto annexed and marked "Exhibit H."

EXHIBIT H.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"*Plan as Amended to April 1st, 1904.*

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

"Special attention is called to changes in the following sections: 1, 3, 4, 5, 9, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction, or any juvenile.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that [such net] copyrighted books [and all others of their books] shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their *copyrighted* books *except at retail* [further] to no one who [known to them to] cuts such **[173]** net prices [or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided]. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale. It is further agreed by the members of the association that they will not themselves offer, nor sell their *copyrighted* books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net) published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of copyrighted fiction and copyrighted juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"V. The only exceptions to the foregoing rules shall be in cases of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33⅓ per cent. on fiction and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction or juvenile books.

"VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board, the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions, *after giving the person accused of such violation an opportunity to explain his action.*

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

[174] That thereafter the American Booksellers' Association passed a so-called Reform Resolution No. 2 in April, 1904, which said resolution is as follows:

EXHIBIT I.

"Reform Resolution No. 2.

"Whereas, the American Publishers' Association has adopted a net price system, and entered into an agreement for its maintenance, by which the members of said association will cut off the supply of all their copyrighted books to any dealer who fails to maintain the net price of any or all copyrighted books published under the net price system:

"(1) Now, therefore, be it resolved, that this, the American Booksellers' Association, in convention assembled, accept the said net price system, with the distinct understanding that it is the intention of the American Publishers' Association to include copyrighted fiction under the net price system as rapidly as possible; and

"(2) Furthermore, be it resolved, that all members of the American Booksellers' Association shall give to each of the members of the American Publishers' Association, and to all publishers who co-operate with them in the maintenance of the net price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock, nor to offer for sale, after due notification, the copyrighted books of any publisher who declines to support the net price system.

"(3) Furthermore, be it resolved, that we instruct our secretary promptly to notify all members of this association that this resolution is applicable and in force with reference to any publisher who shall have made it manifest that he is unwilling to co-operate with this association, and with the members of the Publishers' Association, in the maintenance of the net price system.

"(4) Furthermore, be it resolved, that this resolution, on being ratified by two-thirds of the members of this association, voting by formal ballot, shall immediately become a law to each and all of the members of this association; and if it shall appear upon the presentment of any three members of this association that a member has purchased, put in stock, or offered for sale the copyrighted books of a publisher who has been formally denounced, such member shall be expelled from membership in this association, and all members of this association shall then and thereafter be restrained from supplying any copyrighted books to such expelled member at a discount from the usual retail price.

"(5) Furthermore, be it resolved, that all members of this association shall be restrained from furnishing any copyrighted books at less than the net or usual retail price to any dealer who shall have been denounced by the Publishers' Association for cutting the price of net copyrighted books, or for otherwise violating the net price system, and who shall have been therefor cut off by the members of the Publishers' Association from the supply of their copyrighted books.

"(6) Furthermore, be it resolved, that all members of this association shall endeavor to keep in stock and push the sale of net copyrighted books so long as they are reasonably in demand, provided such discount is allowed by the publishers to the dealers as will yield them a living profit; and they shall maintain the net prices of the same in accordance with the terms of the publishers' agreement for the maintenance of the net price system.

"I [or we] hereby vote to rescind Reform Resolution No. 1 and to adopt Reform Resolution No. 2.

"[Signed] Name .....

"Address .....

"Dated March 10, 1904."

(17) That since May, 1901, the date that the first resolutions and agreements of the American Publishers' Association and the American Booksellers' Association and their respective members went into effect, and until April, 1904, a large majority of all the publishers, in numbers and extent of business, including the complainant here- **[175]** in, and a large majority of all the booksellers throughout the United States, consisting of about 90 per cent. both in numbers and in extent of business, have obeyed the rules and regulations of the two associations as from time to time amended. They and each of them refused to sell or sanction the sale of any books of any kind, whether copyrighted or uncopyrighted, whether published by any member of the American Publishers' Association or not, to any dealer throughout the United States who did not maintain at retail the net or restricted price at which each copyrighted book was published under the net price or restricted price system, nor would they sell or sanction the sale of any books of any kind to any one who was known or believed to sell such net or restricted copyrighted books at retail at less than the net or restricted price, nor would they sell or sanction the sale of any books of any kind to any one who sold books of any kind to a price-cutter on copyrighted books, or who was known or believed to supply a price-cutter with any books of any kind; and when any dealer or person sold any net price books or restricted price books at less than the net or restricted price, or any jobber or wholesaler supplied a price-cutter with any books of any kind, or was known or believed to so supply him, the two associations circulated and published notices warning all persons in the trade, whether members of either of such associations or not, that the book supply of such persons had been cut off pursuant to the rules of the two associations.

(18) That since April, 1904, any dealer who does not maintain the net or restricted price at retail of any copyrighted book published by any member of the Publishers' Association under the net price or restricted price system cannot purchase any copyrighted books of any kind from any of the members of either of the associations at less than the retail price, whether such copyrighted book is published by any of the members of the associations or not, and whether

such copyrighted book was published under the net price system or not, or prior thereto.

(19) That the defendants were placed on the cut-off list in May, 1901, because they refused to maintain the net retail price of $1.40 on the copyrighted book "Tarry Thou Till I Come," published by Funk & Wagnalls, but uniformly sold the same at retail at $1.24; and since said time their name has been circulated monthly upon the list of dealers whose supplies have been cut off under the rules of the two associations, and against whom the trade at large was warned as price-cutters and as coming under the rules of the two associations as dealers to whom books should not be sold, and, furthermore, that books should not be sold to any one who in turn was known or believed to resell the same to these defendants. That since March, 1904, the rules have been amended and relaxed as above set forth, so as to permit dealings with the defendants in uncopyrighted books only. That as to all copyrighted books of any and all kinds the members of said associations are not permitted under the rules to sell to the defendants, nor to sell to any one who resells or is believed to resell to the defendants; and the cut-off lists or blacklists have been published against these defendants and **[176]** against such other dealers as have been cut off from their supply of books, copyrighted or otherwise, without any interruption or intermission from the time they were first included in the list of dealers whose supplies were cut off until the present time, without any change in the method employed prior to the passage of the last amendment, which eliminated uncopyrighted books from the rules.

(20) That such combination and agreement as hereinbefore described are now in force, and that it is intended by the members of the two associations and the two associations to continue them in force.

(21) That the complainant was, since May, 1901, a member of the American Publishers' Association, and a party to all the agreements of said association hereinbefore set forth, and obeyed and lived up to all the rules and regulations of the American Publishers' Association hereinbefore set forth, and published all its books, including "The Cast-

away," in acordance with the rules and regulations of the association above set forth.

(22) That the members of the said two associations, including the complainant herein, do now, and at all the times herein mentioned have, resided and carried on their business of selling books in many different states, and, in the conduct of their respective business as publishers and wholesale and retail dealers in books, the members of the said two associations, including the complainant, were and now are engaged in the business of purchasing books, copyrighted and uncopyrighted, from each other and from other persons, in many states other than the states in which the purchasers resided, or now reside, and do business; and all such books were and have been transported, in compliance with the contract of purchase, from the state where such books were purchased to the purchaser, and delivered to the purchaser in the state where he resided, or now resides in and conducts his business, and members of both of such associations, including the complainant herein, also sell and have sold books to many persons who are not members of the said associations, in states other than the ones in which the sellers reside and conduct their business, and all such books were and have been transported, in compliance with the contract of purchase, from one state to another, and then delivered to the purchaser, and all the rules, regulations, and agreements made by the said two associations and its members, including the complainant, as hereinbefore set forth, were intended to be applied and be enforced, and have been and are now applied to and enforced, against all publishers and dealers in books throughout all the states of the United States, whether such publishers and dealers were or were not members of either of such associations, and whether they purchased books in one state for transportation and delivery in another, or for delivery in the state where purchased.

(23) That the members of the said two associations, including the complainant herein, have heretofore produced, distributed, and sold, and still produce, distribute, and sell, the majority of all books purchased and dealt in throughout the state of New York and all other states and territories of the United States.

[177] From these facts, which are conceded, it appears that the original purpose of the combination and agreement of the association of publishers, including the complainant, was (1) to maintain the net retail price of all copyrighted books published by the members of such association, or any of them, at such price per book as might be fixed by the publisher of that book, and (2) to prevent the sale at retail of any one or more of such copyrighted books by any dealer in books at retail at a less price per copy than that so fixed. (See finding 10.) Thereupon the persons, firms, and corporations in the combination, including the complainant, formed a corporation under the name "American Publishers' Association." This corporation included a large majority of all the publishers of all books, both copyrighted and uncopyrighted, in the United States. This corporation, immediately on its organization, adopted the resolution (Exhibit A), and it and its members entered into an agreement with each other, and combined together to do the acts and things, and refrain from doing the acts and things, mentioned in such resolution (Exhibit A). That subdivision or paragraph III thereof was illegal and in restraint of interstate commerce is perfectly plain. (See finding 22.) In fact, the effect of the decision of the Court of Appeals of the state of New York, quoted in the findings (finding 15), is so to declare. By paragraph or subdivision X of such resolution the combination to keep up the price of books and limit and restrain interstate commerce was to be further extended. Thereupon the American Booksellers' Association was formed. (See finding 12.) That the object and purpose as there set forth was illegal cannot be doubted. We now have the combination extended to at least 90 per cent. of the booksellers of the United States, and including, not only 90 per cent. of all booksellers, but 90 per cent. of all publishers of books. The combination as existing under those resolutions, etc., is not confined to publishers and sellers of copyright books, but includes the publishers and sellers of all books. The declared object and purpose of this combination is (1) to fix the retail price of books; (2) to maintain such retail price; (3) to refuse to furnish or sell any books to any dealer in books who does not maintain such prices—that is, who sells a book at less than the fixed price; (4) to compel all publishers and dealers in books, in practical effect at least, to come into the combination and enforce and maintain these prices, or be blacklisted and driven from the business; (5) to drive out of the business of general publishing and bookselling all who refuse or neglect to maintain these prices. The freedom of the owner of a book—any book, except those specially excepted—duly purchased and paid for to sell the same, soiled or injured, or read and no longer desired, was thus attempted to be destroyed. The right of a retail bookseller to sell to the purchaser of 50 books for his library at a less price than to the purchaser of one book must not be exercised under the pain and penalty of having his supply of books cut off and of being driven from the business and financially ruined. (See Exhibit B, finding 12.) As to what was done in restraint of interstate commerce, see finding 13.

[178] An attempt was then made by the American Publishers' Association to eliminate the vicious provision of the written agreements and resolutions adopted by the combination by the substitution of article or subdivision III of Exhibit H. (See finding 16.) This must be read with the words included in brackets left out. The American Booksellers' Association followed, with the adoption of Exhibit I, or "Reform Resolution No. 2." In finding 17 is set out what was done up to April, 1904. What has been done by the combination since April, 1904, is set out in finding 18. As appears from finding 19, the defendants were put on the so-called cut-off list, or blacklist, in May, 1901, when the unmodified agreement or combination was being enforced. Its offense was in refusing to maintain the retail price of a copyrighted book, however. Defendants' name has not been taken from the list at any time. It is found and conceded that the complainant is living up to and enforcing the agreements, rules, and regulations aforesaid, as modified, of course, and has published and is publishing all its books, including "The Castaway," because thereof, and in accordance and compliance therewith. It follows, necessarily, from the facts recited from 1 to 23, inclusive, and is found as a further fact, that the notice in "The Castaway," on the page follow-

ing the fly leaf, viz.: "The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright. The Bobbs-Merrill Company"—is an act done by the complainant, acting in combination with the said American Publishers' Association and the American Booksellers' Association, and the members thereof, in execution of the said combination and agreement, and for the purpose of enforcing same, and because of the said combination and agreement as evidenced by the acts of, and the resolutions and rules adopted and made by, such associations, and agreed to and being executed by the members of said association, including this complainant. It also follows and is found as a fact that such notice was put in such books, and that its enforcement as an alleged license agreement is attempted, by means of this action, not because the complainant reserved or intended to reserve to itself any interest in said books containing such printed notices, nor because it merely licensed or intended to license the purchasers thereof, who purchased same in the first instance from the complainant, to use or sell such books in a certain way, or on certain terms and conditions, or at certain prices, but as an attempt by complainant, as a member of said American Publishers' Association, to enforce as against this defendant the rules of such associations and combination fixing prices, in an effort to maintain them. It is part of a scheme, and the right of the complainant to maintain this action depends on the validity of that scheme or combination. Is such notice in such books sufficiently explicit in its terms to constitute a license agreement or contract, or any restrictions on or modification of the absolute title thereto in the defendant? It does not purport to reserve to the complainant any interest in the book, or any right to control it, or the action of its owner in his use and disposition of it, except by possible inference.

[179] In *Heaton Peninsular Button-Fastener Co.* v. *Eureka Specialty Co. et al.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, the owner of a patent for fastening buttons to shoes with metallic fasteners made and sold the machines with this notice on a metal plate, so conspicuously fastened

thereto that all must see it, and so securely fastened as to constitute substantially an integral part of the machine, viz:

"*Condition of Sale.*—This machine is sold and purchased to use only with fasteners made by the Peninsular Novelty Company, to whom the title to said machine immediately reverts upon violation of this contract of sale."

Here is a plain, unequivocal statement, one that cannot be misconstrued or misunderstood, that there is a condition attached to the sale, viz., that the machine is to be used with fasteners of a certain make only, and that a use with other fasteners will be such a violation of the agreement as to defeat the title or right given. This was seen by the purchaser, and he took the machine on that condition, and by so doing agreed to the condition and became bound thereby. He became a mere licensee. He acquired the right to use that machine in a certain way only.

In *Cortelyou and Another and Neostyle Company* v. *Charles Eneu Johnson & Co.* (recently decided by this court) 138 Fed. 110, the patented rotary neostyle was sold with this notice on a metal plate firmly and conspicuously attached thereto, viz.:

"*License Agreement.*—This machine is sold by the Neostyle Company and purchased by the user with the express understanding that it is licensed to be used only with stencil paper and ink (both of which are patented), made by the Neostyle Company New York City."

When the purchaser took this machine he assented to this condition and became bound by it, and became a licensee. He is told that he is licensed to use the machine in a certain way and with certain supplies only. Had he been licensed to sell only—that is, made an agent to sell—and empowered to sell at a certain fixed price only, it is unquestionably true that, had he violated the agreement by selling at a lower, or even a higher, price, he could have been enjoined. Having the sole power to vend his patented articles, he would undoubtedly have the right to fix the price at which they should be sold, and stop sales made by his agents and licensees in violation of the authority conferred. This is now settled as to a patent right. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88, 92, 93, 22 Sup. Ct. 747, 46 L. Ed.

1058. In the opinion in that case (pages 92–93, 186 U. S., page 755, 22 Sup. Ct., 46 L. Ed. 1058), we find the following:

"The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the state of Michigan. As these contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addystone* [180] *Pipe, etc. Company*, v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions, imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. * * * The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

In *Victor Talking Machine et al.* v. *The Fair*, 123 Fed. 424, 61 C. C. A. 58, the syllabus reads:

"The owner of a patent, who manufactures and sells the patented article, may reserve to himself, as an ungranted part of his monopoly, the right to fix and control the prices at which jobbers or dealers buying from him may sell to the public, and a dealer, who buys from a jobber with knowledge of such reservation and resells in violation of it, is an infringer of the patent."

And in the opinion, after stating that the grant of a patent by its terms covers three separate or separable fields, the learned judge giving the opinion says:

"The field of sale is as much within the monopoly as the others, and so it has been decided. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. And in *Edison Phonograph Co.* v. *Kaufmann* (C. C.) 105 Fed. 960, and *Same* v. *Pike* (C. C.) 116 Fed. 863, the holdings were that a patentee may reserve to himself, as an ungranted part of his monopoly of sale, the right to fix and control the prices at which jobbers and dealers may sell the patented article to the public, and that whoever without permission enters the reserved portion is an infringer."

In the Victor Talking Machine Case, supra, the notice affixed to the machine read:

"*Notice.*—This machine, which is registered in our books No.———, is licensed by us for sale and use only when sold to the public at a price not less than $———. No license is granted to use this machine when sold at a less price. * * * A purchase is an acceptance of these conditions. All rights revert to the undersigned in the event of any violation.

"VICTOR TALKING MACHINE CO."

In the *Edison Phonograph Company Cases*, cited (see supra) by Judge Baker in the Victor Talking Machine Case, supra, there was a restrictive contract, and this was referred to in the following language by a notice on the box containing the instrument when sold, viz.:

"*Notice to Dealers.*—This record is sold subject to restrictions as to the persons to whom and the prices at which it may be sold. Any violation of such restrictions makes the seller or user an infringer of the Edison patents."

A reference to the case in 116 Fed. 863, will show that the restriction was very clear and explicit. The notice in "The Castaway" does not suggest a restriction upon the title to the book, or that the person or persons taking the book for sale are obtaining anything short of an absolute title, and no one would suppose that the [181] publisher of the book would attempt or assume to fix the price at which dealers should sell after obtaining absolute title to the book from such publisher. The words, "No dealer is licensed to sell it at a less price," are notice that licensees, not absolute owners, are so restricted. The words, "and a sale at a less price will be treated as an infringement of the copyright," clearly do not even tend to make such a sale by an absolute owner of such books an infringement of the copyright.

It is a close question whether a copyright may be infringed by selling in violation of express and explicit restrictions placed on the dealer, expressly made an agent or licensee only, as to the mode of sale or the price at which same is to be sold. Act March 3, 1891, c. 565, 26 Stat. 1106 [U. S. Comp. St. 1901, p. 3406], entitled "An act to amend title sixty, chapter three, of the Revised Statutes of the United States, relating to copyrights," amends section 4952 so as to read:

"The author * * * or proprietor of any book * * * shall, upon complying with the provisions of this chapter have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same."

Section 7 of that act (26 Stat. 1109 [U. S. Comp. St. 1901,

p. 3413]) amends section 4964 of the Revised Statutes so as to read as follows:

"Every person, who after the recording of the title of any book and the depositing of two copies of such book, as provided by this act, shall, contrary to the provisions of this act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, print, publish, dramatize, translate, or import, or knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction."

This section declares what acts constitute a violation of the copyright of a book. It declares that, to constitute a violation of the copyright, the offender must have, within the term limited—that is, the life of the copyright—and without the consent of the proprietor thereof, first obtained in writing and executed in the presence of two or more witnesses, printed or published or imported, contrary to the provisions of the act, such copyrighted book, or contrary to the provisions of the act, within such time and without such consent, must have sold or exposed to sale a copy of such copyrighted book, known to have been illegally printed. In substance this section declares that it is an infringement of a copyright to print or publish the copyrighted book without the consent of the proprietor, given in writing, signed in the presence of two witnesses, or to import a copy of such book without such consent, or knowingly to sell or expose for sale a copy or copies of such copyrighted book when unlawfully printed or imported. From this it would appear that an infringement by the sale of a copyrighted book consists in the selling or exposing for sale of a copy of such book that has been unlawfully printed or imported. If this be the law, it is not an [182] infringement of a copyright to sell or expose for sale a copy or copies of such book, when the same was lawfully printed or lawfully imported. The result would be that it is not an infringement of the copyright of a book to sell a copy or copies thereof lawfully printed, as in this case, in violation of a mere condition imposed upon a dealer by the publisher, by which such dealer agrees not to sell below a certain price; the title to the book having been vested in such dealer by the publisher thereof, or even

in cases where the absolute title had not passed to the dealer. If the publisher of the book, being the proprietor of the copyright, parts with the title to such book, either a single copy or a number of copies, and receives his pay therefor, he has voluntarily parted with all control over that or those particular books. The owner of those books is neither a licensee nor an agent. He has the absolute property therein, and the absolute ownership of an article of personal property carries with it the right to give away or sell for such consideration as the owner sees fit to impose, prescribe, or demand, so long as he violates no law. This view of the copyright laws of the United States, as amended by the act of March 3, 1891, seems to be taken by Macgillivray in his work on the Law of Copyright, p. 287, c. 4, § 2. He there says:

"*Prohibited Acts and Remedies.*—It is an infringement, subject to the remedies stated below, to do any of the following acts in respect of a copyrighted work: In the case of books, without the consent of the proprietor, in writing, signed in the presence of two witnesses (1) to print or publish; (2) to dramatize or translate; (3) to import; (4) knowingly to sell or expose for sale copies unlawfully made or imported."

We find no suggestion that it is an infringement of the copyright of a book for the owner of the book to sell copies at a price which violates a valid contract between the publisher of the book and the dealer, and which was made at the time such dealer became the owner.

In *Harrison* v. *Maynard, Merrill & Co.*, 26 U. S. App. 99, 61 Fed. 689, 10 C. C. A. 17, the complainants, publishers of books and the owners of a copyrighted book, sent a quantity of the printed and unbound sheets of such book to the bindery of one Alexander for binding, and such sheets were to be stored until complainants should order bound copies. Sometimes they bound copies in advance. A fire occurred in the bindery, and both complainants and Alexander supposed the commercial value as books of all such bound or unbound sheets of such books in such bindery was destroyed. On examination complainants' agent so reported. Thereupon Alexander, without objection from complainants, sold the entire débris to one Fitzgerald, who, without moving it, sold same to some dealers in old paper. Alexander imposed no restriction or condition when he sold. Fitz-

gerald, who had become the owner of the débris, including the printed sheets and bound volumes, put this condition and restriction in the bill of sale:

"It is understood that all paper taken out of the building is to be utilized as paper stock, and all books to be sold as paper stock only, and not placed on the market as anything else."

[183] Harrison, a dealer in books, visited the place and purchased of these dealers in old paper some of the volumes of the copyrighted book not destroyed, and put them on the market. He had no notice of the restriction or condition put in the bill of sale given by Fitzgerald. Complainants, owners of the copyright, brought suit to enjoin such sale by Harrison. On these facts the court (Wallace, Lacombe, and Shipman, Circuit Judges) held that, so long as the owner of a copyright retains the title to the copies of the book which he has the exclusive right to vend by virtue of the copyright, he can impose restrictions upon the manner in which and upon the persons to whom the copies are to be sold. They also held that if the agents of the owner of the copyright, intrusted with the possession of such books, violates his instructions and fraudulently sells to a person who has knowledge of the restrictions, such sale by the agent constitutes a fraud upon the owner of the copyright, and that such fraud constitutes an infringement of the copyright, with which the owner has never parted, and that such fraud—meaning, of course, such sales—can be restrained by virtue of the statutes applicable thereto. The court states that this right to enjoy the benefit of the copyright statutes results from the fact that the owner has never parted with the title to the book or the copyright, although he may have parted with the possession of the book. The court also holds that the right to restrain the sale of a particular copy of the book by virtue of such statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser, although with an agreement for a restricted use. If this is true of one particular book, it is also true of a large number of copies. The court also says, in substance, that the new purchaser cannot reprint the copy, but that, the copy having been absolutely sold to him, the

ordinary incidents of ownership in personal property, among which is the right of alienation, attaches to it. The court further says:

"If he has agreed that he will not sell it for certain purposes or to certain persons, and violates his agreement and sells to an innocent purchaser, he can be punished for a violation of his agreement; but neither is guilty under the copyright statutes of an infringement. If the new purchaser participates in the fraud, he may also share in the punishment."

The court cites in support of these statements *Clemens* v. *Estes*, 22 Fed. 899. If this be a correct statement of the law, and this court does not doubt that it is, we recur to the simple proposition whether or not the complainant in the case now under consideration, the Bobbs-Merrill Company, retained any title in the books in question by printing on the page following the title-page the statement, "Copyright 904. The Bobbs-Merrill Company. May." And thereunder the statement:

"The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.

"THE BOBBS-MERRILL COMPANY."

The defendants in this case purchased 90 per cent. of its copies of this book from dealers at wholesale at a reduction of 40 per cent. from said mentioned retail price. The other 10 per cent. of their **[184]** copies they purchased at retail, paying the full retail price therefor. The defendants knew of the statement printed in said books above quoted, and knew that it was printed in each copy of the book. The wholesale dealers from whom the defendants purchased their copies obtained such copies either from complainants direct or from other wholesale dealers at a discount from the above-mentioned retail price. Such wholesale dealers knew that the book was copyrighted, and were familiar with the said statement printed in each copy thereof. The books that came to the defendants prior to reaching them did not pass through the hands of any person or persons who were ignorant of the said notice printed therein. It is expressly found, however, and conceded, that these wholesale dealers from whom the defendants here obtained their copies were under no agreement or obligation to enforce the observance of the

terms of said notice by retail dealers, or to restrict their sales of copies of such book to retail dealers who would agree to observe the said notice.

As has been stated, the notice contains no suggestion that the title of the purchaser to the book is in any way limited. The notice is that the price of the book at retail is one dollar net; and, if the words "no dealer" are to be construed as referring solely to retail dealers, then the notice is that the Bobbs-Merrill Company has not licensed any retail dealer to sell the book at retail for less than one dollar per copy. The fair meaning of this is that, in cases where the Bobbs-Merrill Company has granted a license to some retail dealer or dealers to sell the book, such licensee or licensees are limited and restricted in his or their authority; but the notice is not a suggestion or an intimation to any person that those who buy and pay for the book in the open market, or even of the Bobbs-Merrill Company, without entering into an express license agreement different from that suggested by this notice, are bound or obligated in any way to demand one dollar per copy for such book. It well may be that the Bobbs-Merrill Company has licensed or will license certain dealers to sell this book, and when it grants a license it has the right to impose conditions on its licensees; but this notice does not state or suggest that every purchaser of one of these books containing this notice becomes a licensee with a limited title, or, in fact, no title, to the book. A person cannot be both licensee and absolute owner.

Again, it is contended that the words "the price of this book" refer to the particular copy containing the notice, and that the words "no dealer is licensed to sell it" refer to the particular copy containing the notice. It is further contended that the court is bound to give this construction to this language, and that therefore the defendants, having knowledge of the notice, assented to the proposition and in effect entered into a contract or agreement with the Bobbs-Merrill Company whereby they became its agents to sell the copies at one dollar per volume, and no less, or its licensee with power to sell such books, for which it had paid the wholesale dealer the price demanded, at one dollar per copy only. This court refuses to give that construction to this notice. This

court declines to hold [185] that the words in such notice "this book" and "it" refer to the particular copy of the book in which the notice is found. The language of the notice is a general statement, referring to the book known as "The Castaway" generally, and not to any particular copy or copies thereof, and, at best, is but a notice that licensees of the publishers are only at liberty to sell such book at one dollar per copy. The notice forms no part of a contract between the purchaser from the publisher and such publisher, nor does it limit or restrict the title of the purchaser. And this court will say here that it would be lending itself to the perpetration of a fraud upon the public should it hold differently. If the Bobbs-Merrill Company, in putting its books upon the market, desires to say to wholesalers and to retailers that it is not selling the entire title to the copies put upon the market, let it say so in plain and unambiguous terms. Let it say in its notice that the purchaser of copies of the book from either the publisher or any wholesale or retail dealer is obtaining but a limited or qualified title in the copies purchased, or that in purchasing one or more copies such purchaser becomes but a mere licensee of the publisher, without title to the copies, and with power to dispose of the same only on receiving a specified sum of money. The Circuit Court of Appeals, in *Harrison* v. *Maynard, Merrill & Co.*, *supra*, also quotes with approval the language of Judge Hammond in *Henry Bill Publishing Co.* v. *Smythe* (C. C.) 27 Fed. 914–925, viz.:

"The owner of the copyright may not be able to transfer the entire property in one of his copies and retain for himself an incidental power to authorize a sale of that copy, or, rather, the power of prohibition on the owner that he shall not sell it, holding that much, as a modicum of his former estate, to be protected by the copyright statute; and yet he may be entirely able, so long as he retains the ownership of a particular copy for himself, to find abundant protection under the copyright statute for his then incidental power of controlling its sale. This copyright incident of control over the sale, if I may call it so, as contradistinguished from the power of sale incident to ownership in all property—copyrighted articles, like any other—is a thing that belongs alone to the owner of the copyright itself, and as to him only so long as and to the extent that he owns the particular copies involved. Whenever he parts with that ownership, the ordinary incident of alienation attaches to the particular copy parted with in favor of the transferee, and he cannot be deprived of it. This latter incident supersedes the other—swallows it up, so to speak—and the two cannot coexist in any owner of the

copy, except he be the owner at the same time of the copyright; and, in the nature of the thing, they cannot be separated, so that one may remain in the owner of the copyright as a limitation upon or denial of the other in the owner of the copy."

In *Garst* v. *Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631, decided October 17, 1901, without dissent, the court, speaking of copyrights, said:

"The law of copyright also gives privileges to authors and publishers that do not pertain to property which anybody may make and sell if he can; but even under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains has parted with all his title to the book, and has conferred an absolute title to it upon a purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership in personal property. *Harrison* v. *Maynard*, 61 Fed. 689, 10 C. C. A. 17. See, also, *Clemens* v. *Estes* (C. C.) 22 Fed. 899; *Meyer* v. *Estes*, 164 Mass. 457, [186] 41 N. E. 683, 32 L. R. A. 283; *Waterman Co.* v. *Waterman*, 27 App. Div. 133, 50 N. Y. Supp. 131."

The same doctrine is plainly expressed in *Keeler* v. *Standard Folding Bed Company*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848. In that case it was held that one who purchases patented articles of manufacture from one authorized to sell them at the place where sold becomes possessed of an absolute property in such articles, unrestricted in time or place. In that case the complainants were the assignees for the state of Massachusetts of certain letters patent granted to one Welch. This assignment as matter of course gave to the complainants the rights of the patentee in and for the state of Massachusetts, viz., the sole right to make, use, and sell the patented article in that state. The Welch Folding Bed Company owned the patent rights for the state of Michigan, and it of course had the same right to make, use, and vend the patented article in that state. The defendants purchased a car load of the patented articles from the Welch Folding Bed Company at Grand Rapids in the state of Michigan. It proposed to sell these articles in the state of Massachusetts, and thereafter did sell some of such articles in the state of Massachusetts, and was engaged in selling the remainder in that state at the city of Boston when the bill of complaint was filed. The Supreme Court held that the defendants, having purchased the patented articles in Michigan from the assignee of the patent for the territory included within the boundaries of the state of Michigan, had the right to sell them anywhere within the

United States, including the state of Massachusetts, notwithstanding the fact that all the patent rights for the state of Massachusetts had been assigned to another person, to wit; to the complainants. The decision is based upon the proposition that where the patentee, not having parted with his rights granted by the patent, makes and vends a patented article, the purchaser can use the article in any part of the United States, and, unless restrained by contract with the patentee, can sell or dispose of the same in any part of the United States. The court says:

"It has passed outside of the monopoly, and is no longer under the peculiar protection granted to patented rights."

The court approves the language of Mr. Justice Clifford in *Goodyear* v. *Beverly Rubber Co.*, 1 Cliff. 348–354, Fed. Cas. No. 5557, wherein he states, in substance, that, the patentee having manufactured the article and sold it for a satisfactory compensation, the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters patent, and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration, discharged of all the rights of the patentee previously attached to or impressed upon it by the law under which the patent was granted. The court further says:

"If, as is often the case, the patentee has divided the territory of the United States into 20 or more specified parts, must a person who has bought and paid for the patented article in one part, from a vendor having an exclusive right to make and vend therein, on removing from one part of the country [187] to another, pay to the local assignee for the privilege of using and selling his property, or else be subjected to an action for damages as a wrongdoer? And is there any solid distinction to be made in such a case between the right to use and the right to sell?"

The court then cites with approval several cases, and especially the language of Mr. Justice Clifford in *Mitchell* v. *Hawley*, 16 Wall. 544, 546, 547, 21 L. Ed. 322, as follows:

"Patentees acquire by their letters patent the exclusive right to make and use their patented inventions, and to vend to others to be used, for the period of time specified in the patent; but when they have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled to but one royalty for a patented machine, and consequently a patentee, when he has himself constructed a machine and sold it without any conditions, or au-

thorized another to construct, sell, and deliver it, or to construct, use, and operate it, without any conditions, and the consideration has been paid to him for the thing patented, the rule is well established that the patentee must be understood to have parted to that extent with all his exclusive right, and that he ceases to have any interest whatever in the patented machine so sold and delivered or authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns."

At page 666, 16 Wall., 21 L. Ed. 322, the court calls attention to the case of *Wilson* v. *Rousseau*, 4 How. 646, 11 L. Ed. 1141, and says that it was there held that:

"As between the owner of a patent on the one side, and a purchaser of an article made under the patent on the other, the payment of a royalty once, or, what is the same thing, the purchase of the article from one authorized by the patentee to sell it, emancipates such article from any further subjection to the patent throughout the entire life of the patent, even if the latter should be by law subsequently extended beyond the term existing at the time of the sale; and in respect of the time of enjoyment, by those decisions the right of the purchaser, his assigns, or legal representatives is clearly established to be entirely free from any further claim of the patentee or any assignee."

The court then says:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws."

In the case now before this court it appears that the publisher of the book "The Castaway" printed and sold these copies. It put them upon the market. It received its price therefor, and reserved no right to demand any further compensation. The defendants purchased in the open market and paid the price demanded. It is conceded that the wholesalers of whom the defendants purchased were under no contract or obligation to impose any condition upon the defendants, and they did not. There is no privity of contract between the defendants and the complainants. There is no sug- [188] gestion in the notice that the retail dealer who buys the copies of the book in the open market enters into

any contractual relation with the publishers. It is not stated that the copy of the book is sold on condition that the purchaser will abide by and enforce the price arrangement. The notice is assertive in its terms. It is a dictum. It says that the price of the book at retail is one dollar net. The plain meaning of this language is that if the signer of the notice sells a copy of the book, or the book in question, containing the notice, at retail, the price is one dollar. The notice also asserts that the Bobbs-Merrill Company has not licensed any retail dealer to sell at a less price. It does not say or suggest that the Bobbs-Merrill Company has not sold millions of copies of the book for the trade, parting with the title absolutely and unconditionally. This court is aware that the Keeler Case, cited above, is a patent, and not a copyright case; but the principle is the same.

In a supplemental brief filed by the counsel for the complainant, he states that he does not consider the notice published in the book as in the nature of a license. He says:

"In my opinion, the putting of the book upon the market and selling it by the owner of the copyright constitutes the license; and this notice published in the book is a limitation and qualification of that license. If the book is put out without any notice, the license is unqualified, and the sale is absolute; but my contention is that the owner of the copyright has the authority to restrict the license, and, being published in this way, the restriction attaches to the property, and is a charge and limitation upon the rights of all parties purchasing the book for resale."

This is a claim that the owner of a copyright for a book, who prints the book and sells it for a consideration, gives to the purchaser a license, and does not sell and convey a piece of personal property absolutely. The contention here is that any notice printed in a book and brought to the attention of the purchaser is a restriction of that license to that extent, and may be enforced, and that a violation of the obligation imposed by the notice is an infringement of the copyright which may be restrained by the federal courts. This doctrine, it seems to this court, is contrary to the adjudicated cases. I do not think this contention can be sustained upon principle. Clearly it is opposed to public policy. The purchaser of an article not patented may duplicate it if he can. The purchaser of an article made under a patent right may not duplicate it, but he may use the article purchased and

sell the same as his own in any way or for any price he sees fit. The purchaser of a book not copyrighted may duplicate it—make copies or a reprint. The purchaser of a copyrighted book may not make or print or publish a copy, as this would be an infringement of the copyright; but this restriction in no way interferes with the absolute ownership of the particular copy of the book. The owner of an article made under a patent right or of a book printed under a copyright is in no sense a licensee of the patentee or of the owner of the copyright.

"License," with reference to real estate, is a permission or authority to do a particular act or a series of acts on the land of another without possessing any estate therein. So, with reference **[189]** to personal property, "license" implies and carries the power to do some act upon or in reference to or to do something with the property of another. Herein it differs from an easement. The word "easement" always implies an interest in the land. See Words & Phrases, vol. 5, tit. "License."

What is the Present Combination and Its Object, or Purpose?

1. The American Publishers' Association has adopted a net price system for all copyright books published or controlled by any member or members of the association and made an agreement to maintain it. By this agreement the members thereof are to cut off all supply of their copyrighted books to any dealer who fails to maintain the net price of such books as fixed by such association, or, what is the same thing, by its members. In short, this combination fixes the price of copyrighted books published by its members, and the price at which such books are to be sold, both at wholesale and at retail, and agrees not to furnish or sell any of these books to any dealer who fails to maintain such price; that is, demand and exact from the purchaser the price so fixed.

2. Another association, the American Booksellers' Association, assents to this, agrees to co-operate and be bound by such system and arrangement and to aid and assist in carrying it into effect, and to this end agrees not to buy, or keep in stock, or offer for sale, the copyrighted book of any publisher

who refuses to join the combination and enforce this price system and demand and exact of the customer this price fixed by the combination. Two-thirds of the members of this association govern. If any member fails to live up to the agreement, etc., he may be expelled, and he is not to have books, and all members are "restrained" from supplying books, etc. (See subdivisions 4 and 5 of Exhibit I.) The objects are: (1) To compel the would-be owners and readers of copyrighted books to purchase their books of the members of this combination, made up of two combinations embracing at least 90 per cent. of all publishers and dealers in copyrighted books, at an arbitrary price fixed by the combination, regardless of the actual value of the book as determined by a demand therefor established in a free and open market or the condition of the books. (2) To compel all publishers of and dealers in copyrighted books to come into the combination, submit to and be controlled by it, and sell books at prices fixed by it, regardless of the value of the books, etc., or of the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books. In short, such as refuse to come in are to be crippled, or perhaps ruined, in their business. As the combination extends throughout the United States by the very terms of the agreement, interstate commerce is necessarily restrained. A judgment for the complainants in this action will restrain interstate commerce.

If this suit is one to restrain the infringement of a copyright, granted to the complainant and now owned by it, by the doing of any act that constitutes infringement of that right, and defendant has infringed, it is entirely immaterial that the combination **[190]** described exists, or that complainant is a member thereof, or that its objects are those described. It is no defense to such a trespass upon the complainant's rights that it has violated and is violating the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), or some statute of the state of New York. In *General Electric Co.* v. *Wise*, 119 Fed. 922–924, this court so held, citing cases. This court there said:

"It is difficult to understand how or why a violation of the Sherman anti-trust law by this complainant, if there has been such a

violation, confers any right on the defendant to infringe this patent. That act points out the penalties for its violation, and it is not understood that such law denies the grantees of patents the protection of the law because they may be violating some statute. However that may be, the evidence falls far short of establishing such a violation by this complainant. The testimony on that subject is squarely contradicted. An individual cannot confiscate the property or property right of a corporation on the ground it has violated that act. *Soda Fountain Co.* v. *Green* (C. C.) 69 Fed. 333; *Columbia Wire Co.* v. *Freeman Wire Co.* (C. C.) 71 Fed. 302; *Bement* v. *Harrow Co.*, 186 U. S. 70, 88–91, 22 Sup. Ct. 747, 46 L. Ed. 1058. *Harrow Co.* v. *Quick* (C. C.) 67 Fed. 131, cannot be accepted as authority on this question."

See, also, *Strait* v. *National Harrow Co.* (C. C.) 51 Fed. 819.

But if the complainant has turned over to the combination the fixing of prices, and has entered into the combination described, and becomes a party to the agreement for the purpose described, and is now, through this suit, attempting, as this court holds it is, to enforce such combination agreement in whole or in part, and such agreement is unlawful, because in violation of the act referred to, then this action cannot be maintained. The complainant confessedly is a party to the combination and the agreement, and cannot, if it be illegal, have a standing in a court of equity to enforce any part of it, directly or indirectly. When a complainant comes into court, asking equity, it must come with clean hands, so far as the transaction involved is concerned. If a party, person, or corporation, in attempting to violate the rights of the public and the rights of those persons who will not join in the attempted violation of law, suffers some injury to his property or property rights, which are being used by his consent by those who are thus violating the law, in perpetrating such violation, at the hands of one who is lawfully resisting such attempted injury, he or it cannot, while continuing the illegal acts, have an injunction to enjoin the resisting acts resulting in such injury. Each owner of the copyright of a book has a monopoly of that particular book. Copyrights, like patents, are assignable, and hence a person or a corporation may lawfully become the owner of any number of copyrights or of all the copyrights of books issued by the United States, and it is immaterial that the purpose is to monopolize the whole business of publishing and selling copyrighted books. In such case such person or corporation

would hold and control all the monopolies for such copyrights of books, and he or it could print and sell, or print and not sell, or refuse to print at all, or refuse to allow others to print or publish. Should he or it print or publish one or more copies of these books, such person or corporation could appoint agents to sell and prescribe and limit their powers. He or it could **[191]** license one or more persons to sell, and prescribe the terms and conditions of such sale, and limit the price at which same should be sold. Assume that such person or corporation has fixed the price at which such book shall be sold at retail by such agents and licensees, and may restrain a disposition of such books in violation of the conditions, we have no combination or conspiracy. One man cannot combine or conspire. It takes two or more to make a combination or a conspiracy. So an agreement by all holders of copyrights to assign same to one person or corporation is but a sale of their own, and they may take pay in cash, horses, scrap iron, or licenses to sell the copyrighted book, provided they actually sell their copyrights. If the agreement be a mere pretense, however, a mere cover for a combination to violate some statute, then such agreement to sell their copyrights would be void, and the whole combination would be illegal and void. So one person may purchase and own all the hay, oats, or potatoes existing in the country. If he becomes such owner, he may fix the price at which he will sell. Here there is no conspiracy or illegal combination. But if the several owners of such produce combine, and agree that they will fix prices, interfere with and limit interstate commerce, drive all other dealers and owners of similar property who will not join them in their purposes out of business, and deprive them, if possible, of their right to purchase and ship produce from state to state as a part of interstate commerce, we undoubtedly have an illegal combination, and no member of such a conspiracy can enforce in a court of equity any contract or agreement made in execution, in whole or part, of such a conspiracy. It is evident that one may do, in fixing and enforcing prices, and in exacting tribute from the people and restraining interstate commerce, what two or more cannot do

in pursuance of an agreement or combination. A corporation, on becoming the owner of several patents or of several copyrights, may do all acts under each that the person to whom such rights were originally granted might have done. Having become the owner, it is entitled to the benefits and privileges of the monopolies granted. But all this affords no sanction or support whatever to the doctrine that the several owners of distinct patents, each having a monopoly of his particular patent, or the several owners of distinct copyrights, each having a monopoly of his particular copyright, may combine and conspire as to their patented articles, or as to their copyrights or books published under and protected thereby, to restrain interstate commerce in articles made or produced thereunder. A right or privilege to form such a combination or conspiracy is not embraced or included within the monopoly granted. The monopoly of one patentee cannot be extended and made more of a monopoly by that of another. The grant of an exclusive right to make and vend a certain machine does not include a license to combine and conspire with another having a like exclusive right to restrain trade and commerce between the states in those articles, if made and put on the market, or to conspire not to put them on the market. The right to elect not to make or sell is necessarily included. The right to combine **[192]** and conspire is not. In any event the so-called Sherman law forbids any and all combinations in restraint of such commerce.

In the case of copyrighted books it is evident that, if the publisher of one or two should demand and exact of the purchaser at retail a grossly unreasonable price, he would sell but few, if any, copies. Others would supply the market, for readers would forego that book, or those books, and find reading matter elsewhere. But when all publishers of and dealers in copyrighted books—and nearly all new books are now copyrighted—combine to exact a fixed, arbitrary price, etc., the readers of books become powerless, if they would read at all, not because of the monopoly granted or sanctioned by the government in granting the copyright, but because of the new monopoly (the conspiracy of monopolists), created by the agreement and combination of these

monopolists—one that is forbidden and denounced by Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Section 1 of that act reads:

"Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce amongst the several states, or with foreign nations, is hereby declared to be illegal."

It is not necessary that the effect necessarily be to restrain trade or commerce. It is sufficient if the combination may have that effect. It seems to this court impossible to hold that this section of the act does not apply to a combination of patentees to restrain trade and commerce in patented articles made under their patents as much as to such a combination made by dealers in other articles of commerce.

In 1 Page on Contracts, p. 698, § 445, after a statement regarding the law as to "Monopoly Contracts concerning Patents," it is said:

"But if the owners of distinct patents combine to prevent competition in business, and to control the prices of the patented article, such combinations and all contracts for such purposes are as invalid as if the articles were not patented."

The following cases are cited to sustain the statement: *National Harrow Co.* v. *Hench*, 83 Fed. 36, 27 C. C. A. 349, 55 U. S. App. 53, 39 L. R. A. 299; *National Harrow Co* v. *Quick* (C. C.) 67 Fed. 130; *Vulcan Powder Co.* v. *Powder Co.*, 96 Cal. 510, 30 Pac. 1113, 31 Am. St. Rep. 242; *Gamewell, etc., Co.* v. *Crane*, 160 Mass. 50, 35 N. E. 99, 22 L. R. A. 673, 39 Am. St. Rep. 458.

In 1 State and Federal Control of Persons and Property (Tiedeman) 412–413, it is said:

"But the mere fact that the subject-matter of the monopolistic combination may be patent rights, covering machines employed in the same art or industry, will not protect the combination from the penal provisions of the anti-trust laws. If a corporation or association is formed among manufacturers and patentees of certain articles of kindred character, in order to control the trade and prices of such articles, the combination is nevertheless illegal, although the exclusive manufacture of the goods is guarantied by letters patent from the United States government."

At the time of that writing (1900) the author was not aware of the decision in *Bement* v. *National Harrow Co.*, 186 U. S. 70, 22 **[193]** Sup. Ct. 747, 46 L. Ed. 1058, which modifies

Syllabus.

some of the cases cited by him, but not in respect to the general doctrine stated.

In *Bement* v. *Harrow Co.*, *supra*, the court, at page 94, 186 U. S., page 756, 22 Sup. Ct. (46 L. Ed. 1058), plainly intimates that the several owners of several patents may not combine to restrain commerce in their patented articles It is unnecessary to cite many cases. If *Montague & Co.* v. *Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, and *Northern Securities Company* v. *United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, are to be respected as law and followed in cases where there is no hue and cry against railroads, this combination is illegal as in restraint of interstate commerce. If anything can be found in the prevailing opinion in *John D. Park & Sons Co.* v. *Wholesale Druggists' Association et al.*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, supporting the contention of the complainant here, it is sufficient to say that this court does not agree with the prevailing opinion or decision in that case, but does agree with the dissenting opinions of Martin, J., and Cullen, C. J., with whom Vann, J., concurred.

The defendants have not infringed and are not threatening to infringe complainant's copyright, nor have they violated any contract. The complainant is seeking to enforce against defendants an unlawful combination agreement, to which such defendants are not parties, and by which they have not consented to be bound to prevent defendants selling books of which they are the absolute owners. The same result on a similar state of facts as to the effect of such notice was reached by the court in *Bobbs-Merrill Co.* v. *Snellenburg*, 131 Fed. 530.

The defendants are entitled to a decree dismissing the complaint, with costs.

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[496] IN RE HALE.[a]

(Circuit Court, S. D. New York. June 8, 1905.)

[139 Fed., 496.]

GRAND JURY—POWERS—WITNESSES—REFUSAL TO TESTIFY.—Where, after a witness had refused to testify before a grand jury considering supposed infractions of the anti-trust law, the grand jury made a presentment to the court charging the witness with contempt, and the court, after hearing, ordered the witness to answer the questions, and to forthwith produce the papers required, the court's action was equivalent to an express instruction to the grand jury to investigate the matter referred to in the presentment, and hence the fact that the grand jury had been previously acting beyond its power was harmless.

WITNESSES—PRIVILEGE—ANTI-TRUST ACT—INQUISITIONS.—An inquisition before a grand jury to determine the existence of supposed violations of the anti-trust act was a "proceeding" within Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1903, p. 365], providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding" under several statutes mentioned, including such anti-trust act.

UNREASONABLE SEARCHES — RIGHTS OF AGENT — SUBPŒNA DUCES TECUM.—A subpœna duces tecum commanding the secretary and treasurer of a corporation supposed to have violated the anti-trust act to testify and give evidence before the grand jury, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, described generically, in effect including all the correspondence and documents of his corporation originating since the date of its organization, to which 19 other named corporations or persons were parties, for the purpose of enabling the district attorney to establish a violation of such act on the part of the witness' principal, constituted an unreasonable search and seizure of papers, prohibited by Const. U. S. Amend. 4.

HABEAS CORPUS—CIRCUIT COURTS—JUDGES—CO-ORDINATE JURISDICTION.—Where a subpœna duces tecum was directed to be issued by a circuit judge, and the witness was committed for contempt for failure to obey the same, he would not be discharged on habeas corpus by another judge of the same court, though the latter was of the opinion that the subpœna authorized an unconstitutional search and seizure of private papers.[a]

[a] Affirmed by Supreme Court (201 U. S., 43). See p. 874.

[a] Syllabus copyrighted, 1905, by West Publishing Co.

Opinion of the Court.

Henry W. Taft, for complainant.

Elihu Root and *De Lancey Nicoll*, for defendant.

WALLACE, Circuit Judge.

This is a proceeding in habeas corpus to test the legality of the imprisonment of the petitioner, pursuant to an order of the Circuit Court, adjudging him guilty of contempt in

refusing to produce certain documents and writings and answer certain questions as a witness before the grand jury impaneled in that court. The petitioner was the secretary and treasurer, and also a director, of McAndrews & Forbes Company, a New Jersey corporation, and had been served with a subpœna duces tecum issued out of that court commanding him to testify and give evidence before the grand jury upon the part of the United States of America "in a certain action now pending and undetermined" in that court between the United States of America and the American Tobacco Company and the McAndrews & Forbes [497] Company, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, all of which were described generically, and may for the present purposes be described as including all the correspondence and documents of his corporation originating since the date of its organization, to which 19 other named corporations or persons were parties. He appeared before the grand jury pursuant to the subpœna, and was then asked several questions bearing upon the general inquiry whether there was any agreement, arrangement, or understanding between his corporation and the American Tobacco Company in relation to the trade in licorice affecting the business between several states of the United States. He declined to produce the papers or to answer the questions, stating to the grand jury as a reason for so doing that he had been advised by counsel that he was under no legal obligation to produce the writings, and that the production of the papers or the answers to the questions would tend to criminate him. Thereupon he was informed by the United States attorney that the proceeding was one under the act of Congress to protect trade and commerce against unlawful restraints and monopolies, and it was not proposed to prosecute him or subject him to any penalty or forfeiture on account of anything to which he should testify, or as to which he should produce documentary or other evidence, and that he (the district attorney) offered and assured to him immunity and exemption from any such testimony. The petitioner again declined to answer, for the reasons previously stated. Subsequently the grand jury made a presentment to

the court charging the petitioner with contempt because of his refusal to produce the writings and give the testimony required, and setting forth fully the facts relating thereto. When this presentment was submitted to the court, the petitioner being present, the court made an order directing him to answer the questions as propounded by the grand jury, and to forthwith produce the papers. Upon his refusal to comply, further proceedings were taken, which resulted in an order by the court adjudging him in contempt, and committing him to the custody of the marshal until he should comply with its previous order.

It is insisted by the petitioner that his imprisonment and restraint are without lawful authority for reasons which may be summarized as follows: (1) That the grand jury could only investigate specific charges against particular persons, and, as there was not any proceeding of that nature before them, and no cause or action of any kind whatever pending in the court, they were not in the exercise of proper authority in prosecuting the investigation when petitioner was before them, and consequently he could not be lawfully required to testify or give evidence; (2) that petitioner was within the protection of the fifth amendment of the Constitution in refusing to testify or produce incriminating evidence against himself; and (3) that the order of the court directing him to produce the papers contravened the fourth amendment of the Constitution, and in fact deprived him of his right to be secure against unreasonable search and seizure of his papers, and was equivalent to a [498] warrant not issued upon probable cause or particularly describing the things to be seized.

It is manifest from the facts recited in the presentment made by the grand jury that the investigation which they were pursuing was not based upon any specific charge which had been formulated and laid before them by the United States attorney, and that it was not founded upon their own knowledge, or upon information derived from any source that a specific offense had been committed by either of the two corporations named in the subpœna. It appears to have been one which they were pursuing, with the assistance of the United States attorney, directed to the dis-

covery of some infraction by one or both of these corporations of the law of Congress of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," known as the "Anti-Trust Law" (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Consequently the first contention for the petitioner presents the question whether it is within the competency of the grand jury to institute and pursue such an investigation in the exercise of its inquisitorial power.

The authority and functions of a grand jury in the courts of the United States in investigating criminal offenses are not prescribed by statute, but are such as inhere in that body by the general sanction of the common-law courts. That a grand jury is not confined to the investigation of an alleged offense to which their attention has been called by the court, or which has been laid before them in an indictment, or an information by the prosecuting attorney of the court, or which is within the personal knowledge of some of the members, is the generally accepted opinion of the courts of this country, unless in some of the states where there may be statutory restrictions to the contrary. As said by Mr. Justice Brewer in *Frisbie* v. *The United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657:

"In this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and, after determining that the evidence is sufficient to justify putting the party suspected to trial, to direct the preparation of the formal charge or indictment."

That they may investigate into offenses which may come to their knowledge, other than those to which their attention has been called by the court, or which have been submitted to their consideration by the district attorney, is shown by the observations of Mr. Justice Field in a carefully considered charge to the grand jury in the United States Circuit Court for the District of California. 2 Sawy. 667, Fed. Cas. No. 18255. That a grand jury has certain inquisitorial powers—and by this is meant the power of instituting an investigation to discover whether a particular crime has been committed—is also a proposition which has been frequently affirmed by the courts of this country; but as to the extent and limitation of this power there is

pronounced divergence of opinion. It will suffice to refer to a few of the many citations which counsel have with great industry collated.

[499] In *Blaney* v. *The State of Maryland*, 74 Md. 153, 21 Atl. 547, the court said:

"However restricted the functions of grand juries may be elsewhere, we hold that in this state they have plenary inquisitorial powers, and may lawfully press, and upon their own motion originate, charges against offenders, though no preliminary proceeding has been had before a magistrate, and though neither the court nor the state's attorney has laid the matter before them. * * * Though far-reaching and seemingly arbitrary, this power is at all times subordinate to the law, and experience has taught that it is one of the best means to preserve the good order of the commonwealth and to bring the guilty to punishment."

In *Re Lester*, 77 Ga. 143, the Supreme Court, after stating in its opinion that it was undeniable that the powers of the grand jury are to a certain extent inquisitorial, but are to be exercised within well-defined limits, said:

"Anything they can find out upon inquiry and observation is legitimate and praiseworthy, but they have no authority to force private persons or the officers of other courts to disclose to them who have violated the public laws, and the names of persons by whom such infractions can be established; in short, to make any man the spy upon the conduct of his neighbors and associates, and compel him to violate the confidence implied in holding social intercourse with his fellows by forcing him to become a public informer."

Such an exercise of power, the court said, would be in derogation of "rights regarded as sacred and paramount in the intercourse between man and man; and these rights have been carefully guarded, not only by the spirit of our law, but by its express enactment."

In the United States Circuit Court for the District of Tennessee (reported in Wharton on Criminal Pleading, p. 224) Mr. Justice Catron compelled witnesses to answer who had been summoned by the grand jury, when it did not appear that there was any specific charge made against any particular person, and when the questions were whether the witnesses knew of any person or persons in the city of Nashville who had begun, or set on foot, or provided means for a military expedition to the Island of Cuba. He said:

"As all these questions tend fairly and directly to establish some of the offenses made indictable by the act of 1818, and are pertinent to the charge delivered to the grand jury, they may be properly propounded, unless the answers would tend to establish that the witness was himself guilty."

Opinion of the Court.

In *United States* v. *Kilpatrick* (D. C.) 16 Fed. 765, the court, after proving the practice of the state courts in North Carolina, said:

"Grand juries cannot make inquisitions into the general conduct or private business of their fellow citizens, and hunt up offenses by sending for witnesses to investigate vague accusations founded upon suspicions and indefinite rumors."

He adds:

"The rights of society, as well as the nature of our free institutions, forbids such a dangerous mode of inquisition."

In Thompson & Merriam on Juries, § 615, it is said, referring to authorities cited:

[500] "These expressions of opinion bristle with evidence of the inquisitorial power of the grand jury to inquire of their own motion into offenses of every character punishable by the court, of which it is a component part."

The subject is summed up in volume 17, Am. & Eng. Enc. of Law (2d Ed.) p. 1279, as follows:

"Although it has been sometimes asserted that at common law the grand jury was charged with inquisitorial duties, and was empowered to institute inquiries and investigations into criminal offenses, according to the weight of authority the power of the grand jury to originate criminal prosecutions otherwise than by a presentment based upon the personal knowledge or observation of the members of that body is ordinarily limited to cases in which individuals have been charged with specific crimes before a magistrate, in which cases the accused has a responsible prosecutor upon the record, who may, if he swear falsely, be indicted for perjury, or to cases which are called to its attention by the court or the prosecuting attorney; and it has no power of its own motion to institute a prosecution by summoning and examining witnesses for the purpose of obtaining information upon which to base a presentment of a supposed offender."

The result of the authorities seems to be fairly summarized in the last citation.

The question whether an improper exercise of the inquisitorial power subverts the jurisdiction of the court, or is simply such an irregularity as to enable the accused or a witness to invoke the intervention of the court, or as may vitiate an indictment, has never been decided. Were it not for the implication arising from the treatment of the subject in *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, it would seem quite clear that it could not affect the jurisdiction of the court. The grand jury is a part of the court in the exercise of criminal jurisdiction, and their proceedings are always subject to the control of the court.

Opinion of the Court.

The court can at any time direct the grand jury to consider a particular accusation, or to investigate a supposed violation of the criminal law; and whether it does this by direct instructions or by directing the prosecuting officer to present the matter for the consideration of the grand jury is of no consequence. If, in the absence of such instructions, the grand jury proceeds of its own motion, and is guilty of any abuse of its powers, the court can at any time intervene, and correct or suppress the proceedings. If the conduct of the grand jury is called to its attention, and the court approves or disapproves, whether its judgment may be correct or wrong, it is in the exercise of its undoubted jurisdiction; and, though it is erroneous, it is not void or illegal, and cannot be reviwed by habeas corpus. Of course, this is not true in cases where the court transcends its authority. In the Counselman Case, which was a habeas corpus case, the court adverted to the contention that the jury in the particular case had not been "investigating specific charges against particular persons," but said that it was not necessary to intimate any opinion as to the validity of the contention, and placed its decision upon another ground. The circumstance that the point was adverted to is hardly enough to suggest that the court considered it to be a valid one.

[501] In the present case it does not appear that the investigation was initiated sua sponte by the grand jury, and it may be inferred from the participation of the United States attorney in the proceeding that it originated in his formal presentation of the charge to them. The subpœna duces tecum was the process of the court. As it commanded the witnesses to appear before the grand jury, it is manifest that the recital about the pending "action" could only have referred to a proceeding between the United States and the two corporations of the only kind which a grand jury can entertain, viz., a preliminary investigation to ascertain whether there was sufficient cause for an indictment. When, after the presentment of the alleged contumacy of the witness by the grand jury to the court, he was ordered by the court to answer questions and produce the documents, the action of the court was equivalent to an express instruction to the grand jury to investigate the proceedings mentioned

in the presentment. While the investigation was not directed to a specific offense, it was directed to the inquiry whether one of the laws of the United States—the so-called Anti-Trust Law—had been violated by either or both of the two corporations mentioned. Without this intervention by the court the investigation would have been one upon the border line between the legitimate exercise and the abuse of the inquisitorial power of the grand jury, but not one which can be safely held to have been an ultra judicial proceeding. After the intervention of the court the original abuse of power, if there was any, became innocuous.

The contention for the petitioner that the order of the court violates the constitutional prohibition against compelling a person to give evidence against himself in a criminal case would be clearly sound were it not for the effect of the immunity act of Congress of February 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1903, p. 365]. In view of his official relations with the corporation, it fairly may be assumed that the petitioner had participated personally in some of the acts or transactions which were the alleged offenses of the corporation, and was therefore originally responsible himself. It is not for this court to question the soundness of the judgment in *Brown* v. *Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, or to weigh the value of the dissenting opinions. That judgment is authoritative that such an exemption from liability to prosecution or penalty as was secured to the witness by the immunity act of February 19, 1903, if it extends to testimony given or compelled before a grand jury, deflects the application of the fifth amendment to the Constitution so that the prohibition against compelling a person to be a witness against himself in a criminal case does not protect him. The petitioner's counsel do not argue otherwise, and their argument is that the immunity given by this act does not extend to testimony given by a witness before a grand jury. The provision is that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, "in any proceeding, suit, or prosecution" **[502]** under the several statutes mentioned,

including the anti-trust act. The argument that a proceeding before a grand jury is not such a proceeding as is meant by the provision has been ingeniously presented, and is not without plausibility. But the word "proceeding" is a broad term, and was apparently intended to include some form of judicial inquiry other than a "suit or prosecution." In one sense it is true a criminal proceeding is not instituted against an accused person until a formal charge is made against him by indictment or information, or a complaint before a magistrate; and proceedings before a grand jury are not, in that sense, a criminal proceeding against an accused. *Post* v. *United States*, 161 U. S. 583, 16 Sup. Ct. 611, 40 L. Ed. 816. But in another sense any initial step before a judicial tribunal preliminary to the commencement of a civil suit or a criminal prosecution is a proceeding. As used in this statute, inasmuch as testimony given in a suit or prosecution embraces that given not only at the trial, but upon all occasions incident to the controversy, the term "proceeding," if limited to some step in the progress of a civil suit or a criminal prosecution which has been previously instituted, is mere tautology. A rational construction seems to require it to include any preliminary step which is incident to the institution of a civil suit or a criminal prosecution.

The contention that the order requiring the petitioner to produce papers called for by the subpœna duces tecum was made in violation of the petitioner's rights under the fifth amendment to the Constitution, raises the question whether such a general inquisition into his private papers as is permitted by the terms of the subpœna was not such an abuse of judicial process as to amount to an unreasonable search and seizure. As Judge Cooley says in his work on Constitutional Limitations:

> "Near in importance to exemptions from an arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers against even the process of the law, except in a few specified cases."

In *Boyd* v. *U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, it was decided that the law of Congress which authorized a court of the United States in revenue cases on motion

of the government attorney to require a defendant to produce in court his private books, invoices, and papers, and permit the attorney, under the direction of the court, to make examination of the same, and which provided that, if the defendant refused to produce the same, the allegations of the attorney as to their contents specified in his written motion should be taken as confessed, was unconstitutional and void, as being repugnant to the fourth and fifth amendments to the Constitution. The court said:

"It is our opinion, therefore, that a compulsory production of a man's private papers, to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search or seizure would be, because it is a material ingredient and affects the sole object and purpose of search and seizure."

[503] And the court concluded:

"We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection of the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings."

It will be observed that the statute in that case did not deprive the party of the custody of the books and papers which he was required to produce, and authorized only such an inspection of them as the court might direct. This judgment concludes an inquiry by this court as to the validity of two propositions, and it settles, first, that a subpœna or an order of the court may be the equivalent of a search and seizure within the constitutional provision; and, second, that any search or seizure for the purpose of obtaining incriminating evidence against the party, is an unreasonable one within the meaning of the provision. The judgment would have controlled this case, and would have entitled the petitioner to be discharged, if the evidence sought to be procured could have been used to incriminate the petitioner. Is a search and seizure any the less unreasonable when it compels the official custodian of all the papers of his principal, whose duty it is to keep their privacy inviolable, to produce them in order to incriminate his principal? It may be conceded that his duty to the state and courts is paramount; but is this true when the evidence is not to be used

against a principal who is under any criminal accusation, or against whom any civil suit is pending, and is only to be used to discover if possibly any ground of accusation can be found against him?

If the petitioner had been ordered to produce a single document or numerous documents in his possession, which were adequately described to enable him to find them, for use as evidence in a pending action, civil or criminal, it seems plain that the order would have been unobjectionable, and such as the courts are daily making. Such was the case of *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860, where the observation was made by the court upon which the government relies.

The petitioner was required to produce a numerous array of documents and papers for the purpose of ascertaining whether they contained anything which would tend to establish the commission of an offense by either of the two corporations; and it is apparent that the object was to enable the government, by inspecting this mass of the private papers and documents of the petitioner's corporation, to find something which might induce the grand jury to find an indictment against his corporation. It is this which gives to the proceeding its color of oppression and the attributes of an unreasonable search and seizure.

The legality of search warrants has been sanctioned on the ground of public necessity, because without them felons and other malefactors would escape detection. But a search warrant for the papers of a suspected party, to be used as evidence against him, was illegal at common law. Archbold, Criminal Law (7th Ed.) 141. **[504]** Because of the obnoxious character of the process, very great particularity is required in designating the articles to be searched for before the officers of the law are permitted to invade the premises where the articles sought are supposed to be. A designation of goods to be searched for as "goods, wares, and merchandise," without more particular description, has been regarded as insufficient, even in the case of goods supposed to be smuggled, where there is usually greater difficulty in giving description, and consequently more latitude should be permitted, than in the case of property stolen. *Sandford* v.

Nichols, 133 Mass. 286, 7 Am. Dec. 151. Lord Camden, speaking of a warrant not specifying the particular papers, but authorizing the seizure of all the papers of the person named in it, described it as "an execution upon all the party's papers," and said:

"To enter a man's house by virtue of a nameless warrant, in order to produce evidence, is worse than the Spanish inquisition—a law under which no Englishman would care to live an hour." *Entinck* v. *Carrington*, 19 State Trials, 1029.

Any process which is issued to perform the office of a search warrant should conform in some remote degree, at least, in certainty and specific description, to the requirements of a valid search warrant. The subpœna issued in this case may possibly meet these requirements, but it is not too much to say that it resembles more nearly a general warrant to search all the private papers of a witness. It falls but little short of being in substance and effect a roving commission, devised by the government to compel a witness to bring before the grand jury a general mass of the private papers of his principal, in order that the prosecuting officer might discover whether at any time during its corporate life the principal had been a party to any act which could afford the basis of a criminal accusation. This was a wanton assault upon the right of privacy, and in my judgment the process, in view of the circumstances under which and the purposes for which it was issued, authorized an unreasonable search and seizure of papers within the spirit and meaning of the fourth amendment.

The conclusions thus indicated would ordinarily lead to an order for the petitioner's discharge, but the order compelling him to produce the papers alluded to in the subpœna was made by one of the judges of this court, and although it was not made under circumstances which afforded an opportunity for deliberate consideration, the manifest impropriety of reversing it indirectly in the same court, held by a different judge, is so great that it ought not to be done if the only result will be to shift the burden of preparing a record for a review by a higher tribunal from the one party to the other. Whether the present decision is in favor of the petitioner or against him, it is understood that it will be taken

for review to the Supreme Court, and pending that review the petitioner will not be confined.

Under these circumstances an order will be entered refusing the discharge of the petitioner.

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[412] CAMORS-McCONNELL COMPANY *v.* McCONNELL.[a]

(Circuit Court, S. D. Alabama. August 31, 1905.)

[140 Fed., 412.]

CONTRACTS—LEGALITY—RESTRAINT OF TRADE.—An agreement, as incidental to the sale of property as a business, that the seller will not enter into a competing business, is valid and enforceable, notwithstanding it is in partial restraint of trade.[b]

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 542–545, 555.]

SAME—ILLEGAL PURPOSE OF COVENANTEE.—A contract by which a person sells his property and business good will to another cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of trade.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 462–464, 547.]

SAME.—In order to defeat a suit to enforce a contract on the ground that its enforcement is sought to aid and facilitate the carrying out of an illegal combination in restraint of trade, it must appear that the contract is directly connected with such unlawful purpose, and not merely collateral thereto.

EQUITY—MAXIMS—COMING INTO COURT WITH CLEAN HANDS.—The maxim that one coming into a court of equity must come with clean hands applies only in case of fraud or misconduct on the part of [413] complainant in regard to the transaction which is the subject of controversy.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 185–187.]

SPECIFIC PERFORMANCE—SALE OF BUSINESS—ENJOINING VIOLATION.—A court of equity will enjoin a defendant from violating a contract, clearly shown, by which he deliberately obligated himself for a valuable consideration not to engage in a certain business.

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[a] Affirmed by Circuit Court of Appeals, Fifth Circuit (140 Fed., 987). See p. 825.

[b] Syllabus copyrighted, 1906, by West Publishing Co.

Opinion of the Court.

In Equity. On motion for preliminary injunction.

Howe, Spencer & Cocke and *R. H. & N. R. Clarke*, for complainant.

Gregory L. & H. T. Smith, for defendant.

TOULMIN, District Judge.

The averments as to the facts of this case, as set out in the bill of complaint, are substantially admitted by the defendant, with the exception that he denies that the contract of January 27, 1900 (Exhibit III to the answer), was made upon the terms set out in the contract of December 8, 1899 (Exhibit A to the bill), or that it had any reference to the provisions of said last-named contract, and that the provisions of article 5 therein were for the use, benefit, and protection of the complainant. And defendant avers that at the time the contract of December 8, 1899, was made it was understood that the United Fruit Company was the real party interested in said contract, and that the provisions of article 5 therein were made for its benefit and protection. It does not appear from anything now before the court that the United Fruit Company has ever availed itself of the provisions of article 5, referred to, that any consideration therefor ever passed or was intended to pass from it to the defendant, or that said company ever complained of the violations of said contract by the defendant. The United Fruit Company is not a party to this suit, but it appears that it is a stockholder of the Camors-McConnell Company. I think that on the bill, answer, and evidence, as now presented, there can be no doubt that the contract of December 8, 1899, was made in contemplation of the formation of the corporation of Camors-McConnell Company, and of its adoption by such corporation when organized, and that it was adopted by said corporation, and that the contract of January 27, 1900, transferring the property, effects, business, and good will of Camors, McConnell & Co., was made in pursuance of, and upon the terms set out in, said contract of December 8, 1899, and that the Camors-McConnell Company has performed the obligations thereby assumed by it, and is entitled to all the benefits accruing under said contracts.

Opinion of the Court.

But the defendant contends that the real purpose of the transaction in question was to suppress existing competition between the business conducted by the copartnership of Camors, McConnell & Co. and the United Fruit Company, and to combine said business with corporations and companies confederated together to monopolize and control the business of buying, importing, and selling fruit throughout the United States, and that the contract sought to be enforced is therefore illegal and void. The defendant further contends that the com- **[414]** plainant and the United Fruit Company are conducting their business in violation of the laws of the United States, and that at the time the contract involved in this suit was made and entered into it was for the purpose of aiding and facilitating the United Fruit Company and the Camors-McConnell Company and other companies in combination with them in conducting their business in violation of the laws of the United States, and that said contract was made in restraint of trade and commerce among the several states and with foreign nations, and for the purpose of forming and maintaining a combination in the form of a trust, and for that reason it is illegal and not enforceable. The covenant here sought to be enforced is that wherein the defendant agreed that he would not, "either individually or by or through a corporation, jointly or severally, directly or indirectly, engage in the growing or importing or selling of tropical fruits, or any other business, directly or indirectly, in competition with the new corporation," the Camors-McConnell Company. The test of the legality and validity of this covenant is whether the main contract is legal. If the contract is illegal, affirmative relief against it will not be granted. No court will lend its assistance in any way towards carrying out the terms of an illegal contract. *Spring Co.* v. *Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *McMullen* v. *Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 25 Sup. Ct. 493, 49 L. Ed. 739.

A contract may, in a variety of ways, affect interstate commerce, and yet be entirely valid, because the interference produced by the contract is not direct. The fact that trade and commerce might be indirectly affected is not sufficient. The

effect must be direct and proximate. *Hopkins* v. *U. S.*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Northern Securities Co.* v. *U. S.*, 193 U. S. 198, 24 Sup. Ct. 436, 48 L. Ed. 679. The indirect effect of the contract under consideration might be to enhance the price of tropical fruit, but the contract itself would not directly or necessarily for that reason be in restraint of interstate trade or commerce. While it might tend to restrain such trade, the restraint would be an indirect result. In the sale of a going business or concern, with the good will attached, where, as ancillary and incident thereto, the seller enters into a covenant with the buyer that he would not compete with him in any way as to diminish the value of the property or business sold, although such covenant may be in partial restraint of trade, it should be upheld and enforced. *Harrison* v. *Glucose Sugar Refining Co.*, 116 Fed. 307, 53 C. C. A. 484, 58 L. R. A. 915; *Nat. Enameling & Stamping Co.* v. *Haberman* (C. C.) 120 Fed. 415. In *U. S.* v. *Addyston P. & S. Co.*, 85 Fed. 281, 29 C. C. A. 141, 46 L. R. A. 122, the court said:

"Covenants in partial restraint of trade are generally upheld as valid when they are agreements by the seller of property or business not to compete with the buyer in such way as to derogate from the value of the property or business sold."

An agreement, as incidental to a sale of property as a business, that the seller would not enter into a competing business, is valid, notwith- **[415]** standing it is in restraint of trade to that extent. *A. Booth & Co.* v. *Davis* (C. C.) 127 Fed. 875; *S. Jarvis Adams Co.* v. *Knapp*, 121 Fed. 34, 58 C. C. A. 1; *U. S.* v. *Addyston P. & S. Co.*, *supra;* Id., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. The sale and transfer by a person of his property and good will to another cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business, and in pursuance of an illegal combination in restraint of trade. *Metcalf* v. *Am. School Furniture Co.* (C. C.) 122 Fed. 115. In *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, the court said:

"We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties." *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 547, 22 Sup. Ct. 431, 46 L. Ed. 679; *Knapp* v. *S. Jarvis Adams Co.* (C. C. A.) 135 Fed. 1008.

In the case of an unlawful combination of the nature asserted here, the remedy is by well-recognized and direct proceedings. The fact, if it be a fact, that the complainant is one of an association or combination of corporations, which constitutes a monopoly, and that its general business is illegal, as one in restraint of trade, cannot be invoked collaterally to affect in any manner its independent contract obligations or rights. *Yarborough's Adm'r* v. *Avant*, 66 Ala. 526; *Ware* v. *Curry*, 67 Ala. 274; *Johnston* v. *Smith's Adm'r*, 70 Ala. 108. It is held that one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, defend against the contract on the ground of the illegality of the combination. *Harrison* v. *Glucose Sugar Refining Co.*, *supra; Dennehy* v. *McNulta*, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609.

On the case as now presented, and assuming that there was a combination or agreement between the complainant and other corporations, which was prohibited by law as being in restraint of trade, I think that the contract in controversy between complainant and defendant was collateral to the said unlawful agreement or combination. Moreover, I do not think that the direct or necessary operation of said contract tends to restrain interstate or international trade or commerce, or to create a monopoly therein. My opinion, therefore, is that there is nothing illegal in the consideration and performance of said contract, and that the defendant should not be permitted to repudiate it because the association of complainant with other corporations is illegal.

But it is urged on the part of the defendant that, even if the contract in controversy was, as a separate and independent contract, a lawful one, it was a part of an unlawful scheme to monopolize interstate trade and commerce in tropical fruit, and it thereby became unlawful. It is true there are some cases in which courts have held that even the

fact that a contract is one for the sale of property or of business and good will has not saved its validity, if it was shown that it **[416]** was only a part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. It was held that in those cases the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. *U. S.* v. *Addyston P. & S. Co., supra.* I think it will be found that the cases referred to were direct proceedings against the alleged monopolies wherein it was sought to enjoin them. There are no provisions in the contract here sought to be enforced which refer to the restrictions of trade, or to the regulation of the importation, sale, and prices of fruit, evidencing an intent to establish a monopoly in such trade.

In the case of *Swift & Co.* v. *U. S.*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, a bill was filed by the United States to enjoin the defendants' commission of alleged violations of the law "to protect trade and commerce against unlawful restraint and monopolies." It charged a combination of a dominant proportion of the dealers in fresh meats throughout the United States to do and not to do certain specified things, with the intent to restrain competition among themselves, and to monopolize the supply and distribution of fresh meats throughout the United States. The case was submitted on bill and demurrer thereto. The court said it seemed to them "that this allegation of intent colored and applied to all the specific charges of the bill, and intended to allege successive elements of a single connected scheme." In the course of the opinion the court further said:

"The constituent elements are enough to give to the scheme a body. * * * Moreover, whatever we may think of them separately, when we take them as distinct charges, they are sufficient as elements of a scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent, for instance, the monopoly, * * * an intent to bring it to pass is necessary in order to produce a dangerous probability that will happen. But, when that intent and the consequent dangerous probability exist, the statute * * * directs itself against the dangerous probability, as well as against the completed result. The charge is not of a single agreement, but a course of conduct intended to be continued. Under the act it is the duty of the court, when applied to, to stop the conduct. * * * The most innocent and constitutionally protected of acts or omissions may be a step in a criminal plot, and, if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

As I understand these expressions of the court, they amount simply to a declaration that conduct agreed upon to effect an unlawful object may be unlawful, and that the court, when applied to in a direct proceeding therefor, will stop such conduct by injunction, as well as punish, in proper criminal proceedings, the unlawful act when completed, notwithstanding it may have been accomplished by separate acts ever so innocent in themselves. Being steps in a criminal plot or scheme, bound together by a common intent, their innocence **[417]** is not sufficient to prevent the punishment of the completed act. I do not think the decision in the Swift Case has any application to this proceeding.

The defendant further claims that the complainant has entered into a combination with various other importers of fruit for the purpose of acquiring a monopoly in the importation and sale of the same, and that the contract in question was to aid and facilitate that purpose, and he insists that the court should for that reason refuse to enforce such contract, and he invokes the maxim that he who comes into a court of equity must do so with clean hands. The combination referred to may be an unlawful one, but the proposition that the defendant, while violating a contract made with the complainant, is entitled to defeat a suit brought to enforce such contract, because the complainant is carrying on its business in an unlawful manner as a monopoly, seems to me to be unwarranted. If the complainant had brought suit against the defendant for a breach of contract, or violation of its alleged rights founded upon the combination, then it might be pertinent to inquire into the character of the combination, and ascertain whether the court would enforce any rights growing out of it. *Strait* v. *Harrow Co.* (C. C.) 51 Fed. 819; *Edison Electric Light Co.* v. *Sawyer-Man Electric Co.*, 53 Fed. 598, 3 C. C. A. 605. Whenever it is

necessary for the plaintiff to prove an unlawful combination or agreement in order to recover, no recovery or relief can be had. A contract connected with and growing out of an illegal act cannot be enforced. *McMullan* v. *Hoffman* (C. C.) 69 Fed. 515. Such, in my opinion, is not the case at bar as now presented. "The rule that one coming into a court of equity must come with clean hands is confined to the conduct of the party in the matter before the court, and not to matters aliunde. Courts will not refuse redress to the suitor because his conduct in other matters, not then before the court, may not be blameless. It is enough, if the suitor shows he has acted justly, fairly, and legally in the subject-matter of the suit." "The iniquity must have been done in regard to the defendant himself, and must have been done in regard to the matter in litigation." *Bonsack-Mach. Co.* v. *Smith* (C. C.) 70 Fed. 386, and authorities therein cited; *Liverpool & L. & G. Ins. Co.* v. *Clunie* (C. C.) 88 Fed. 160; *Knapp* v. *S. Jarvis Adams Co.* (C. C. A.) 135 Fed. 1008.

The maxim of equity to which defendant refers contemplates some fraud or misconduct on the part of complainant in regard to the transaction which is the subject of controversy. "It must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought." Authorities *supra;* 1 Pom. Eq. Jur. 399. "It is well settled that the granting of a provisional injunction rests in the sound discretion of the trial court, and that it is not necessary that the court should, before granting it, be satisfied from the evidence before it that the plaintiff will certainly prevail upon the final hearing of the cause. On the contrary, 'a probable right and a probable danger that such right will be defeated, without the special interposition of the court,' is all that need be shown as a **[418]** basis for such an order." *Sanitary Reduction Works* v. *California Reduction Co.* (C. C.) 94 Fed. 693; *Georgia* v. *Brailsford*, 2 Dall. 402, 1 L. Ed. 433; 1 High on Inj. p. 4. "If there is one thing more than another which is essential to the trade and commerce of this country, it is the inviolability of contracts deliberately entered into, and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit

of it, and then to repudiate it and the obligation which he has undertaken, is prima facie, at all events, contrary to the interests of any and every country." "In all such cases" as that now before the court "courts have uniformly enjoined the delinquent party from engaging in the business from which he has agreed to refrain, and from disclosing the secrets of the business which he has thus acquired." *Harrison* v. *Glucose Sugar Refining Co.*, 116 Fed. 310, 53 C. C. A. 484, 58 L. R. A. 915, and authorities therein cited.

I am of opinion that the complainant is entitled to the injunction restraining H. L. McConnell from a breach of his contract with the complainant as set out in the bill of complaint, and an injunction will be issued in accordance with the prayer of said bill, except as to so much thereof as prays that defendant be enjoined from becoming or remaining a stockholder of the American Banana Company, as to which an injunction is now denied.

Let a decree be entered and a preliminary injunction issue in accordance with the foregoing opinion, on complainant's giving a good and sufficient bond in the sum of $1,000, conditioned as required by law and rules of court.

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[987] McCONNELL *v.* CAMORS-McCONNELL CO.

(Circuit Court of Appeals Fifth Circuit. October 30, 1905. On Rehearing, February 6, 1906.)

[140 Fed., 987.]

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

For opinion below, see 140 Fed. 412. [See p. 817.]

Gregory L. Smith and *Harry T. Smith*, for appellant.

W. B. Spencer and *R. H. Clarke*, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. Without examining this case now as to its merits, the court has concluded that it is not advisable or

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proper to interfere with the discretion of the trial court in the granting of the temporary injunction. Adhering to the construction we have heretofore given the act allowing appeals in such cases, we affirm the judgment of the Circuit Court. *Lehman* v. *Graham*, 135 Fed. 39, 67 C. C. A. 513; *Railroad Comm.* v. *Rosenbaum*, 130 Fed. 110, 64 C. C. A. 444; *Kerr* v. *New Orleans*, 126 Fed. 920, 61 C. C. A. 450; *Massie* v. *Buck*, 128 Fed. 27, 62 C. C. A. 535.

ON PETITION FOR REHEARING.

The judges who concurred in our former decree are still satisfied therewith, and the petition for rehearing is denied.

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[923] AMERICAN BRAKE BEAM CO. v. PUNGS.

(Circuit Court of Appeals, Seventh Circuit. January 20, 1905.)

[141 Fed. 923.]

CONTRACTS—LEGALITY—RESTRAINT OF TRADE.—A contract recited that plaintiff, who was the patentee of an invention relating to brake beams, for the consideration of $10,000 to be paid him, had assigned to defendant, which was a corporation engaged in the manufacture of brake-beams, a certain patent and a pending application for a second and provided that plaintiff during the life of the patent should not become connected with any company manufacturing or selling brake-beams in the United States either as officer, employé or shareholder but reserved to him the right to terminate such part of the contract at any time by refunding the consideration paid him by defendant. *Held*, that such agreement to remain out of the brake-beam business did not render the contract unlawful as one in restraint of trade and competition or creating a monopoly and that plaintiff could maintain an action thereon to recover the stipulated consideration.

[Ed. Note.—For cases in point see vol. 11, Cent. Dig. Contracts, §§ 550–553.]

In Error to the Circuit Court of the United States for the Northern Division of the District of Illinois.

The action in the Circuit Court was on a written agreement between Pungs and the Brake Beam Company, wherein the Brake Beam Company, for certain considerations therein named, agreed to pay Pungs the sum of ten thousand dollars, credit being given for two thousand five hundred dollars already paid.

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The defense was the general issue, with notice of special defenses.

At the trial, on motion of the plaintiff, a verdict for the plaintiff for the sum of nine thousand, one hundred and thirty-five dollars, and forty-one cents was returned; and on this verdict, after motion for new trial was overruled, judgment was entered. Upon the refusal of the court to grant a new trial; upon the court's direction to the jury to return a verdict for the plaintiff; and upon the exclusion of certain evidence offered on the trial by defendant, the principal errors complained of are assigned.

The evidence showed, that beginning in 1886 as an inventor, and 1887 as a manufacturer, Pungs was in the metallic brake-beam business until 1892, when with others, he organized the American Brake Beam Company, which took over, along with other companies, his previous company. Of the American Brake Beam Company, Pungs was a stockholder and the manager until 1894, when selling his stock to Henry D. Laughlin, the latter became general manager of the company. Until 1897, however, Pungs remained in the employ of the company, superintending its business at Detroit, Michigan. On this latter date he was discharged.

January 19th, 1899, one of the contracts sued upon was executed in writing as follows:

"An agreement between Wm. A. Pungs of the city of Detroit, in the state of Michigan, and the American Brake Beam Co., a corporation under the laws of the state of Illinois, whose chief or home office is in the city of Waukegan, in said state.

[924] Witnesseth: In consideration of the mutual agreements of the parties, as herein expressed, they agree as follows:

"1st: Under the date of June 28th, 1898, letters patent No. 606,298 were issued from the patent office of the United States to said Pungs, covering the brake beam therein described. His application for a patent on another brake beam has been allowed by the patent office, as per notice to him from Thomas S. Sprague & Son, dated Nov. 12th, 1898, and hereto attached. This latter patent, Pungs will cause to be issued to himself or the Brake Beam Co., as his assignee, as may be agreed.

"2nd: Both these patents said Pungs sells to said Company, and he will assign them in due form, and also will assign to the Company all such letters patent as may be hereafter granted to him on any metallic brake beam or any part relating to a brake beam, and will enter into a written contract with the Company not to engage in a brake beam business in any way, shape or form, and not to be connected with any company manufacturing or selling brake beams, either as officer employé or shareholder (the Chicago Railway Equipment Company alone excepted), all for the price and sum of Ten Thousand Dollars ($10,000.00) to be paid to him by said Brake Beam Company in four

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equal installments of $2,500.00 each, the first payable three months after the date hereof, the second in six months, the third in nine months, and the fourth in twelve months after said date; such stay-out contract to cover the period covered by said letters patent No. 606,298, and to be coextensive with the country. But he shall be given the right in said contract to at any time terminate it by refunding to said Brake Beam Company, its successors or assigns, said sum of Ten Thousand Dollars ($10,000.00).

"3rd: In the event said Pungs at any time prior to the expiration of the term covered by said letters patent, that is to say, at any time prior to June 28th, 1915, becomes an officer, agent or shareholder in any company or corporation manufacturing or selling metallic brake beams of any type whatever, or engages in the business himself, that in that case his so doing shall be construed as an election on his part to refund to said Brake Beam Company the said sum of Ten Thousand Dollars ($10,000.00), forthwith, and he covenants and agrees so to do.

"4th: This contract is in no way to affect the representative claims of the parties against each other and shall not be so treated, the deal covered by it being independent and alone.

"March 22nd, 1899, a supplemental contract in writing was executed as follows:

"An agreement between William A. Pungs of the city of Detroit, the state of Michigan, and the American Brake Beam Company, a corporation under the laws of the state of Illinois, whose chief office is in the city of Waukegan in said state.

Witnesseth:

"In consideration of the mutual agreements of the parties as herein expressed, they agree as follows:

"1st: Since the execution of the contract between the parties, dated January 19th, 1899, said Pungs has transferred to said Brake Beam Company letters patent of the United States No. 606,298 referred to in the 1st paragraph of said contract, and has also executed an assignment to said Brake Beam Company of his pending application for another patent on brake beams, which is also referred to in said 1st paragraph, and will without delay, cause the letters patent covering his said application to be forthwith issued to said Brake Beam Company, as assignee of himself, and to be duly delivered to the Company.

"2nd. As contemplated in the said second paragraph of said contract of January 19, said Pungs now enters into this written contract with said Company, and by it covenants and agrees that he will not engage in the brake beam business in any way, shape or form at any place within the United States of America, its territories, or the District of Columbia and that he will not be connected with any company manufacturing or selling brake beams in the United States, either as officer, employé, or shareholder (the Chicago Railway Equipment Company alone excepted), at any time during the period covered by said letters patent No. 606,298. Said Pungs reserves the right, however, to at any time terminate this contract, and thus to relieve himself of his stay-out [925] obligation, by refunding to said Brake Beam Company, its successors or assigns, the sum of Ten Thousand Dollars ($10,000,000), which is the price to be paid him by said company for said letters patent, and his stay-out obligations, as hereinafter more clearly expressed.

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3rd: For the letters patent as aforesaid and the stay-out obligation aforesaid, said Brake Beam Company covenants and agrees to pay to said Pungs the sum of Ten Thousand Dollars ($10,000) in four equal installments of twenty-five hundred dollars ($2,500) each, the first installment to be payable on the 19th day of April A. D. 1899; the second on the 19th day of July, the third on the 19th day of October, 1899, and the fourth and last on the 19th day of January, 1900.

4th: In the event said Pungs at any time prior to the expiration of the term covered by said letters patent, that is to say, at any time prior to June 28, 1915, becomes an officer, agent or shareholder in any company or corporation manufacturing or selling metallic brake beams of any type whatever, or engages in the business himself, then and in that case his so doing shall be construed as an election on his part to refund to said Brake Beam Company said sum of Ten Thousand Dollars ($10,000) forthwith, and he covenants and agrees so to do.

On these contracts, twenty-five hundred dollars, and no more, have been paid. The suit was for the balance. Further facts are stated in the opinion.

Harry P. Weber, for plaintiff in error.

Dwight C. Rexford, for defendant in error.

GROSSCUP, Circuit Judge, after stating the facts, delivered the opinion of the court. The contract, upon which suit was brought, obligated the Brake Beam Company to pay an indivisible sum, ten thousand dollars. The consideration was the conveyance to the Brake Beam Company of certain inventions patented and to be patented; as also an agreement, that during the period to be covered by certain of the letters patent, Pungs would not engage in the brake beam business in any place within the United States, or be connected with any company engaged in such business. The contract does not disclose how much of the consideration was for the patents, or how much for the agreement to remain out of business. On the face of the contract, either consideration, assuming that they were both lawful, would sustain the contract, and entitle Pungs to a recovery.

It is not argued that the consideration, so far as it is embodied in the inventions transferred, is not lawful. Par-

ties may lawfully assign inventions not yet patented, and even future inventions, so far as such future inventions are tributary to the inventions assigned.

But it was insisted that the agreement embodied in the contract to remain out of the brake beam business within the United States for the time named, was an attempt to illegally restrain trade, to illegally restrict competition, and to create a monopoly; and was, therefore, an unlawful consideration; and evidence was offered tending to show that though the assignment of the inventions was stated to be a part of the consideration, the sole real consideration, as understood between the parties at the time, was this agreement to remain out of the brake beam business. This evidence was excluded. Evidence, also, was offered tending to show that the inventions were without commercial or practical value. But independently of its probative weight on the issue whether the agreement to remain out of business was or was not the sole real consideration, such evidence clearly would have been immaterial.

[926] The first question thus presented is this: Is the agreement to remain out a consideration that invalidates the contract? If the contract is not thus invalidated, the entire case made by plaintiff in error fails.

It will be noted that Pungs actually transferred the patents, so that the contract in this respect was already executed; also, that the period he was to remain out of the brake beam business was just the period the transferee was to have the benefit of the patents transferred; and, further, that Pungs was at liberty, at any time during the period named, to return to the brake beam business upon refunding the ten thousand dollars paid him.

We do not look on this as a contract in restraint of trade. It binds no one to stay out of the trade. At most, it is an agreement, merely, that if Pungs renews his connection with the trade, he shall return the consideration received by him for the patents transferred. Pungs, personally, was not a manufacturer of brake beams. He was in no true sense a dealer or competitor, commercially, in that business. His connection with the business was that of inventor chiefly; and the agreement under consideration may be considered as an

incident, only, to the commercialization of his invention. Even in this he has put no mortgage on his inventive faculties. He has merely put himself where, without putting any binding restraint on his inventive faculties, or for that matter, upon his liberty as a manufacturer, he will realize, for the time being, on what he has already invented, the largest commercial return.

This is not, in our judgment, restraint of trade. The question whether a given contract is restraint of trade depends as much upon the nature of the business said to be restrained as upon the more commonly mentioned elements of time and place. *Harrison* v. *Glucose Refining Company*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915. The nature of the contract under consideration comes plainly within the principles of that case, and of *Morse, etc., Company* v. *Morse*, 103 Mass. 73, 4 Am. Rep. 513, and other cases.

In the view thus taken of this question, the other questions raised and discussed become immaterial. The judgment of the Circuit Court is affirmed.

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[176] UNITED STATES *v.* ATCHISON, T. & S. F. RY. CO.

(Circuit Court, W. D. Missouri, W. D. December 4, 1905.)

[142 Fed., 176.]

INJUNCTION—VIOLATION—CONTEMPT—INFORMATION.—An information for contempt at the relation of the United States against a railroad company for violation of a temporary injunction restraining it from granting rebates is criminal in character. In such proceeding the defendant is entitled to every reasonable doubt as to the obligatory force of the mandate, and whether its disobedience was willful.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 514.]

SAME.—If the court issuing the injunction alleged to have been violated had no jurisdiction of the subject-matter of relief prayed for in the bill, the restraining order was void, and no contempt could be predicated of its disregard.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 439.]

CARRIERS—JURISDICTION—ENJOINING GRANT OF REBATES.—Prior to the enactment by Congress of the Elkins act (Act Feb. 19, 1903, c. 708,

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32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), a United States Circuit Court had no jurisdiction in equity over a suit instituted by direction of the Attorney General of the United States to enjoin a railroad company from granting rebates under the interstate commerce law, especially where no order had hitherto been made by the interstate commerce commission on the railroad company to discontinue the forbidden act.

SAME.—The interstate commerce act and the act known as the "Sherman Anti-Trust Law" are separate and independent acts, not germane in character and purpose; and therefore jurisdiction in the Circuit Court of the [177] United States over a bill in equity to enjoin a railroad company from granting rebates to favored shippers cannot be maintained upon the ground that such act of the railroad company is a monopoly within the meaning of the second section of said anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

STATUTES—CONSTRUCTIVE PROSPECTIVE OPERATION.—Statutes are presumed to be prospective in operation, and the courts refuse to give a retroactive effect to statutes, unless the intention is so clear and positive as by no reasonable possibility to admit of other construction.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 344.]

SAME.—The doctrine of relation, like every other fiction of the law, has its limitations. It can never be applied where its root was not planted in an antecedent lawful right.

INJUNCTION—ENJOINING GRANT OF REBATES—VIOLATION—VOID ORDER—CONTEMPT.—A suit in equity instituted by the Attorney General of the United States to enjoin a railroad company from granting rebates, and a restraining order made thereon in March, 1902, were not validated by the enactment of the Elkins act in February, 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]). *Held*, further, that if the suit could have been continued under the Elkins act, where the antecedent offense of the railroad company was being continued after February 19, 1903, an action by the United States attorney in the summary method authorized by the latter act would have presented an issue of fact entitling the defendant to a hearing thereon; and any injunction granted would be as to violations of law then being committed, but would not have the effect to vitalize an antecedent injunctive order granted by the court when it had no jurisdiction to make it. *Held*, further, that where no such action was taken by the United States attorney after the passage of the Elkins act, an information for contempt filed by him, based on a violation of such void order, has not the effect to bring it within the operation of the Elkins act.

SAME—CONSTRUCTION OF ORDER—CONTEMPT.—Where the bill for an injunction against a railroad company, at the relation of the United States attorney, for granting rebates, in its specifications describes

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only grain and packing-house products of meat on which rebates were being granted, followed by a general allegation that the defendant was likewise granting rebates on other necessities of life, the subjects of interstate traffic, etc., and the injunctive order specifically enjoined the granting of rebates on the specified articles of traffic "or any other interstate traffic," *held*, that the latter general term, on the rule of "ejusdem generis" and "noscitur a sociis," is controlled by the antecedent particularization, and is limited to objects of like kind with those specified; and therefore an information for contempt, predicated of alleged rebates granted by the defendant a year or so afterwards in another jurisdiction on the commodities of salt and coal, could not be sustained under such limited restraining order.

CARRIERS—REBATES—TRAFFIC RATES—DIVISION.—Where a short line railroad, chartered by the state, authorized to haul freights for hire, is owned by stockholders common to said short road and the shipper, and a long distance railroad connecting therewith enters into a joint traffic arrangement with it for the transportation of interstate traffic, and the two roads file and publish such joint rates, as required by the interstate commerce law, and live up to the same—Quære: Can an information by the United States attorney against the interstate carrier [178] for granting rebates to such shipper be sustained on evidence tending to show that the division of the through rate is grossly disproportioned to the haul over such short line?

(Syllabus by the Court.)

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This is a proceeding for contempt, growing out of a temporary restraining order made by this court on March 25, 1902. The restraining order was predicated upon a bill of complaint in equity filed by the United States attorney for this district, under direction of the Attorney General of the United States, against the defendant railroad company. The bill recited that the action was taken on the request of the Interstate Commerce Commission. It charged that the defendant railroad company, a corporation of the state of Kansas, was engaged in the transportation of interstate commerce; that in conformity to the requirements of the interstate commerce act of congress it had filed with the Interstate Commerce Commission at Washington City a copy of schedule of rates and charges established and published by it for the transportation of freight traffic; among other things on cured meats, known as "packing-house products," and also on dressed meats, for transporting the same from Kansas City, Mo., and Kansas City, Kan., across the states of Missouri, Iowa, and Illinois, to the city of Chicago, Ill., and other points known as "Chicago common points"; that these were the only lawful rates for transporting such commodities between said points prior to January, 1902, to the time of the institution of the suit. That notwithstanding its duty to ship at no greater or less rate in that regard, the defendant, combining and confederating with certain persons, to the orator unknown, to create a monopoly in the transpor-

tation of said commodities on defendant's line of railway between the points aforesaid, early in the year 1901, entered into an agreement or agreements with the persons unknown to transport such commodities between such points at rates much less than the published, established rates on said commodities. It is then charged that in pursuance of said combination the defendant transported such packing-house products from Kansas City, Mo., to Chicago and Chicago common points, billing the same at the established rate therefor, but in pursuance of said unlawful agreement rebating to such unknown persons the difference between the rate agreed upon and the established rate, and transported such traffic at less than schedule rates. In paragraphs 5 and 6 the bill charges that prior to the 1st day of January, 1901, the defendant filed with the Interstate Commerce Commission its schedule of rates established jointly with connecting railways, for the transportation of grain from Mississippi river points to New York and New York common points, and from Kansas City, Mo., to the Mississippi river points aforesaid, and to Chicago and Chicago common points. These paragraphs refer exclusively to grain and its transportation between the points specified. The seventh paragraph then charges that the defendant granted to certain favored grain buyers and shippers, whose names are unknown, who shipped wheat, corn, and other grain over the defendant's line between the points aforesaid, large concessions and rebates from its published and established schedules, whereby such shippers obtained from the defendant unlawful rebates in respect to such shipments on grain between the points aforesaid. There is no charge in this paragraph of any combination or monopoly; it is simply a charge for carrying grain for certain shippers below the schedule rates. The ninth paragraph charges that during the period complained of shippers could not, at the points of origin, without ruinous loss, purchase at market prices and pay transportation to eastern destination at the said published and established rates. This charge refers to "said commodities"; but does not specify packing-house products, dressed meats, or grain. The bill prayed for special and general injunctions against the defendant.

A temporary restraining order was granted and set for the 23d day of June, 1902, for further hearing. It recited that until that date, or the further order of the court, the defendant, its officers, agents, and servants, be enjoined and restrained from further acting under and enforcing, or executing in any manner whatever, any agreement to transport over the defendant's [179] railroad, or any part thereof, between the states, any packing-house products, dressed meats, grain, or the products of grain, or any other interstate traffic, at any greater or less rate than the rates named for such services in defendant's established schedule in force on its lines, and at the time said traffic is transported on file with the Interstate Commerce Commission, or from departing from their schedule rates in carrying any of said above products or traffic between the states, and enjoining them from hereafter agreeing with any shipper or other person to transport such traffic at any other or different rates than such as may be provided for in its schedules as filed and published; and enjoining them from paying any rebates, or making any concessions whatever in defendant's rates and charges whereby any such traffic transported by said defendant over its railroad, or in respect to any traffic in the transportation of which said defendant may participate, shall be carried by it at any rate different from the established rate at the time such traffic shall be transported, "without prejudice to the right of the defendant to move at any time to vacate this order upon such ground as it may be advised, and no ground shall be

deemed waived by reason of defendant not having presented them in opposition to this application."

On June 2, 1902, the defendant filed demurrer to the bill on the following grounds: (1) That the complainant does not state any such cause as ought, in a court of equity, to entitle the complainant to any such relief as prayed for; that the bill does not contain any matter of equity, on account of which this court could grant any decree, or give the complainant any relief against the defendant. (2) That the court has no jurisdiction to hear and determine the action; and that the court, as a court of equity, cannot take cognizance of the matters set forth in the bill, and has no power or jurisdiction to hear or determine the same. (3) That as to so much of the bill as seeks a general injunction restraining the defendant from hereafter agreeing to pay rebates, or transporting at less than the published tariff, the court has no jurisdiction to hear and determine this action, and no power to issue any general injunction as prayed for in the bill. This demurrer was not heard until some time during the early part of 1903; and on May 8, 1903, the demurrer was overruled; and leave was given to the defendant to file answer to the bill within 30 days; and in the meantime the temporary restraining order was continued in force until the further order of the court.

On May 25, 1903, the defendant filed answer, taking issue on the allegations of the bill respecting any combination or confederation with other persons to transport such commodities between such points at less than the published rates; or that in pursuance of any such unlawful agreement it rebated or refunded, or paid back to the shippers, the difference between the established rates and the amount alleged to have been agreed upon, or that it transported such traffic at less compensation than that specified in the published rates, or that it in any instance departed from the established rates; or that it granted to favored shippers, or any other shippers, lower or different rates than those named in its lawful published schedule or rates on any traffic. It also denied any intent or ultimate purpose to continue in the future to transport traffic nominally at its published rates and charges, and subsequently by unlawful rebates or concessions to depart therefrom. The answer also denied that the complainant was entitled to any relief in a court of equity. No further action was taken on these issues other than the appointment of an examiner to take testimony, and no testimony has been taken.

On the 19th day of August, 1905, the complainant, the United States of America, filed in this court an information, charging the defendant with the violation of said restraining order, in that between the 26th day of March, 1902, and the 1st day of January, 1904, in violation of the interstate commerce law, and contrary to the rates of traffic established in its published schedules, etc., the defendant, its officers, agents, and servants, wrongfully and knowingly violated and disregarded said temporary restraining order, in that it carried on its line of road between and among the states and between certain states and territories of the United States, salt at a different and less rate than that named and specified in its published schedules of rates, and more particularly for the Hutchinson-Kansas Salt Company, a Kansas cor- [180] poration. The information charged that the Hutchinson-Kansas Salt Company was engaged in the business of manufacturing salt at Hutchinson, in the state of Kansas, and of transporting and selling the same at all points along the Missouri river and more particularly in the states of Kansas, Missouri, and Nebraska; that the said Hutchinson-Kansas Salt Company owned and controlled numerous salt wells in said territory, and numerous mills for the manufacture of salt, about nine in number, the largest of which said

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mills so owned by said salt company was known as the "Morton Mill"; that the tracks of the defendant company ran on one side of said mill, and the tracks of the Chicago, Rock Island & Pacific Railway Company ran on the other side thereof, and that there are two switches connecting both sides of said mill with the tracks of said railway companies; that there is also in connection with said mill another track known as the "cinder track"; that the entire length of these switches and sidings is less than a mile in length, and were originally constructed by the said Hutchinson-Kansas Salt Company for the purpose of connecting said large mill known as the "Morton Mill" with both of said railway systems; that said switches, etc., were owned and maintained by said salt company, and that no switching charges of any character were charged to any railroad corporation for the use thereof in the transportation of the product of said mills; that in July, 1902, a certain railroad corporation was organized known as the "Hutchinson & Arkansas River Railroad Company" by the officers and stockholders of the salt company; that the salt company pretended to sell and did convey said switches to said last-named railroad corporation; that for the purpose of evading the temporary restraining order heretofore referred to, and in violation of the terms thereof, the defendant made pretended joint tariffs and schedules with the Hutchinson & Arkansas River Railroad Company; that the agreement as to such joint tariffs while nominally made with the Hutchinson & Arkansas River Railroad Company was, in truth and in fact, an agreement made and entered into with the Hutchinson-Kansas Salt Company, whereby the salt company was to receive rebates and concessions upon the transportation of salt from said city of Hutchinson, in the state of Kansas, to points upon the Missouri river. The information then sets out the manner in which this was accomplished. It is then charged that in pursuance of such understanding the defendant on or about the 1st day of August, 1902, published and filed with the Interstate Commerce Commission a joint tariff agreement with the Hutchinson & Arkansas River Railroad Company, showing the rates on salt from Hutchinson to the points aforesaid; and that between the 1st day of August, 1902, and the 1st day of January, 1904, the defendant, from time to time, carried and transported for said salt company as aforesaid, for use in the manufacture of packing-house products at the points aforesaid, and as such business was performed made settlements with the Hutchinson-Kansas Salt Company, in which the defendant paid to the salt company 25 per cent. of said joint tariff rate on all salt so transported, to the extent of many thousands of dollars; all of which, the information charges, appears from evidence taken before the Interstate Commerce Commission at hearings in Hutchinson, Kan., and Chicago, Ill., on the 5th and 22d days of December, 1903, which evidence is filed as an exhibit with the information. The information further charges that between the 1st day of August, 1902, and the 1st day of January, 1904, there were, in the city of Hutchinson and its immediate vicinity, other persons, whose names are unknown, engaged in the business of manufacturing salt, and selling and shipping the same to Missouri river points over the line of the defendant; that such persons were compelled and required by the defendant to pay the full freight rates and charges named in the published and established schedules, whereby the defendant unlawfully discriminated against such other persons in favor of the Hutchinson-Kansas Salt Company.

On September 16, 1905, the defendant filed motion to quash the information upon the ground that the bill of complaint, on which the restraining order was issued, which complained only of alleged violations of the interstate commerce law, in respect of the transportation of certain commodities prior to the filing of the bill, was not

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predicated upon any lawful order or requirement of the interstate commerce commission; that at the time of filing the com- [181] plaint and the issuing of the restraining order this court was without jurisdiction or authority to entertain said bill, or to make said restraining order; that no amendment to said bill was filed by the complainant against the defendant alleging or showing any violation of the provisions of the interstate commerce law by defendant in respect to any alleged departures from its published tariff rates in favor of any shippers after the passage of an amendment to said interstate commerce law known as the "Elkins Act," approved February 19, 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]),which said act for the first time gave this court jurisdiction to entertain bills of complaint on behalf of the United States against railway companies to restrain them from giving to any shipper a less rate than that contained in its published schedules. And, further, that the court was without jurisdiction after the passage of the said Elkins act to issue any injunction covering the acts complained of in the information filed herein, for the reason that under said act and section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), the defendant could be proceeded against in equity only in the jurisdiction where it had its principal office, or in which the act complained of was committed, and there is no allegation in the original bill filed herein, or in the information, that the defendant had its principal office within this judicial district, or that the act complained of was committed either in whole or in part within said district; but, on the contrary, the bill and information allege that the defendant is a corporation of the state of Kansas, and the information avers that the act complained of was committed wholly within said state; and hence not within this judicial district. And further, that in the bill of complaint the only specific charge made against the defendant with regard to departure from its published rates in favor of particular shippers, was in respect to rates concerning the transportation of grain and packing-house products over its lines; and no charge was made concerning the transportation of salt, or a departure from the published rates thereon; that said bill was wholly insufficient to warrant the issuing of a restraining order in respect of rates concerning the transportation of salt; and that the restraining order in respect of any other commodities than grain or packing-house products was unwarranted. And further, that it does not appear from the information that in the transportation of salt from Hutchinson, Kan., the defendant violated the terms of said restraining order; but on the contrary it appears that the traffic mentioned was transported under the rate specified in its published tariffs or on joint published tariffs, to which this defendant was a party, and which were duly published and filed with the Interstate Commerce Commission, and that the information is otherwise insufficient and uncertain.

Gardiner Lathrop, for the motion.

M. D. Purdy, Assistant Attorney General, and *A. S. Van Valkenburgh*, United States District Attorney, opposed.

PHILIPS, District Judge (after stating the facts).

The United States having no pecuniary interest in the subject-matter of the original bill of complaint, acting only pro bono publico, the alleged contempt belongs essentially

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to what is termed "criminal contempts," to vindicate the dignity of the court. *In re Nevitt*, 117 Fed. 448, 458, 54 C. C. A. 622, 632; *Bessette* v. *Conkey Company*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997. As such the proceeding is to be strictly construed in favor of the personal liberty of the defendant. As it is to vindicate the dignity of the court in compelling respect for its mandate, a judge may best demonstrate his title to respect by according to the accused the benefit of any reasonable doubt in his own mind as to the obligatory force of his command, and whether or not its disobedience was willful. *In re Watts et al.*, 190 U. S. 32, 23 Sup. **[182]** Ct. 718, 47 L. Ed. 933. If the court issuing the temporary restraining order had no jurisdiction to make it under the bill of complaint, because it was without the power to proceed to final adjudication of the matters embraced in the bill, the order was one which the defendant was under no legal obligation to observe, and could not, therefore, be adjudged in contempt for disregarding it.

In Re Sawyer et al., 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, one Parsons, who claimed to have been elected police judge of Lincoln, Neb., filed a bill in equity in the United States Circuit Court, praying for an injunction to restrain the mayor and councilmen of the city from proceeding further with certain charges against him, or taking any vote on the report of the committee declaring the office of police judge vacant, or appointing any person to fill that office. A temporary restraining order was issued accordingly which the mayor and council failed to obey. They were cited for contempt, found guilty and adjudged to pay a fine, and in default to stand committed to the custody of the marshal. On writ of habeas corpus the jurisdiction of the Circuit Court over the subject-matter was challenged, and consequently its right to issue the injunction. The Supreme Court held that the Circuit Court was without jurisdiction to entertain the bill in equity for an injunction. Mr. Justice Gray quoted from *Elliott* v. *Peirsol*, 1 Pet. 328, 340, 7 L. Ed. 164, the following:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void."

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Further on he said:

"The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void; their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged."

To the same effect are the following authorities: *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 861; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Worden* v. *Searls*, 121 U. S. 26, 7 Sup. Ct. 814, 30 L. Ed. 853; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Ex parte Buskirk*, 72 Fed. 14, 18 C. C. A. 410, 25 U. S. App. 613.

So in *St. Louis, etc., Railroad Company* v. *Wear*, 135 Mo. 230, 265, 36 S. W. 357, 366, 33 L. R. A. 341, the court said:

"It is always permissible to show, upon process for contempt, that the order disobeyed was beyond the jurisdiction of the authority from which it emanated. If that showing is successfuly made, no punishable contempt has been committed."

Growing out of this established rule is the further principle: The order alleged to have been violated must not only come clearly within the competency of the court to make, but the thing or act enjoined **[183]** must be clearly and definitely defined, so as to leave the party enjoined in no reasonable doubt or uncertainty as to what specific thing or act is prohibited. Rapalje on Contempt, p. 20; *Weeks* v. *Smith*, 3 Abb. Prac. 211–214; *In re Cary*, (D. C.) 10 Fed. 622, note. Did the court have jurisdiction to maintain and enforce in equity the relief prayed for in the bill of complaint? It was filed at the instance of the Attorney General of the United States on behalf of the United States, to enjoin the defendant railroad company from violating the interstate commerce law inhibiting the granting of rebates by the defendant carrier to favored shippers engaged in the shipping of grain and packing-house products from Missouri river points to Chicago, Ill., and common points of distribution there.

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It is true that allegations of a general character were inserted in the bill, with the evident purpose of giving a semblance of jurisdiction to the United States Circuit Court in equity as conferred by what is known as the "Sherman Anti-Trust Law." Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. There is a general charge in the bill that the defendant combined and confederated with certain persons, unknown, to create a monopoly in the transportation of said commodities on defendant's line of railway between the points aforesaid, "to transport such commodities between said points at rates much less than the published, established rates on such commodities at that time filed with said commission and in lawful force on defendant's line." This charge is confined to packing-house products and dressed meats; and the transportation involved was only between the specified points, and the monopoly was to be accomplished by giving to certain persons rates less than the schedule rates. It is not charged that such persons were favored over other shippers, or that these rates were not given to all shippers. This is immediately followed by the allegation that in pursuance of said combination the defendant transported "such packing-house products" from Omaha and Missouri river common points to Chicago and Chicago common points, billing the same at the established rates, but secretly transported such traffic at less than scheduled rates.

Section 2 of said anti-trust act is as follows:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

In *The United States* v. *Joint Traffic Association*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 31, 43 L. Ed. 259, the court said:

"In *Hopkins* v. *United States* (decided at this term) 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, [184] with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.'"

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While the bill under review does not allege an unlawful restraint, but a monopoly, the language and thought of the Supreme Court used in respect of the construction of the act as it touches contracts in restraint of trade, apply with equal force to an alleged monopoly. The statute, by no expression or implication, interdicts the increase of a railroad's business by any competition, however energetic, eager or grasping. The essence of the charge in the bill of complaint is that the defendant, by carrying in fact at a rate below that established and published, tried to get all the transportation it could of the designated products. In the Trans-Missouri Joint Traffic Association Cases the reasoning of the court was that the agreement there involved directly tended to obstruct free competition. By the portion of the bill here touching the Sherman act, it seeks to enjoin the defendant from doing the very act which, in the Trans-Missouri Joint Traffic Case, the court held to be unlawful in repressing. The truth is that, as the Department of Justice at Washington was somewhat in nubibus in its experiment with the resort to equity in order to escape the embarrassing question of the jurisdiction of the court, general allegations of a monopoly under the anti-trust act were thrown out as a possible life-preserver.

If, as contended by the United States attorney in his oral argument and brief, the bill of complaint is to be sustained on the ground of an allegation respecting monopoly under the Sherman act, how is this contempt proceeding to be sustained on that basis? The Sherman anti-trust act is an independent statute. It cannot be eked out or assisted by the interstate commerce act to create an offense under it.

As the monopoly charged was a "combining and confederating with certain persons who are to the orator unknown, to create a monopoly in the transportation of said commodities (packing-house products) on defendant's line," how is the information for contempt to be sustained on the ground that, between the 1st day of August, 1903, and the 1st day of January, 1904, the defendant violated the injunction by a device whereby it granted rebates to a favored shipper of salt at Hutchinson, Kan.? The only charge of a monopoly predicated in the bill of complaint was in respect of packing-house products from Missouri river points east. The prayer of the bill in that part known as "the omnibus prayer for relief" is that the defendant, its officers, etc., be restrained "from paying any rebate or making any concession whatever, either by direct or indirect means, whereby any traffic transported by said defendant over its railroad, or in respect to any traffic in the transportation of which said defendant may participate shall be carried by it at any rate different from the lawfully published rate then established, etc." And so was the restraining order limited. The **[185]** information does not contain any allegation that the act in transporting salt constituted a monopoly. And yet, it is seriously contended that the jurisdiction of the court can be maintained on the ground of a monopoly interdicted by the anti-trust act, and of consequence the defendant can be charged with contempt on the ground of monopoly for having granted a rebate. The position is obviously untenable.

The bill of complaint must stand alone upon the interstate commerce act. The bill, as framed, and the argument made in support thereof at the hearing on the demurrer, were all based upon the broad proposition that, at common law, at the instance of the Attorney General of the United States, the United States had the right, in execution of the declared public policy of the general government in respect of the regulation of interstate commerce, to appeal to the equity side of its own courts for an injunction; that as by its legislation it was declared to be unlawful for any railroad, engaged in the carriage of interstate commerce, to make discriminations by the method of granting rebates to favored

shippers, it could invoke the jurisdiction of this court to enjoin the offending railroad from doing such forbidden act. But after argument and submission of the demurrer to the bill the Supreme Court in *Missouri Pacific Railway Company* v. *United States*, 189 U. S. 274, 23 Sup. Ct. 507, 47 L. Ed. 811, held, as expressed in the syllabus, that prior to the passage of the act of Congress "to further regulate commerce with foreign nations and among the states," approved February 19, 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), a District Attorney of the United States under the direction of the Attorney General of the United States in pursuance of a request by the Interstate Commerce Commission was without power to commence a proceeding in equity against a railroad corporation to restrain it from discriminating in its rates between different localities. And, therefore, there was error committed below in refusing to sustain a demurrer of the defendant railroad company to a bill filed by a District Attorney of the United States under the circumstances stated.

The third section of the act of February 19, 1903 (32 Stat. 848, c. 708 [U. S. Comp. St. Supp. 1905, p. 600]), known as the "Elkins Act," is as follows:

"That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discrimination forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or is being committed in part in more than one judicial district or state, it may be dealt with, inquired of, tried, and determined in either such judicial district or state, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity * * * and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders. * * * It shall be the duty of the several district attorneys of the United States, whenever the Attorney General **[186]** shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this act shall not preclude the bringing of suit for recovery of damages by any party injured, or any other action provided by said act approved February fourth, eighteen hundred and eighty-seven, entitled An act to regulate commerce and the acts amendatory thereof."

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Mr. Justice White, in the opinion in *Missouri Pacific Railway Company* v. *United States*, *supra*, said:

"Although by the fourth section of the act (Act Feb. 19, 1903, c. 708, 32 Stat. 849 [U. S. Comp. St. Supp. 1905, p. 601]), conflicting laws are repealed, it is provided 'but such repeal shall not affect causes now pending, nor rights which have already accrued, but such causes shall be prosecuted to a conclusion, and such rights enforced in a manner heretofore provided by law, and as modified by the provisions of this act.' We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought, prior to the passage of the act, to enforce the provisions of the act to regulate commerce. In the nature of things it cannot be ascertained from the record whether the railroad company now exacts the rates complained of as being discriminatory and which it was the purpose of the suit to correct; but if it does, of course the power to question the legality of such rates by a suit in equity, brought like the one now here, clearly exists. Under these circumstances we think the ends of justice will best be served by reversing the decree below and remanding the cause to the Circuit Court for such further proceedings as may be consistent with the act to regulate commerce as originally enacted and as subsequently amended, especially with reference to the powers conferred and duties imposed by the act of Congress approved February 19, 1903, heretofore referred to."

While it must be confessed that the paragraph above quoted is not very perspicuous, there is in my mind no doubt that it was the thought and purpose of the court that when the cause went back to the Circuit Court, if the defendant railroad company was then continuing to "exact the rates complained of" in the original bill, instead of putting the Government entirely out of court by dismissing the bill, it might amend informally—perhaps by motion—pursuant to said section of the Elkins act, by showing that the railroad company was continuing in the given particular, the violation of the interstate commerce act, to avoid the reinstitution of like complaint. In the very nature of the law, the injunction to be granted would apply to and operate alone upon acts then being done by the railroad company. It is inconceivable that the court could have intended to say that under the Elkins act an injunction could be had for a past violation of the interstate commerce law, not being repeated at the time of granting the injunction under the Elkins act. Otherwise it would be violative of rules of law deeply rooted in the jurisprudence of the country. An injunction never goes to restrain a past act, already accomplished. It acts alone upon a wrong in fieri. Again, all legislative enact-

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ments are presumed to be prospective in their operation, unless the contrary is expressly declared. "Courts refuse to give statutes retroactive construction unless the intention is so clear and positive as by no possibility to admit of any other construction." Sedgwick's Construction of Statutes, etc., 166.

Mr. Justice Cooley, in his work on Constitutional Limitations (page [187] 76), says in respect of the rule that legislative acts are presumed to be prospective in their operation, that:

"It is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively. * * * Retrospective legislation is * * * commonly objectionable in principle and apt to result in injustice; and it is a sound rule of construction which refuses lightly to imply an intent to enact it."

In *Finney* v. *Ackerman*, 21 Wis. 271, the court, speaking of the language used in the law of 1865, which in its broad sense might perhaps be held to apply to tax deeds previously executed, said:

"This language must, however, be construed as applying to deeds executed after the passage of the law. For the rule is well settled, that statutes are not to be construed as having a retrospective effect unless the intention of the Legislature is clearly expressed that they shall so operate. *Seamans* v. *Carter*, 15 Wis. 548, 82 Am. Dec. 696. That intention is not to be assumed from the mere fact that general language is used which might include past transactions as well as future. Statutes are frequently drawn in such a manner. Yet such general language is held to have been used in view of the established rule that statutes are construed as relating to future transactions, and not to past."

See full discussion of this question in *State* v. *Grant*, 79 Mo. 113, 49 Am. Rep. 218; *Leete* v. *State Bank of St. Louis*, 115 Mo. 184, 21 S. W. 788.

The doctrine of relation, like every other fiction of the law, has its limitations. It can never be made to bear fruit where its root was not planted in some antecedent, lawful right. This principle is aptly illustrated by the opinion of Judge Adams in *Powers* v. *Hurmert*, 51 Mo. 136–138:

"Relation is sometimes allowed to prevent injustice, as when an attachment has been issued and levied without sufficient affidavit, and an amended affidavit is afterwards made it will relate back so as to uphold the attachment and uphold the previous levy. But, in that case, the right to the attachment and its levy existed at the time, and only lacked the formality of a sufficient affidavit."

When the original bill was filed and the restraining order was made, there was no pre-existing equity in favor of the United States, sua sponte, at the request of the Interstate Commerce Commission, to institute such a proceeding for an injunction. The right to maintain it at the relation of the Government at common law did not exist. It did not attach under the interstate commerce statute for the all-sufficient reason that under Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Act March 2, 1889, c. 382, § 5, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165], it is provided:

"That whenever any common carrier * * * shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the commission * * * it shall be lawful for the commission or for any company or person interested in such order or requirement to apply in a summary way, by petition, to the Circuit Court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and [188] the said court shall have power to hear and determine the matter * * * and if it be made to appear to such court, on such hearing * * * that the lawful order or requirement of said commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, etc., * * * and in case of any disobedience of any such writ of injunction * * * it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, etc."

Neither the bill of complaint nor the information herein alleges that any such order had ever been issued by the commission, and it is not claimed on behalf of the government that the commission ever proceeded beyond a preliminary inquiry. The jurisdiction of the United States Circuit Court to grant such injunction was conditioned upon the antecedent order of the commission, and failure of the defendant to comply therewith. *Interstate Commerce Commission* v. *Western, N. Y. & P. R. R. Co.* (C. C.) 82 Fed. 192, 196; *Farmers' Loan & Trust Company* v. *Northern Pacific Railway Company* (C. C.) 83 Fed. 249, 267; *Sheldon et al.* v. *Wabash Railway Company et al.* (C. C.) 105 Fed. 785; *Interstate Commerce Commission* v. *Lake Shore & M. S. Railway et al.* (C. C.) 134 Fed. 942, 946; *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.* (C. C.) 73 Fed. 409; *Central Stock Yards Company* v. *Louisville & N. R.*

Co. (C. C.) 112 Fed. 823, 827, 828. The Supreme court has recognized the correctness of this construction of the law, in *East Tennessee, V. & G. Railway Company* v. *Interstate Commerce Commission*, 181 U. S. 1, 27, 21 Sup. Ct. 516, 525, 45 L. Ed. 719, the court said:

"Whilst the court has, in the discharge of its duties, been at times constrained to correct erroneous constructions which have been put by the commission upon the statute, it has steadily refused, because of the fact just stated, to assume to exert its original judgment on the facts, where under the statute, it was entitled, before approaching the facts, to the aid which must necessarily be afforded by the previous enlightened judgment of the commission upon such subjects."

So, in *Interstate Commerce Commission* v. *Clyde Steamship Company*, 181 U. S. 29–33, 21 Sup. Ct. 512, 45 L. Ed. 729, the court again declined to go into an original investigation, saying that that duty was laid upon the commission by the interstate commerce act in the first instance.

This being conceded as correct law, as it must be, there was no jurisdiction in this court to make the injunction order in question. It challenges all our conception of law and precedent that that which was dead at common law can be regalvanized and made alive by a post facto statute law. It would contradict the positive conclusion reached after most thorough investigation and discussion by Mr. Justice White in the case of *Union Pacific Railway Company* v. *Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, to attribute to his ruling in *Missouri Pacific Railway Company* v. *United States*, *supra*, the purpose to hold that the original bill in this case, predicated alone of a common-law right to relief in equity, could be so amended as to rest for its support upon the statute law enacted nearly a year after the restraining order was made under the common-law suit, so as to give life to such [189] antecedent order, and subject the defendant to prosecution for contempt for violating an order that was coram non judice when made. It was expressly held in *Union Pacific Railway Company* v. *Wyler*, *supra*, that a cause of action based on a common-law right could not be amended so as to predicate a further proceeding thereunder based on a statutory right, for the reason that it was not a continuation of the original cause of action, but a substituted cause.

The repealing section of the Elkins act, saving the rights of causes then pending and rights which had already accrued, only declared that:

"Such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this act."

As there was no manner provided by law, prior to the Elkins act, enabling the United States to maintain such a bill in equity as the one under consideration, it had no rights in the proceeding to be saved. The words "as modified by the provisions of this act," being subjective rather than active in terminology, by no permissible liberality of construction can operate to make the Elkins act relate backward, so as to vitalize an order which was a dead letter when made. As already suggested the only comprehensible thought in the mind of the court in the Missouri Pacific Railway Case, supra, in reversing the decree of the Circuit Court, and sending the case back, was to allow the United States attorney to proceed therein in the summary, informal manner provided by section 3 of the Elkins act, by showing that the railroad company was then continuing to do the act complained of in violation of the interstate commerce law. If, after the passage of the Elkins act, the United States attorney might have appeared in this case, by motion, or otherwise, alleging that the defendant was continuing its alleged violation of the interstate commerce law, it must be conceded that he would thereby have presented an issuable fact on which the defendant would be entitled to have a hearing; for, if the essential fact did not exist, there could be no predicate for continuing the proceeding under the Elkins act. No such movement has ever been made by the United States attorney. This contempt proceeding, therefore, rests for its sole support upon an injunctive order the court had no jurisdiction to make when issued. The only answer made to this in argument is that, after the passage of the Elkins act, the court by order continued in force the restraining order of March 25, 1902. The effect of this, however, was not to issue any new injunction, but only to continue the original order. The continuing order was bottomed alone upon the original bill of complaint. If the original order made thereon had no force

and effect in law when first made, the court, by no post mortem act, could vitalize it.

If the position of the government's counsel be well taken, it must obtain that if, in 1910, the Interstate Commerce Commission should, on investigation, ascertain that the defendant railway company, out on the Pacific Coast where its lines extend, was granting rebates on carloads of cattle or California fruits, or at Chicago, Ill., was granting rebates on agricultural implements, furniture, or dry goods and groceries, instead of the United States attorney for California or **[190]** Illinois instituting proceedings in that jurisdiction, as the Elkins act contemplates and provides, the United States attorney for the Western District of Missouri could move against the railroad company in this court for contempt of the restraining order made in March, 1902, based upon allegations that at that time the defendant was granting rebates on grain and packing-house products in this jurisdiction. If the restraining order of 1902 is not itself restrained by the rule ejusdem generis, then as to all the railroads, to wit, the Atchison, Topeka & Santa Fé Railway Company, the Chicago, Rock Island & Pacific Railroad Company, the Chicago & Alton Railroad Company, the Missouri Pacific Railway Company, the Chicago, Burlington & Quincy Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, which were enjoined under a like bill and under a like order at the same time, there need never be any order made on them by the Interstate Commerce Commission to desist from granting rebates at any place or at any time, on any kind of commodity shipped by them, or any action taken against them by the United States District Attorney in the jurisdiction where the offense should be committed. But no matter when, where or how, or on what subject-matter of interstate traffic either of said roads may grant rebates, a resort in this court to a contempt proceeding against the company, under the order issued in March, 1902, predicated of a suit in equity of which this court had no jurisdiction, would hit the blot.

It must be conceded, beyond tolerant cavil, that a bill praying for an injunction must be predicated of some specific

wrong then being done by the defendant to the complainant. The only violations of the provisions of the interstate commerce act specified in the bill as being committed at the time consisted in the granting of forbidden rebates on grain and packing-house products shipped from within this district. The eighth paragraph of the bill contained a broad, general averment based on information and belief, that on many other principal commodities, constituting the bulk of railroad traffic between the states, comprising the ordinary necessities of life, the said defendant grants unlawful rebates, etc., between the states and between the states and territories, to certain other favored shippers whose names are to the orator unknown. No venue is laid in this sweeping "omnium gatherum" charge; and no particular specification. It requires no citation of authorities to maintain that such indefinite, general allegation without place, whether in Illinois, Missouri, Kansas, Colorado, California, New Mexico, or Arizona, through which the defendant's lines extend, would not authorize the court to grant an injunction predicated thereon. The restraining order enjoined the defendant "from further acting under and enforcing or executing in any manner whatever any agreement to transport over defendant's railroad, or any part thereof, between the states, any packing-house products, dressed meats, grain, or the products of grain, or any other interstate traffic, at any greater or less rate than the rates named for such services in defendant's established schedule, etc." The authorities are all agreed that the general words "or any other interstate traffic," used in such connection, on the rule of noscitur a sociis and ejusdem generis, are con- **[191]** trolled by the antecedent specification, and are limited to objects "of like kind with those specified." *United States* v. *Bevans*, 3 Wheat. 336, 4 L. Ed. 404; *St. Joseph* v. *Porter*, 29 Mo. App. 605; *State* v. *Bryant*, 90 Mo. 534, 2 S. W. 836; *Fuchs* v. *St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; *City of St. Louis* v. *Laughlin*, 49 Mo. 559; *Ex parte Neet*, 157 Mo. 527, 57 S. W. 1025; *State* v. *Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; *Boatmen's Bank* v. *Fritzlen*, 135 Fed. 650, 68 C. C. A. 288.

True it is that the general evil struck at by the interstate commerce act was unjust discriminations and rebates; yet, the specific subject-matter predicated in the bill of complaint was rebates being granted on grain and prepared meats and their products, being shipped from this jurisdiction. Allied products of those specified commodities would alone come within the requirements of the rule of ejusdem eadem. In the case of *Swift* v. *United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 279, 49 L. Ed. 518, there was an injunction against the defendants, restraining them from using certain specific devices in violation of the anti-trust act, followed by a general clause, not dissimilar in its import to the general clause in the restraining order herein. When this general clause was attacked as vicious, in argument before the Supreme Court, the Attorney General of the United States said in reply:

"It is not true that this injunction broadly enjoins them against violations of the law. It enjoins them against certain specific conspiracies, well pleaded in the petition, well stated in the injunction, capable of being understood by one who desires to understand them. The particular paragraph of which my friend so much complains—the language or by any other method or device, the purpose or effect of which is to restrain commerce as aforesaid—is not open to the objection which he urges against it. There are specific devices set forth in the injunction and prohibited, and there is a general prohibition in the clause against any combination to restrain commerce as aforesaid; that is, according to the specific restraints which precede immediately this paragraph of the injunction."

In the opinion delivered by Mr. Justice Holmes, he says:

"We are bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of the summons for contempt. We cannot issue a general injunction against all possible breaches of the law. * * * The general words of the injunction 'or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid,' should be stricken out. The defendants ought to be informed, as accurately as the case permits, what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid."

Comment: This proceeding by contempt against the railroad company does not commend itself to my sense of fair play and "a square deal." The Hutchinson & Arkansas River Railroad Company is a railroad corporation, chartered by the state of Kansas. As such, it is presumptively

invested with the power to exercise the right of eminent domain; and is presumptively a public carrier, authorized to carry freights for hire, although it may confine its opersations to the transportation of the output of particular salt mills. No railroad [192] company connecting with or receiving freights from it has a right to demand or expect that it should carry and deliver to it freight free of charge. Whether its rates exacted are excessive and forbidden depends upon whether or not the creative act from the state or the state authority has fixed a maximum. If that be exceeded, it rests for correction in the right of visitation and interference on the part of the state. Congress has not undertaken to regulate the matter of an equitable division of rates on a joint tariff between two railroads. Under existing law, that is entirely a matter of private contract between the railroads, and if the joint through rate be less than the aggregate of the local rates fixed under the existing local laws, it is a matter of no concern to the government. The interstate commerce act only requires that the established schedule shall be filed with the commission, duly published; and that it shall then be adhered to by the joint parties. Any railroad company touching at Hutchinson, Kan., desiring to do business in carrying salt, finds the shipper entrenched behind a chartered railroad connected with the plant or plants of the salt manufacturer, which carries the entire output to the connecting roads. The shipper says to the railroad soliciting its business: We will ship over our short line and deliver to you on condition that you will make a joint through rate agreement with us, or for terminal facilities, giving us the lion's share of the income or charge, which may be an exorbitant exaction. The soliciting railroad must submit to the exaction or do no business with the large shipper. When thus coerced, some other shipper of salt at Hutchison, who does not own any connecting short line road, becomes jealous of his competitor in business, and complains to the Interstate Commerce Commission, charging that the short railroad thus used is but a device by which such shippers obtain a rebate. Instead of the government invoking all of the prohibitory and penalizing provisions of the statutes against the real offender—the shipper—in such

transactions, by directly proceeding against him in the United States Circuit Court of Kansas, where the offense was committed, it resorts to a prosecution for contempt, under an order 3½ years old, made in this jurisdiction, predicated of an entirely distinct subject-matter of traffic, and asks that the interstate railroad company alone be punished. And this court, in this ex parte proceeding against the railroad company, is asked to enter into an investigation of the character of the railroad at Hutchinson, as to who are its stockholders and operators, and the exact relation between it and the Hutchinson-Kansas Salt Company, and how the contract for through traffic rates between the parties was brought about. When the government shall pursue and punish such shippers, if guilty, it will strike at the very root of the rebate evil. And as I doubt not the railroad companies would profit by the result, they can best bring about the desired consummation by opening instead of closing the mouths of the men under their control when their evidence is sought.

There is a second like information against the defendant railway company, growing out of the rebates alleged to have been conceded to the Colorado Fuel & Iron Company, a corporation of Colorado, on shipments of coal from Trinidad, Colo., and Gallup in the territory [193] of New Mexico, to points in the territory of Arizona, El Paso, Tex., and to points in the republic of Mexico. These shipments were made in 1903–1904. This instance has attracted considerable public attention, because of the sensational association of the names of Mr. Ripley and Paul Morton, then president and vice president, respectively, of the defendant company, with the transaction. The record in the case, however, consisting of the pleadings and the exhibits of evidence taken before the Interstate Commerce Commission, fails to furnish any foundation for imputing to those gentlemen any personal responsibility for the alleged violation of the interstate commerce law. Such matter, however, is extraneous. For the reasons assigned in the foregoing discussion, this court cannot proceed to sentence in this contempt proceeding. However reprehensible the conduct of the defendant railroad company, if it be as alleged in these transactions, may

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have been, or however much disposed this court be to compel obedience to its lawful mandates, it is persuaded that it is without authority in this proceeding to draw to it the questions involved, rightfully belonging to the jurisdiction of the United States Circuit Court for the Districts of Kansas and Colorado. "Thus saith the law" is a perpetual injunction upon the judge, when called upon to exert judicial power, which he may not disregard without standing in contempt of his own conscience.

It results that the motions to quash the informations are sustained.

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[216] LOEWE ET AL. *v.* LAWLOR ET AL.

(Circuit Court, D. Connecticut. December 13, 1905.)

[142 Fed., 216.]

PLEADING—SUFFICIENCY OF COMPLAINT—ACTION UNDER ANTI-TRUST ACT.—The complaint, in an action to recover damages under section 7 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), *held* sufficient on a motion for correction of the same.[a]

At Law. On motion for correction of complaint.

See 130 Fed. 633.[b]

Davenport & Banks, for plaintiffs.

Bristol, Stoddard, Beach & Fisher, De Forest & Klein, and *Howard W. Taylor*, for defendants.

PLATT, District Judge.

The dispute herein has not yet reached that critical period which warrants a recital of the elaborate complaint which the motion attacks. It is enough to say that the gist of it is somewhat as follows, viz.: For many years the plaintiffs had been opposed to the closed-shop policy, and had consistently refused to take any action tending to establish that policy, and the defendants knew it. On July 25, 1902, the plaintiffs had a large and profitable interstate trade in hats. The de-

[a] Syllabus copyrighted, 1906, by West Publishing Co.

[b] See p. 563.

Syllabus.

fendants, with others (see paragraphs 9–18, inclusive), had a way of making people come to terms on the disputed issue, which way is described carefully and minutely. They had been instrumental in using the described way effectively upon many individuals, firms, and corporations, and had boasted of their success, so as to affect the plaintiffs when they should come at them. In 1901 they told the plaintiffs that, if they did not yield on the disputed issue, they would treat them as they had the others and force them to do so, but plaintiffs refused to yield. Thereupon and therefore, on July 25, 1902, defendants put into operation the machinery before described, with attachments thereto and refinements thereof, and so inflicted serious injuries upon plaintiffs in violation of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), under which and by virtue whereof this suit has been brought.

[217] It is not understood to be one of the functions of the court, on such a motion as this, to compel the plaintiffs to state their case in the way most satisfactory to the defendants. Indeed, it is not easy to conceive how such a complicated situation, covering, as it does, such an important and serious question, could have been otherwise set forth. At any rate a close scrutiny of the complaint discloses nothing which is so obviously wrong that it ought to be expunged on motion.

Motion denied.

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[531] RUBBER TIRE WHEEL CO. v. MILWAUKEE RUBBER WORKS CO.

Circuit Court, E. D. Wisconsin. January 23, 1906.)

[142 Fed., 531.]

PATENTS—LICENSES—RIGHT TO ATTACH CONDITIONS.—It is within the rights of the owner of a patent to grant licenses conditioned that the licensees shall sell the patented article only at prices fixed by the agreement and also restricting the production of a licensee, and such agreements, if made in good faith and for the purpose of protecting the patent monopoly, are not illegal as in restraint of trade and commerce, and such good faith is not impeached by the fact

that the patent has been held invalid by the federal courts in some circuits, where it has been sustained in others.

[Ed. Note.—Power of patentee to control his invention, see note to *Heaton-Peninsular Button Fastener Co.* v. *Eureka Specialty Co.*, 25 C. C. A. 280.]

PATENTS—LICENSES—VALIDITY OF PROVISIONS—RESTRAINT OF TRADE.—Complainant, owner of a patent for a rubber tire which had been adjudged invalid by the Circuit Court of Appeals for the Sixth Circuit, entered into license contracts with all of the large manufacturers of tires in the United States, all of whom were engaged in interstate commerce. Such contracts were uniform, and each made a part thereof collateral contracts made at the same time, one of which was between complainant on one part and all of the licensees on the other. As a whole the contracts provided for the payment of a royalty equal to 4 per cent. of the net selling price of the tires made thereunder, fixed the prices at which the tires should be sold at a substantial advance over the then market price, and also limited the production of each licensee to a certain per cent. of the production of all, providing that if the licensee made less than his "quota" he should be paid a rebate of 20 per cent. on the value of the shortage, and if he made more he should pay a royalty of 20 per cent. on the excess. The contracts also provided for a board to supervise the operations of the licensees to which one-half the royalties should be paid and which should have power, with the consent of a majority of the licensees, to purchase tires from any of them and resell at such prices as it deemed for the interest of all. *Held*, that such contracts went beyond the rights of complainant under its patent monopoly in raising and maintaining prices in the states composing the Sixth federal circuit, in which the monopoly had no practical existence, and in creating a fund to be used to crush competition by outside manufacturers, as well in the Sixth circuit as elsewhere, and were illegal and void as creating a combination in restraint of interstate trade and commerce, in violation of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200.])

Winkler, Flanders, Smith, Bottum & Fawsett and *Augustine L. Humes*, for plaintiff.

John F. Burke and *Charles Quarles*, for defendant.

SANBORN, District Judge. Action at law to recover royalties under the Grant patent, No. 554,675, dated February 18, 1896, for rubber-tired wheels. The royalties claimed amount to $4,109.42; but, deducting certain offsets, the plaintiff, if entitled to recover, should have judgment for $2,517.66 principal, with 6 per cent. interest from the time the several amounts of royalties going to make up this sum

became due, with due regard to the time of the payment of the sums making up the offsets. The defenses are that the license contract securing the royalties is denounced as illegal by the Sherman anti- **[532]** trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), making void every contract combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states; also that the royalty contract is invalid under section 1791j of the Wisconsin Revised Statutes of 1898, prohibiting corporations organized under Wisconsin laws from entering into any combination, conspiracy, trust, pool, agreement, or contract intended to restrain or prevent competition in the supply or price of any article constituting a subject of trade or commerce in Wisconsin. Defendant is a Wisconsin corporation, and plaintiff an Ohio corporation. The reply to these defenses, in argument, is that they are immaterial, because the articles in question are patented, and the royalties claimed are under a patent monopoly; hence the license is neither within the Sherman act nor the Wisconsin trust act. In rebuttal to such anticipated reply, defendant pleads in its answer that the several agreements between the parties set out in the complaint were intended to form a combination in restraint of trade; that the patent mentioned in such agreements was void, and was believed by all the parties to the agreements to be void; that the patent had been so adjudged by the United States Circuit Court of Appeals for the Sixth Circuit, and the Supreme Court had refused to review that decision; that the patent was resorted to as a pretext merely to enable the contracting parties to evade the Sherman act and the Wisconsin statute, and the license contracts were not in fact, nor intended to be, license contracts under letters patent; but to create such unlawful combinations that by such contracts prices were raised beyond the natural and legitimate market prices, and the amount of manufactures restricted; and that the pretended license contracts were void under the Sherman act and the Wisconsin statute.

The three contracts pleaded and proved show a combination in restraint of trade and are in substance as follows: On October 10, 1903, plaintiff and defendant made the

license agreement. It recites that plaintiff is the owner of the patent, and that defendant desires to obtain the right to manufacture, use, and sell vehicle tires made under the patent. Therefore it is agreed that plaintiff grants defendant such rights for one year, to the extent set forth in a "supplementary agreement" attached to the agreement of license, in the United States, except 19 states and certain counties and cities in other states. Three counties in Ohio are excepted from the grant. Plaintiff agrees to vigorously prosecute infringements, except such as may be committed in the Sixth federal circuit. Defendant agrees to pay a royalty of 4 per cent. of the net selling price of tires made under the license, and the further royalty of 20 per cent. over its "quota" fixed by the supplementary agreement. The supplementary agreement, of even date with the license, recites licenses like the foregoing to 17 other rubber-tire manufacturing companies, and fixes the quota which defendant shall manufacture each month during the license year at 2 per cent. in dollars and cents of the aggregate amount made and sold by all the licensees. The third agreement, made at the same time, called the "Licensees' Agreement," is between plaintiff as first **[533]** party and all the licensees as second parties. It recites the licenses, and that it desired that the right of manufacture shall be exercised on uniform terms and conditions, and the operations of all the licensees supervised by an impartial administration. Therefore it is agreed that if any licensee shall sell more than its quota it will pay, in addition to the 4 per cent. royalty, 20 per cent. on the amount sold by it in excess of its quota; and, on the other hand, if it shall sell less than its quota, it shall be paid 20 per cent. on the shortage. Prices for first quality tires are fixed at 65 cents a pound, and for second quality 55 cents. Plaintiff agrees to employ a commission of five persons to supervise the operations of the licensees, and pay it one-half the royalties, or 2 per cent. If any licensee sells at less than the fixed prices it is to forfeit its right to license rebates under this contract. The licensees are to manufacture only two grades of tires. The commissioners may, by written consent of a majority of the licensees, purchase tires from any of them, and resell at such prices as they may deem for

the interest of all the parties. These contracts most clearly make a combination within the Sherman act, if the subject-matter be within that act. That is the only question in the case.

The following facts appear in evidence: There has been considerable litigation over the patent. It was first sustained in *Rubber Tire Wheel Co.* v. *Columbia Pneumatic Wagon Wheel Co.*, 91 Fed. 978, in the Circuit Court for the Southern District of New York, decided in December, 1898. In May, 1902, the patent was sustained by the Circuit Court for the Southern District of Ohio (unreported), but on appeal the Circuit Court of Appeals for the Sixth Circuit held it void as an aggregation of old devices. *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co.*, 116 Fed. 363, 53 C. C. A. 583, before Lurton, Day, and Severens, circuit judges. About the same time, in *Consolidated Rubber Tire Wheel Co.* v. *Finlay Rubber Tire Co.*, 116 Fed. 629, in the Circuit Court for the Northern District of Georgia, Judge Newman sustained the patent, and also held defendant estopped to contest the validity of the patent. Before his opinion was published his attention was called to the Ohio case, but he declined to change his decision, as defendant was estopped. The patent was also declared valid in the Circuit Court of Appeals of the Republic of France, sitting at Paris. There is also an infringement suit now pending in the Southern District of New York, brought to stop infringement and also for the purpose of obtaining either an agreement in the various circuits as to the validity or invalidity of the patent, or such disagreement among them as will take the question to the Supreme Court. That court denied certiorari to review the Ohio decision. 187 U. S. 641, 23 Sup. Ct. 842, 47 L. Ed., 345. The Circuit Court of Appeals of the Sixth Circuit also held the patent invalid in *Rubber Tire Wheel Co.* v. *Victor Rubber Tire Co.*, 123 Fed. 85, 59 C. C. A. 215, following the Goodyear Case. In the case now pending in New York, the witness Stapleton and several other attorneys represent the complainants, one of them being plaintiff here. Soon after the decision in Ohio, Mr. Stapleton advised plaintiff that the patent is valid, and so advised it in the early part of

1903. Similar advice was given [534] by Mr. John R. Bennett, an experienced patent lawyer in New York.

The opinion of Mr. Stapleton was based on the fact that the judges in three of the circuits had upheld the patent, and on his opinion that the Court of Appeals of the Sixth Circuit based its decision on wrong premises. The "tipping function" of the patented tire, hereafter described, the court held was not disclosed in the patent specifications. It was held that the specifications do not state how tightly or loosely the tire is to be applied to the wheel, so as to make this tipping function operative. Mr. Stapleton thinks the court was mistaken in this respect, and for that reason advised plaintiff that the patent will be sustained. It further appears in evidence that early in 1903, before the contracts in question were made, the rubber tire market was much demoralized. Prices were being cut by many manufacturers. After the combination was made the prices were maintained as fixed in the agreement, and it did away with all competition. Before the combination prices were 50 cents and 40 cents, respectively, and afterwards 65 and 55. After the expiration of the agreement the prices went back to the former rates. During the combination defendant made no effort to get any new business. All the tire manufacturers were in the pool except two small concerns. Defendant's tires were made in Wisconsin and sold in that and many other States.

The patent is for a specific combination of old devices. The chief ground on which it is sought to be sustained is that it produces a new and useful result, a new mode of operation, or an old result in a more advantageous way. The new result claimed is the neutralizing of side strain, from blows or friction, by what has been called the "side-tipping function," not found in the prior art. From the cut of a transverse section of the tire and felloe it will be seen that side pressure on the tire, if the retaining wires be not too tightly drawn, will cause the tire to rise on the side pressed, and tip on the other, rising in the channel and turning on the corner or angle of the opposite side, as upon a pivot, returning to its seat when the pressure is removed. Thus the strain is relieved, and both breaking and splitting prevented, as

well as the cutting of the tire on the sloping flange or rim of the wheel. In the New York and Georgia cases this "tipping function" is held a novel and useful result, sufficient to sustain the patent. But in the Ohio case, while it is admitted that this feature, if present, might sustain the patent, yet that it is neither specified or claimed by the patentee. It is said by that court to depend on the proper tension of the retaining wires, and the specifications nowhere show how tight they shall be. Judge Lurton says:

> "If this capacity for side movement be a beneficial function plainly inherent in Grant's combination and arrangement of old parts in relation to each other, and not a mere 'obscure property lurking in some accidental corner of his device,' it was not essential that the patentee should point it out as one of the advantages of his structure. This is because he has invented a machine, structure, or manufacture which includes in its necessary mode of operation the function in question, and, whether the inventor knew or not the full measure of the beneficial function of his structure, he is entitled to all the uses of his invention."

The court held that the tipping function was not plainly inherent in his very structure or device, because there is nothing to show how [535] tight the wires are to be stretched. The tipping capacity is not even pointed out, so that no mechanic, following the specifications, would know how tight or loose the wires were to be made. 116 Fed. 375, 376; 53 C. C. A. 583. On the other hand, Judge Newman, in the Georgia case, says that the shape of the tire—that is, the outward slant of the portion within the rim—its close fitting against the rim, and its angle below the edge of the rim, cooperate with the two-part wire fastenings to cause the rubber to rise, when exposed to extraordinary lateral force on one side, and turn on the angle of the other side, thus producing the tipping function and relieving the strain.

I have thus stated the question of patentability for its bearing on the belief and intent of the parties to this suit, their bona fide belief on the question of validity, and their resulting intent in making the licenses and licensees' agreement; in other words, in forming the tire trust. Mr. Stapleton, believing that the Court of Appeals of the Sixth Circuit missed the true construction of the specifications in respect to this new function, advised plaintiff, before the trust agreement was made, that the patent was, in his opinion, valid.

Certainly it is entirely probable, as it seems clear to me, in view of such opinion so expressed, the opinion of Mr. Bennett, the character of the question itself, the fact that three Circuit Courts and the French court have sustained the patent, and the great success which the tires have been, in practical effect, that the parties to this suit, and to the licensees' agreement, may in good faith have believed in the validity of the patent. There is nothing in the character of the concrete, though narrow, question of patentability, as it seems to me, which rebuts the probability of such honest belief. It may well have been supposed, because the tipping function has an actual, practical existence in the tires built under the patent, that this feature, however obscurely, is included in the specified mode of operation, and that such novel and beneficial result would save the patent in the end, notwithstanding the Ohio decision. The Grant tires are wonderful preservers of carriages, old and new. If the "one-hoss shay" had been equipped with them it would, in my opinion, be running yet. It is at least possible that the courts will find in the patent specifications, by fair implication, a function which skilled workmen, all over the country, have actually found in them; and the owner and its licensees, though conscious that the patent has been to some extent discredited, and that its validity rested on narrow grounds, might yet have honestly believed that it would be finally sustained. At all events, bad faith has not been proved.

But, if it be assumed that the Ohio decision was the inducing cause of the combination, a more serious question is presented. Likewise, if the combination went beyond what was reasonably necessary to the enjoyment of the patent monopoly. It is impossible to restrain commerce in a thing which has no inherent commercial freedom. An existing monopoly can not be monopolized. The patentee having brought forth the article from the world of mind, having added so much to the common stock of property, may do as he chooses with it. *Singer* v. *Walmsley*, Fed. Cas. No. 12900. It is the patented machine or device itself, not merely the mental conception producing it, which **[536]** is protected from infringement. Any other rule would render

the patent protection wholly illusory. Such protection extends to assignees and licensees equally with the patentee. It is not until the patented device has been sold and passed out of the dominion of the patent owner that the monopoly limit is reached. *Adams* v. *Burke*, 17 Wall. 453, 21 L. Ed. 700; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848.

The Constitution, in the interests of invention, grants to the patentee the absolute right to exclude or debar the world from making, using and selling his device; and Congress by passing acts in aid of powers given it, like the power to regulate commerce, can not interfere with this constitutional right of exclusion, embargo, or inhibition. Having the absolute power of complete exclusion, the proprietor may exclude, conditionally or in part, by imposing limits as to time, place, price, or persons. He may deal arbitrarily, may sell or withhold from sale, vend to one at one price and to another at a different price, permit use in one State and not in another, give reasons or not, or deal fairly or unfairly; and in doing all or any of these he is within his right, until the patent expires or is avoided, or the articles pass beyond the limits of his monopoly. He may even bring nonpatented articles within his monopoly by providing that the patented device shall be sold only in connection therewith. All this is so well settled, not only as to patents, but copyrights, secret process remedies, and trade secrets, that it is only necessary to refer to a few cases. *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424, 61 C. C. A. 58; *Bement* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *U. S. Consol. S. R. Co.* v. *Griffin & Skelly Co.*, 126 Fed. 364, 61 C. C. A. 334; *Rupp, Wittgenfeld Co.* v. *Elliott*, 131 Fed. 730, 65 C. C. A. 544; *Dr. Miles Medical Co.* v. *Goldthwaite* (*C. C.*) 133 Fed. 794; *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031. Like every kind of arbitrary power it is liable to abuse, but the power to abuse it resides in its very nature.

These observations apply only to patented articles which have not passed beyond the monopoly limit through sale by the patentee, licensee, or assignee. Here the monopoly ends.

The articles are then in the same condition as if unpatented, subject to all trade and commerce regulations like any other property. See *Adams* v. *Burke*, 17 Wall. 453, 21 L. Ed. 700. Nor do such observations seem to apply to sale or manufacture in the states composing the Sixth federal circuit. It can not be reasonably said that the proprietor has power to exclude or debar the use, sale, or manufacture in Ohio, Michigan, Kentucky, or Tennessee, since no court there will grant it an injunction, decree for infringement, or account, or judgment for damages. In those states the patent owner has no power at all, no dominion of market, no monopoly. It can not, from a practical standpoint, accomplish a single one of the things mentioned which flow from its monopoly, simply because no remedy there exists. "Ubi jus, ibi remedium, et vice versa."

What the effect of a decision avoiding a patent for lack of novelty has upon the nine lives of a patent is a practical question, not a theoretical one. Suppose the same thing had happened to this patent as **[537]** occurred in the Driven Well Cases, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064, and 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160; the patent being held void in one and valid in the other. If the Supreme Court in one case should hold the device anticipated, and in the other, for lack of evidence, sustain the patent, the effect would be to destroy the monopoly. True, the patent would still be presumptively good. The decision of the Supreme Court would not even be evidence against it. Pleading and proof would still have to show the prior art; and the patent might in a particular case be still sustained, even by the same high court which formerly avoided it. But from the practical standpoint the patent would be worthless. The owner would not have the presumption to attempt its enforcement. No Circuit Court in the country would afford him a particle of real protection. He would be helpless, the patent lifeless and despised, dead beyond the power of resurrection, no matter how useful the machines or devices made under it. Any attempt to revive such a patent and give it vitality would not only be futile, but would bring it and its proprietor into further contempt. But in the rest of the United States the Grant patent stands on different grounds. The Sixth circuit de-

cision would not afford the slightest evidence of its invalidity, however persuasive upon the court it might be. Not only this, but plaintiff believed it valid. Nor is there any evidence to show that the decision of the Sixth Circuit Court of Appeals was the inducing cause of the combination. I think it was due to the belief of all the parties that such a combination was within the rights of the plaintiff as owner of the patent. I do not find any evidence of bad faith on the part of either of the parties to this suit, or any of the licensees.

But the vital question, upon which I have had much difficulty, is whether the combination goes so much beyond the limits of the patent monopoly, and secures results so unnecessary to the patentee's rights, as to render the license agreements void. Do the restrictions of the license agreements add to the patent monopoly, or do they only keep up or continue the monopoly secured by the patent? The patentee having by his invention brought into existence the patented devices, they are not, in the usual sense, the subjects of monopoly. "A patent is that which brings out from the realm of mind something which never existed before and gives it to the country." *Singer* v. *Walmsley*, 1 Fish. Pat. Cas. 558, 22 Fed. Cas. 207. Monopoly restrains trade or commerce in articles which before were the subjects of trade or commerce. Patented articles were not so, for they did not exist before. Hence they cannot be the subjects of prohibited monopoly, unless the restriction be extended beyond what the patentee secures. *In re Greene* (C. C.) 52 Fed. 194; *Bement* v. *Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *U. S. Cons. Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 Fed. 365, 61 C. C. A. 334; *National Phonograph Co.* v. *Schlegel*, 128 Fed. 733, 64 C. C. A. 594. What, then, does the patent secure? What are the true limits of the lawful patent monopoly? Are the license agreements in their very nature illegal, because going beyond the patent domain, and employing restrictions not essential to fortify or sustain the patent right? As stated be- **[538]** fore, the patentee has the right of exclusion or inhibition against all others, in the making, use, and sale of the new devices he has invented and newly produced, and within this field his rights

are unlimited. The license agreements do not attempt to limit total production, nor, apparently, the field of production or territory of sale. They do not restrict competition between the various licensees. They fix and control prices, and the quota of each manufacturer—provisions entirely lawful, and within the patent monopoly. They regulate the kinds of tires to be made, also permissible. They create a board of arbitration or administration, to enforce the performance by all the parties of the terms of their agreements, which would not be subject to criticism, unless designed to reach beyond the patent field and secure results not granted by the patent laws.

But in two important ways the provisions of these contracts attempt to secure results not contained within or flowing from the lawful monopoly of the patent. First, they raise and maintain prices, and restrict trade and interstate commerce, in Michigan, Ohio, Kentucky, and Tennessee, where the patent monopoly has no practical existence; second, they create a fund for crushing competition in interstate commerce throughout the whole country, as well in the Sixth circuit as elsewhere, and not only competition in the Grant tires between outside manufacturers and those who are in the combination, but competition of all other rubber tires against the Grant tires. The arbitrators may, with the written consent of a majority of the licensees, purchase tires from them and sell at any price. They could thus, by selling at less than cost, stamp out and destroy competition against the licensees by independent makers of any kind of rubber tires. In these two ways the contracts do, in my opinion, secure illegitimate results, in their nature unlawful, neither contained within nor essential to the patent monopoly. It is true, as the Supreme Court has decided, that agreements made to promote legitimate business under a patent, with no purpose to thereby restrain interstate commerce, are not within the anti-trust act, even if they do indirectly and remotely affect such commerce. *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259. Although I do not find in this case express unlawful intent, yet the necessary result being the restraint of interstate commerce in a prohibited field, not indirectly or remotely, but directly and substantially, it necessarily follows that the contracts were invalid, and that the suit must fail.

Within the proper domain of his monopoly the patentee may combine and conspire and restrict as much as he pleases. But I cannot conceive that enlightened courts, under a government of law, will find it consonant with just notions of duty to permit a patentee, however worthy his invention or large and extensive his rights, by means of his royalties to create a fund for crushing lawful opposition, destroying legitimate and proper competition, and restraining trade and commerce, not only in the patented articles themselves, but all others competing with them. Even in territory lawfully subject to his monopoly, I cannot believe this possible; still less in a broad do- **[539]** main covering four populous states in which the patent has become practically worthless—a territory greater in extent than that of the British Isles.

In view of the conclusion reached it is unnecessary to consider the effect of the trust act of Wisconsin. See, however, *U. S. Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 Fed. 364, 61 C. C. A. 334; *Columbia Wire Co.* v. *Freeman Wire Co.* (C. C.) 71 Fed. 302.

Defendant's attorneys will prepare findings conforming to this opinion, and directing judgment dismissing the complaint, with costs.

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[179] CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY *v.* BAY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 174. Argued December 15, 1905.—Decided January 2, 1906.

[200 U. S., 179.]

Where it appears from the record of a case in a state court that a Federal question was raised, and, in the absence of an opinion, it appears from a certificate made part of the record that it was not raised too late under the local procedure, and that it was necessarily considered and decided by the highest court of the State, this court has jurisdiction to review the judgment on writ of error.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it; and where a contract relates to commerce between points within a State, both on a boundary river, it

Argument for plaintiffs in error.

will not be construed as falling within the prohibitions of the Sherman act because the vessels affected by the contract sail over soil belonging to the other State while passing between the intrastate points.

Even if there is some interference with interstate commerce, a contract is not necessarily void under the Sherman act if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law.

A contract for sale of vessels, even if they are engaged in interstate commerce, is not necessarily void because the vendors agree, as is ordinary in case of sale of a business and its good will, to withdraw from business for a specified period.[a]

[A purchaser of river craft cannot invoke the antitrust act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to relieve him from his obligation to pay the purchase price, because of his covenant to maintain the present traffic rates, which is not declared by the contract to enter into the consideration of the sale—especially where the rates referred to primarily, if not exclusively, relate to domestic, and not to interstate, business.][b]

THE facts are stated in the opinion.

Mr. Ledyard Lincoln, with whom *Mr. Julius L. Anderson* was on the brief, for plaintiff in error:

The contract is void under the Sherman act.

Repeated attempts have been made to restrict the broad and general language of the statute, but the Federal courts and especially this court have uniformly held that the act means just what it says and cannot be confined to unreasonable restraints nor such as were condemned by the common **[180]** law before its passage. *United States* v. *Freight Assn.*, 166 U. S. 290, 312, 340; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 573, 575; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271; *S. C.*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331, 402; *Ches. & Ohio Fuel Co.* v. *United States*, 115 Fed. Rep. 610, 619.

The commerce restrained was interstate. Both the Portsmouth Company and the Bays were engaged in steamboat-

[a] The foregoing syllabus and the abstracts of arguments copyrighted, 1906, by The Banks Law Publishing Co.

[b] This paragraph taken from the U. S. Supreme Court Reports, Book 50, p. 428. Copyrighted, 1906, by the Lawyers' Co-Operative Publishing Co.

Argument for plaintiffs in error.

ing between ports in Pennsylvania, West Virginia, Ohio and Kentucky. Nor was the element of restraint merely ancillary. *Tuscaloosa* v. *Williams*, 127 Alabama, 110, 119.

It cannot be questioned that the transportation of persons and property from one State to another is interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Lottery Case*, 188 U. S. 321, 345.

The transportation of goods on a through bill of lading from one point in a given State to another in the same State by way of an adjoining State or Territory is interstate commerce. *Hanley* v. *Kansas*, 187 U. S. 617.

The States of Kentucky and West Virginia extend to low water mark on the Ohio side, so that even boats plying directly from Syracuse to Cincinnati without stopping at intermediate points would necessarily at ordinary stages of the river pass through parts of West Virginia and Kentucky. *Indiana* v. *Kentucky*, 136 U. S. 479; *Hanley* v. *Anthony*, 5 Wheat. 374; *Booth* v. *Hubbard*, 8 Ohio St. 243; *McFall* v. *Commonwealth*, 2 Metcalf (Ky.), 394.

Contracts not relating directly to interstate commerce, but local in their nature, have been held not within the prohibition of the Sherman act, although the parties contracting in fact sold commodities or solicited business beyond the state line, as the contract must affect interstate commerce directly and not remotely or incidentally. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604. But see *United States* v. *Freight Assn.*, 166 U. S. 290, 325; *Lufkin* v. *Fringeli*, **[181]** 57 Ohio St. 596; *Monongahela Co.* v. *Jutte*, 210 Pa. St. 288, and cases cited in note; 74 Am. St. Rep. 235, 273; *Bement* v. *Harrow Co.*, 186 U. S. 92.

The Sherman act prohibits any contract in restraint of trade which would be illegal at common law. As to what would be illegal see *Horner* v. *Graves*, 7 Bingham, 735, 743; 24 Am. & Eng. Ency. of Law, 850, and as to rule in the State of Ohio see *Lange* v. *Work*, 2 Ohio St. 519, 528. See also *United States* v. *Addyston Pipe Co.*, 85 Fed. Rep. 271, and cases cited, p. 290; *Texas* v. *Southern &c. Co.*, 6 So. Rep. 888; *Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Emery* v. *Candle Co.*, 47 Ohio S. 320; *State* v. *Standard Oil Co.*, 49 Ohio St.

137; *South Chicago* v. *Calumet*, 171 Illinois, 391; *Anderson* v. *Jett*, 89 Kentucky, 375 (a case of competing steamboat lines).

The two packet companies who signed the contract were not engaged in private, but in quasi-public business, and therefore any restraint upon such business would be prejudicial to the public interest and cannot be sustained. *United States* v. *Freight Assn.*, 166 U. S. 333; *Gibbs* v. *Baltimore*, 130 U. S. 396.

The Federal question was raised properly and in time.

If the Federal or jurisdictional question be raised for the first time in the assignments of errors in the Supreme Court of the State, the question is presented in time. *Farmers' Ins. Co.* v. *Dobney*, 189 U. S. 301; *Land & Water Co.* v. *San Jose*, 189 U. S. 179; *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, 231; *Rothschild* v. *Knight*, 184 U. S. 334, 339; *Furman* v. *Nichol*, 8 Wall. 44, 56.

Mr. Lawrence Maxwell, Jr., and *Mr. Joseph S. Graydon* for defendants in error:

No Federal question is presented or was properly raised.

The vessels affected by the contract were not engaged in interstate commerce. *Hanley* v. *Kansas City Railway*, 187 U. S. 617, does not apply. See *Lehigh Valley* v. *Pennsylvania*, 145 U. S. 192. The court will not assume facts to make the contract illegal. *Herpolsheimer* v. *Funke*, 95 N. W. Rep. 687; [182] *Jewett Publishing Co.* v. *Butler*, 159 Massachusetts, 517; *Mills* v. *Dunham*, 1 Ch. 1891, 576, 586.

Mr. Justice Holmes delivered the opinion of the court.

This is an action upon a contract, brought by the defendants in error to recover an instalment of money due by its terms. A judgment in their favor was sustained by the Supreme Court of the State, although the petition in error to that court set up that the contract was illegal under the act of Congress of July 2, 1890, c. 647, 26 Stat. 209. No opinion was delivered, but a certificate that this objection was relied upon and that it necessarily was considered was made part of the record by that court. Therefore the present writ of error properly was allowed. The record shows that the question

was raised and the certificate shows that it was not treated as having been raised too late under the local procedure, a point upon which the state court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest court of the State. *Farmers' & Merchants' Insurance Co.* v. *Dobney*, 189 U. S. 301.

The contract was an indenture between the Portsmouth and Pomeroy Packet Company, George W. and William Bay, of the first part, and the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, of the second part. By this instrument the parties of the first part sell to the latter two steamers, two deck barges, two coal flats and five hundred dollars in the stock of the Coney Island Wharf Boat Company, for $30,500, to be paid as therein provided. The party of the second part also agrees to pay to the Bays $3,600 annually in advance for five years, provided, however, that in case of opposition to its boats by other boats running from Cincinnati to Portsmouth, Ohio, or to points above Portsmouth, not including points above Syracuse, Ohio, causing it to carry freight and passengers at certain exceedingly low rates, the time of payment of the instalments shall be postponed until the opposition has ceased. It is [183] further agreed that if the opposition continues for two years without interruption, and no annual payment be made, the Bays may cancel the agreement.

"It is also agreed as a part of the consideration of this agreement" that for five years the parties of the first part, or either of them, shall not be "engaged in running or in operating, or in any way be interested in any freight and passenger packet or business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to or for points below Portsmouth, Ohio," with a qualification as to the towing and barge business, so long as it does not interfere with the other party's freight and passenger business from Portsmouth to Cincinnati. "It is also understood in this agreement that the party of the second part will maintain the rates charged by the parties of the first part on busi-

ness above Portsmouth, Ohio, said rates, however, never to exceed railroad rates between said points." The last mentioned covenants, set forth in this paragraph, are especially relied upon as making the contract illegal as in restraint of trade. The previously mentioned suspension of instalments in case of opposition rising to a certain height also is referred to as a combination to aid the purchaser in getting a monopoly of river trade between Portsmouth and Cincinnati, including, it is said, some Kentucky ports.

It might be enough, perhaps, to answer the whole contention, that it does not appear on the record that the contract necessarily contemplated commerce between the States. It would be an extravagant consequence to draw from *Hanley* v. *Kansas City Southern Ry.*, 187 U. S. 617, a case of a State attempting to fix rates over a railroad route passing outside its limits, that the contract was within the Sherman act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points. It may be noticed further that Ohio equally has jurisdiction on the river. *Wedding* v. *Meyler*, 192 **[184]** U. S. 573. A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts. Technically, perhaps, there might be some trouble in saying that the Supreme Court of Ohio did not decide the case on the ground that the illegality was not made out as matter of fact.

But we do not like to put our decision upon technical reasoning where there is at least a fair surmise that such reasoning does not meet the realities of the case. We will suppose then that the contract does not leave commerce among the States untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. The route mentioned is between Ohio ports. The contract, in what it especially contemplates, is a domestic contract and, so far as it is so, is shown to be valid under the local law by the decision of the Ohio court. The chief and visible object of its provisions has nothing to do with commerce among the States. That which suspends payment of instalments in case of very

serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

It is argued, to be sure, that the last mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words "it is also agreed as a part of the consideration of this agreement." By these words the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the sale of the ships, and made one of the conventional inducements of the purchase. The price is paid not for the vessels alone but for the vessels with the covenant. So, still more clearly, the parallel instalments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale. Presumably all that there was to sell, beside **[185]** certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from any one, we believe, that such a contract, made as part of the sale of a business and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 329, *United States* v. *Joint Traffic Association*, 171 U. S. 505, 568, and it was so decided in the case of a patent. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 92. It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller necessary in order to give the sale effect were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed.

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It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into consideration for that which was the consideration of his debt and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64; *Bank of Australasia* v. *Breillat*, 6 Moore, P. C. 152, 201; *Pigot's Case*, 11 Co. Rep. 26*b*, 27*b*. The plaintiff in error did business between **[186]** Cincinnati and Syracuse, Ohio, and the rates referred to must be assumed to be rates within those points. If the covenant had any indirect bearing on commerce with another State, what we have said sufficiently explains why we deem it insufficient to make the whole agreement void.

Judgment affirmed.

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[43] HALE *v.* HENKEL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.[a]

No. 340. Argued January 4, 5, 1906.—Decided March 12, 1906.

[201 U. S., 43.]

Under the practice in this country the examination of witnesses by a Federal grand jury need not be preceded by a presentment or formal indictment, but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committed, and if so they may indict upon such evidence. In summoning witnesses it is sufficient to apprise them of the names of the parties with respect to whom they will be called to testify without indicating the nature of the charge against them, or laying a basis by a formal indictment.

The examination of a witness before a grand jury is a "proceeding" within the meaning of the proviso to the general appropriation act

[a] Writ of habeas corpus dismissed by the Circuit Court (139 Fed. 496). See p. 804.

Syllabus.

of 1903, that no person shall be prosecuted on account of anything which he may testify in any proceeding under the Anti-trust Law. The word should receive as wide a construction as is necessary to protect the witness in his disclosures.

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, and does not apply if the criminality is taken away. A witness is not excused from testifying before a grand jury under a statute which provides for immunity, because he may not be able, if subsequently indicted, to procure the evidence necessary to maintain his plea. The law takes no account of the practical difficulty which a party may have in procuring his testimony.

A witness cannot refuse to testify before a Federal grand jury in face of a Federal statute granting immunity from prosecution as to matters sworn to, because the immunity does not extend to prosecutions in a state court. In granting immunity the only danger to be guarded against is one within the same jurisdiction and under the same sovereignty.

The benefits of the Fifth Amendment are exclusively for a witness compelled to testify against himself in a criminal case, and he cannot set them up on behalf of any other person or individual, or of a corporation of which he is an officer or employé.

[44] A witness who cannot avail himself of the Fifth Amendment as to oral testimony, because of a statute granting him immunity from prosecution, cannot set it up as against the production of books and papers, as the same statute would equally grant him immunity in respect to matters proved thereby.

The search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel the production upon a trial of documentary evidence through a *subpœna duces tecum*.

While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, a corporation is a creature of the State, and there is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers.

There is a clear distinction between an individual and a corporation, and the latter, being a creature of the State, has not the constitutional right to refuse to submit its books and papers for an examination at the suit of the State; and an officer of a corporation which is charged with criminal violation of a statute cannot plead the criminality of the corporation as a refusal to produce its books.

Franchises of a corporation chartered by a State are, so far as they involve questions of interstate commerce, exercised in subordination to the power of Congress to regulate such commerce; and while Congress may not have general visitatorial power over State corporations, its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress.

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A corporation is but an association of individuals with a distinct name and legal entity, and in organizing itself as a collective body it waives no appropriate constitutional immunities, and although it cannot refuse to produce its books and papers it is entitled to immunity under the Fourth Amendment against *unreasonable* searches and seizures, and where an examination of its books is not authorized by an act of Congress a *subpœna duces tecum* requiring the production of practically all of its books and papers is as indefensible as a search warrant would be if couched in similar terms.

Although the *subpœna duces tecum* may be too broad in its requisition, where the witness has refused to answer any question, or to produce any books or papers, this objection would not go to the validity of the order committing him for contempt.[a]

[50 L. ed., 652.] [b]

[The examination of witnesses before a grand jury need not be preceded by a presentment, indictment, or other formal charge.]

[In summoning witnesses before a grand jury it is sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify, without indicating the nature of the charge against such persons.]

[The examination of witnesses before a grand jury concerning an alleged violation of the antitrust act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), is a "proceeding" within the meaning of the proviso to the act of February 25, 1903 (32 Stat. L., 854–903, chap. 755, U. S. Comp. Stat. Supp. 1906, p. 366), that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the antitrust act is one.]

[The right of a witness to claim his privilege against self-incrimination, afforded by U. S. Const., 5th Amend., when examined concerning an alleged violation of the antitrust act of July 2, 1890, is taken away by the proviso to the act of February 25, 1903, that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the antitrust act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the state courts for the offense disclosed.]

[The difficulty, if any, of procuring the testimony which a person has given on his examination before a grand jury concerning an alleged violation of the antitrust act of July 2, 1890, does not render the immunity from prosecution or forfeiture, given by the proviso to the act of February 25, 1903, insufficient to satisfy the guaranty of U. S. Const., 5th Amend., against self-incrimination.]

[The privilege against self-incrimination afforded by U. S. Const., 5th Amend., is purely personal to the witness, and he cannot claim the privilege of another person, or of the corporation of which he is an officer or employee.]

[The protection against unreasonable searches and seizures afforded by U. C. Const., 4th Amend., cannot ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers in obedience to a *subpœna duces tecum*, issued in aid of an investigation by a grand jury of an alleged violation of the antitrust act of July 2, 1890, by such corporation.]

[A corporation charged with a violation of the antitrust act of July 2, 1890, is entitled to immunity under U. S. Const., 4th Amend., from such an unreasonable search and seizure as the compulsory production before a grand jury, under a *subpœna duces tecum*, of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different states.]

[a] The foregoing syllabus and the abstracts of arguments copyrighted, 1906, by The Banks Law Publishing Co.

[b] The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reporter, Book 50, p. 652, copyrighted, 1906, by the Lawyers' Co-Operative Publishing Co.

Statement of the Case.

THIS was an appeal from a final order of the Circuit Court made June 18, 1905, dismissing a writ of *habeas corpus* and remanding the petitioner Hale to the custody of the marshal.

The proceeding originated in a *subpœna duces tecum*, issued April 28, 1905, commanding Hale to appear before the grand jury at a time and place named, to "testify and give evidence [45] in a certain action now pending . . . in the Circuit Court of the United States for the Southern District of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company on the part of the United States, and that you bring with you and produce at the time and place aforesaid":

1. All understandings, agreements, arrangements, or con-

tracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between MacAndrews & Forbes Company and six other firms and corporations named, from the date of the organization of the said MacAndrews & Forbes Company.

2. All correspondence by letter or telegram between MacAndrews & Forbes Company and six other firms and corporations.

3. All reports made or accounts rendered by these six companies or corporations to the principal company.

4. Any agreements or contracts or arrangements, however evidenced, between MacAndrews & Forbes Company and the Amsterdam Supply Company or the American Tobacco Company or the Continental Company or the Consolidated Tobacco Company.

5. All letters received by the MacAndrews & Forbes Company since the date of its organization from thirteen other companies named, located in different parts of the United States and also copies of all correspondence with such companies.

Petitioner appeared before the grand jury in obedience to the subpœna, and before being sworn asked to be advised of the nature of the investigation in which he had been summoned; whether under any statute of the United States, and the specific charge, if any had been made, in order that he might learn whether or not the grand jury had any lawful right to make the inquiry, and also that he be furnished with a copy of the complaint, information or proposed indictment upon which they were acting; that he had been informed that there was no action pending in the Circuit Court as stated in the subpœna, and that the grand jury was investigating no specific charge against **[46]** any one, and he therefore declined to answer: First, because there was no legal warrant for his examination, and, second, because his answers might tend to incriminate him.

After stating his name, residence and the fact that he was secretary and treasurer of the MacAndrews & Forbes Company, he declined to answer all other questions in regard to the business of the company, its officers, the location of its office, or its agreement or arrangements with other companies. He was thereupon advised by the Assistant District Attorney that this was a proceeding under the Sherman Act to protect trade and commerce against unlawful restraint and monopolies; that under the act of 1903, amendatory thereof, no person could be prosecuted or subjected to any penalty or forfeiture on account of any matter or thing concerning which he might testify or produce documentary evidence in any prosecution under said act, and that he thereby offered and assured appellant immunity from punishment. The witness still persisted in his refusal to answer all questions. He also declined to produce the papers and documents called for in the subpœna:

First. Because it would have been a physical impossibility to have gotten them together within the time allowed.

Second. Because he was advised by counsel that he was under no legal obligations to produce anything called for by the subpœna.

Third. Because they might tend to incriminate him.

Whereupon the grand jury reported the matter to the court, and made a presentment that Hale was in contempt, and that the proper proceedings should be taken. Thereupon all the parties appeared before the Circuit judge, who directed the witness to answer the questions and produce the papers. Appellant still persisting in his refusal, the Circuit judge held him to be in contempt, and committed him to the custody of the marshal until he should answer the questions and produce the papers. A writ of *habeas corpus* was thereupon sued out, and a hearing had before another judge of the same court, who discharged the writ and remanded the petitioner.

[47] *Mr. De Lancey Nicoll*, with whom *Mr. Junius Parker* and *Mr. John D. Lindsay* were on the brief, for appellant in this case and in No. 341 argued simultaneously herewith.[a]

There were no facts authorizing the Circuit Court to entertain any charge against appellant. Unless the grand jury in prosecuting the investigation acted within its jurisdiction, the court had no authority to punish the witness for his supposed contumacy in refusing to answer questions. *People* v. *Cassels*, 5 Hill, 164; *Ex parte Fisk*, 113 U. S. 713; *Scott* v.

[a] McAlister *v.* Henkel, *post*, p. 90.

McNeal, 154 U. S. 34; Cooley, Const. Lim. 7th ed. p. 575; *United States* v. *Terry*, 39 Fed Rep. 355.

No judicial matter was pending in the Circuit Court when appellant was required to attend before the grand jury, or when the orders of May 5 and May 8 were made, in or upon which he could lawfully be required to testify or produce evidence.

Notwithstanding the *subpœna* said "in a certain action," no action was pending; there can be no action, prosecution or criminal proceeding, until after someone has been formally accused of acts constituting a criminal offense by indictment or by information. *Post* v. *United States*, 161 U. S. 583, 587.

Nor was there any particular charge against the corporations named in the *subpœna duces tecum*, or under investigation. The grand jury was merely engaged in an effort to find out whether they had or had not transgressed the Sherman Act.

An *ex parte* investigation, based upon mere suspicion, without any complaint or charge, and that may be without result, is not a "case" or "controversy" within the meaning of the Constitution. *Pacific Railway Commission* v. *Stanford*, 32 Fed. Rep. 241; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

The grand jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation; consequently its requirement, and the orders of the court, based upon it and the witness's refusal, were *coram non judice* and void.

[48] At common law the powers of grand juries were restricted to indictments returned after the examination of witnesses, and presentments made upon their own knowledge or observation.

The former was a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by the grand jury. Blackstone, Bk. IV, c. 23.

The grand jury was continued as a part of our Federal institutions by the Fifth Amendment; but its powers and duties, not being defined by the Constitution or any Federal statute, are only such as grand juries possessed at common

law, namely, of considering and acting upon indictments previously framed and laid before them by a known prosecutor, and of presenting facts within their own knowledge. *United States* v. *Mundell*, Iredell, J., 1795, 8 Virginia (6 Call), 245, 247.

No Federal statute authorizes a grand jury to inquire into matters called to their attention by the court or prosecuting attorney, where there is no specific charge against one or more individuals. Such a statute would be unconstitutional, and the idea that a grand jury has practically unlimited inquisitorial power rests, upon various loose and ill-considered utterances in reported cases. 17 Am. & Eng. Ency. 2d ed. 1279.

No case in this country holds that there can be a legitimate inquiry without a previous charge; and except in Tennessee, where there is legislative authority in respect to certain offenses, the idea of general inquisitorial power is repudiated. *Re Lester*, 77 Georgia, 143; *Lewis* v. *Commissioners*, 74 N. Car. 194; *Ward* v. *State*, 2 Missouri, 120. See also *Frisbie* v. *United States*, 157 U. S. 160; *People* v. *Kelly*, 24 N. Y. 74; *O'Hair* v. *People*, 32 Ill. App. 277; *Webster's Case*, 5 Greenleaf, 432; *Post* v. *United States*, 161 U. S. 585; *Beavers* v. *Henkel*, 194 U. S. 73, 84.

Although a grand jury may send for witnesses before indictment actually framed, some specific charge must be pending before them directed against a particular person or persons. *Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Kilpatrick*, 16 Fed. Rep. 765; *Lloyd* v. *Carpenter*, 3 Pa. L. J. 188.

[49] A grand jury does not possess, and cannot, under the constitution of this State exercise, purely inquisitorial power, because such power is no sense a judicial one.

The greatest evil incident to the Star Chamber was its inquisitorial procedure. Upon suggestion or suspicion citizens were subpœnaed and subjected to examination under the *ex officio* oath. See preamble of act for the abolition of that court (July 5, 1641; 16 Charles I, c. 10; 5 S. R., 110) reciting the violation of the statute of 25 Edw. III.

To exercise judicial power there must be parties to the

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proceeding, a matter in controversy, an assertion and a denial; in short, a distinct issue to be determined. Cooley, Const. Lim. 132; *Matter of Pacific Railway Commission* v. *Stanford*, 32 Fed. Rep. 241; *Interstate Com. Com.* v. *Brimson*, 154 U. S. 447.

The theory of our criminal proceeding, like that of Great Britain, is accusatory and not inquisitorial. *United States* v. *James*, 60 Fed. Rep. 257. See opinion of Chief Justice Marshall in *United States* v. *Hill*, 1 Brock. C. C. 159.

Section 1 of the act of February 25, 1903, does not give the petitioner immunity from prosecution, on account of the transactions concerning which he was directed to testify and produce evidence before the grand jury, the investigation before that body not being a "proceeding, suit or prosecution" under either of the acts referred to in the act of February 25, 1903; consequently the petitioner was within the legitimate exercise of his right under the Fifth Amendment of the Constitution, when he refused to testify or produce evidence before the grand jury on the ground that by so doing he might have criminated himself.

The legislative guaranty must have a broad construction in favor of the right which it is intended to secure. *Counselman* v. *Hitchcock*, *supra*.

See also as to similar language in the act of February 11, 1893, *Brown* v. *Walker*, 161 U. S. 591; but the immunity is worthless here unless the language subsequently used, "proceeding, suit, or prosecution," embraces a grand jury investigation. If it does not, the witness is deprived of his constitu- **[50]** tional rights; any reasonable doubt on this head should be resolved in his favor.

A witness hereafter pleading the immunity afforded by this act as a bar to criminal prosecution will be held to strict proof, especially if he seeks to plead this Federal statute as a bar to a state prosecution. See *Jack* v. *Kansas*, 199 U. S. 372.

An inquiry before a grand jury is not a "suit" nor a "prosecution." *Post* v. *United States*, *supra; Paul* v. *Virginia*, 148 U. S. 107; *State* v. *Wolcott*, 21 Connecticut, 279; Constitution, Fifth Amendment.

The act of February 25, 1903, is unconstitutional in that

Argument for appellant.

it undertakes to deprive the various States of their right and power to prosecute persons concerned in transactions, which violate their own laws, thus infringing upon the provision of the Tenth Amendment. *Brown* v. *Walker*, *supra*, is against this proposition, but see *Jack* v. *Kansas*, 199 U. S. 372, where it is in effect limited by the improbability only of state prosecution rather than the right of the State to proceed.

The order of May 5 requiring appellant to produce the papers called for in the *subpœna duces tecum* was void under the Fourth Amendment. Its enforcement would amount to the ancient seizure and search which continued by usage in England until the decision of Lord Camden in *Entick* v. *Carrington*, 19 How. St. Tr. 1029. See also *Boyd* v. *United States*, 116 U. S. 616, 626; *Hartranft's Appeal*, 85 Pa. St. 433; *Ex parte Brown*, 72 Missouri, 83; *In re Lester*, 77 Georgia, 143; *In re Morer*, 101 N. W. Rep. 588.

The writ must also particularly describe the papers desired. *Ex parte Brown*, *supra; Sandford* v. *Nichols*, 13 Massachusetts, 286.

A corporation is entitled to the same immunities as an individual. It cannot be compelled to incriminate itself. Wigmore on Evidence, § 2259; *Logan* v. *Penna. R. R. Co.*, 132 Pa. St. 403; *Santa Clara County* v. *Railroad Company*, 118 U. S. 394; *King of Sicilies* v. *Willcox*, 7 St. Tr. (N. S.) 1049.

By the express provisions of the Sherman Act corporations **[51]** are deemed to be persons. Section 8. A corporation can only be examined through its officers, directors or agents. In the present case the Government undertook deliberately by that method to compel the corporation to submit to examination, not as a witness, but by forcing one of its officers and directors to produce its books and papers for the sole purpose of ascertaining whether or not the corporation had committed a crime under the Sherman Act.

The rule that the protection of the Fourth and Fifth Amendments is the personal privilege of the witness and cannot be claimed for the benefit of another has no possible application to the case of an officer, director or agent of a corporation who seeks to secure to the corporation its con-

stitutional rights and immunities; for these rights can only be asserted through its officers, directors and agents.

In this view the witness is not seeking to invoke the privilege of another, but the corporation itself invokes its own privilege in the only manner and by the only means it can employ for that purpose.

If, under these circumstances, it could be said that the corporation was a witness, and, therefore, entitled to the immunity afforded by the statute, this might, perhaps, meet our present contention. But the position of the Government is that the corporation is not protected by the statute. Its avowed purpose is to use the papers as the basis of an indictment against the corporation. See *Davies* v. *Lincoln National Bank*, 4 N. Y. Suppl. 373; *Rex* v. *Purnell*, Wilson, 239; *In re Morse*, 101 N. W. Rep. 588.

Mr. Henry W. Taft, Special Assistant to The Attorney General, with whom *The Attorney General* and *Mr. Felix H. Levy*, Special Assistant to The Attorney General, were on the brief, for the United States in this case and in No. 341:

The procedure of a grand jury in this country at the time of the enactment of the Fifth Amendment was, and, with unimportant exceptions, has remained quite different from that of **[52]** the similar body in England. Under this procedure the grand jury proceeds, before a bill of indictment is framed, to investigate, at the instance of the court or of their own body or of the district attorney, a suspected or alleged crime and to determine whether it has been committed, and, if so, who committed it. In so doing they exercise broad inquisitorial powers. The administration of the criminal law in this country necessitates this procedure, and this was clearly within the common law powers of a grand jury in 1791 when the Fifth Amendment was adopted however different the usual practice in England may have been at that time.

The power of a grand jury extends to the broadest kind of an inquisitorial proceeding. Counsel for appellant have mistaken a radical change of mere procedure for an attempted enlargement of power. Or if it is a question of power, long before 1791 the American idea prevailed that the State and

not the individual is the agency which should start a criminal prosecution; that this was vitally different from the English idea and necessarily involved radical changes in the grand jury system and the extension of its powers; and that it was with reference to such a system and such powers that the Fifth Amendment was adopted.

During the first hundred years of our independence precedents are not numerous and authority for grand jury procedure rests not so much upon adjudications of the courts, as upon practice sanctioned by long usage and general recognition.

As to power of grand jury to find indictments on its own investigations, see lectures delivered by Judge Wilson in 1791 and 1792, Works James Wilson, ed. 1896, p. 213, and charge of Judge Addison, 1791, Common Pleas Court, Fifth Circuit, Addison's Pa. Rep. Appx. 38; but see *Lloyd* v. *Carpenter*, 1845, 5 Penn. L. Jour. 55 and *State* v. *Smith*, 1838, Meigs, 99.

United States v. *Mundel* (1795), 8 Virginia (6 Call.), 245, does not support appellant's contention. Its tendency is the other way. See also *Ward* v. *State* (1829), 2 Missouri, 120; *State* v. *Freeman* (1842), 13 N. H. 488.

[53] It thus appears that at the date of the adoption of the Fifth Amendment and for fifty years thereafter under the procedure sanctioned by usage and precedent, an American grand jury (1) could proceed in cases other than those in which a private prosecutor presented a duly engrossed indictment, and (2) on its own motion or at the instance of the court or the prosecuting attorney, could (and necessarily by an inquisitorial method) investigate an alleged or suspected crime and after the investigation direct an indictment to be drawn.

The legality of the grand jury, without the agency of the district attorney, calling witnesses, whom they interrogated as to their knowledge concerning a Cuban expedition, was sustained, and the broad inquisitorial powers of grand juries was recognized. See report in note to § 337, Wharton's Crim. Pl. & Pr. 8th ed., and see also the charge delivered by Justice Field to a grand jury in California. 30 Fed. Cas. 994; 2 Sawyer, 667.

The limitations placed by Mr. Justice Field upon the in-

quisitorial powers of the grand jury do not relate to matters brought to their attention either by the court or by the district attorney, and that they permit a general investigation of a crime upon the "personal knowledge" of a juror, where such knowledge goes no further than to include "facts which tend to show" that a crime has been committed, which, of course, implies the power to call witnesses other than the grand juror having such knowledge. See also *United States* v. *Kimball*, 117 Fed. Rep. 156; *Frisbie* v. *United States*, 157 U. S. 160; *United States* v. *Reed*, 27 Fed. Cas. 737; *United States* v. *Terry*, 39 Fed. Rep. 355; *United States* v. *McAvoy*, 18 How. Pr. 380.

In the state courts see *State* v. *Terry*, 30 Missouri, 368; *Ex parte Brown*, 72 Missouri, 83; *Commonwealth* v. *Smyth*, 11 Cush. 473; State v. Wolcott, 21 Connecticut, 272; *State* v. *Magrath*, 44 N. J. L. 227; *Blaney* v. *State*, 74 Maryland, 153; *People* v. *Northey*, 77 California, 618; *McCullough* v. *Commonwealth*, 67 Pa. St. 30; *Rowland* v. *Commonwealth*, 82 Pa. St. 405; Thompson and Merriam on Juries, §§ 612, 615; Wharton's Crim. Pl. & Pr. 8th ed. § 338. *O'Hair* v. *People*, 32 Ill. App. 277; *State* **[54]** v. *Smith*, Meigs, 99; *Lewis* v. *Board of Commissioners*, 74 N. Car. 194, and *United States* v. *Kilpatrick*, 16 Fed. Rep. 765, distinguished.

A specific charge against a particular person is not necessary to give the grand jury jurisdiction. The English practice of private prosecutors has never prevailed. The grand jury acts on information of the district attorney or from its own knowledge or information otherwise obtained. Thompson and Merriam on Juries, § 609; 1 Bishop's Crim. Pr. § 278; charge of Mr. Justice Field, 30 Fed. Cas. 994; *The King* v. *John Lukens*, 1 Dallas, 7.

In its beginnings the grand jury seems to have been devised as a convenient method to assist itinerant justices in England in detecting crime and punishing it. They seem clearly to have been expected to investigate, and originally they indicted frequently, on mere rumor. See Pollock & Maitland's History of the English Law, vol. 2, pp. 622, 639, for description of the grand jury before the time of Edward I, founded on Bracton and Britton; Bracton, "De Corona," Twiss' ed. vol. 2, c. 22, fol. 143, p. 451; Reeves' History

English Law, vol. 1, p. 457; Stephens' History Crim. Law, vol. 1, p. 253; Stubbs' Constitutional History of England, vol. 1, p. 661 *et seq.*; *Earl of Macclesfield* v. *Starkey* (1684), 10 Howell's State Trials, 1330.

A specific charge involves definiteness. Date and circumstances and the technical accuracy characteristic of an indictment are not necessary to the exercise of jurisdiction by the grand jury.

A witness could object to answering a question because the proceeding was not properly inaugurated, demand a ruling by the court as to whether under the charge presented the question was admissible; and thus an investigation begun before the grand jury would soon assume the aspect of a trial in court, subverting the whole purpose of the grand jury system and seriously affecting the administration of justice.

If appellant's claim be conceded that a charge be necessary, it must follow that he can object to the admissibility of evidence **[55]** on the ground that it is not competent under the charge. But the granting of such a right would necessarily result in a violation of the secrecy of the proceedings of the grand jury and of the rule that a witness has no right to question the regularity of the proceedings of a grand jury. *United States* v. *Brown*, 1 Sawy. 533, Fed. Cas. 14671; *McGregor* v. *United States*, 134 Fed. Rep. 187; *United States* v. *Cobban*, 127 Fed. Rep. 713; *United States* v. *Farrington*, 5 Fed. Rep. 343; *United States* v. *Ambrose*, 3 Fed. Rep. 283.

The court will assume that the district attorney and the grand jury proceeded in accordance with their sworn duties and in accordance with law. *United States* v. *Terry*, 39 Fed. Rep. 355; *United States* v. *Hunter*, 15 Fed. Rep. 712; *United States* v. *Reed*, 2 Blatchf. 435.

A witness before a grand jury has no right to raise objections as to the constitution of that body, unless his constitutional rights are clearly in danger. *Ex parte Haymond*, 91 California, 545.

No inconvenient or unjust results can attend the adoption of the rule the Government contends for, and sound public

policy demands that it be held that the action was properly set in motion in this case.

It was contended below that to concede inquisitorial powers to a grand jury without in every case requiring a specific charge against a particular person would open up under the guise of the administration of justice possibilities of wrong and oppression "beyond conception."

In the many jurisdictions where broader inquisitorial powers exist and have been exercised by grand juries, they have not been used as an engine of oppression. The system is surrounded with such safeguards that the danger of abuses is very remote.

The scope of the powers of a grand jury is limited by the jurisdiction of the court of which it is an appendage. *United States* v. *Hill*, 1 Brock. 156. It is also subject to the direction of the court and cannot effectually exercise some of its most **[56]** important functions without the interposition of the court. It must resort to the court to enforce by *subpœna* the attendance of witnesses, and it is only through the order of the court that witnesses may be punished for contumacy. *Commonwealth* v. *Bannon*, 97 Massachusetts, 214; *Heard* v. *Pierce*, 8 Cush. 338. The court may inquire whether the grand jury has exceeded its powers, *People* v. *Naughton*, 7 Abb. U. S. 421, 426; *Denning* v. *The State*, 22 Arkansas, 131, 132, and may punish the entire jury or any of its members. *Turk* v. *State*, 7 Ohio Pt. II, 240, 243; *State* v. *Cowan*, 1 Head, 280; *Re Ellis*, Hemp. 10. Thus, while the grand jury is an independent body, its independence is confined within well-defined limits.

Whether a cause or action under the title mentioned in the subpœna was pending is unimportant. The proceeding might have proceeded without a title. Titles of proceedings before a grand jury are invariably fictitious. *United States* v. *Reed*, 27 Fed. Cas. 737; *Appeal of Hartranft*, 85 Pa. St. 433.

The Fourth Amendment does not relate to the compulsory production of papers for use as evidence. *Summers* v. *Moseley*, 2 Cr. & M. 477; *Wertheim* v. *Continental R. & T. Co.*, 15 Fed. Rep. 718; *Adams* v. *United States*, 192 U. S. 585; *Interstate Com. Com.* v. *Baird*, 194 U. S. 25; *In re Moser*, 101 N. W. Rep. 591; 1 Greenleaf, Evidence, 16th ed. § 469*a*; *Boyd* v. *United States*, 116 U. S. 616.

Unreasonableness under the Fourth Amendment cannot be predicated upon either the indefiniteness of the description of the books and papers called for in the subpœna or upon the volume of evidence and the inconvenience in producing it. *United States* v. *Babcock*, 3 Dillon, 567; *In re Storror*, 63 Fed. Rep. 564; *United States* v. *Tilden*, 10 Ben. 566; *In re Mitchell*, 12 Abb. Pr. 249.

It was not for the witness to determine whether the description of the papers was sufficiently definite or the papers themselves material to the inquiry, or whether the production of such a volume of papers was oppressive. He must comply, so far as it was possible, with the terms of the writ and produce the **[57]** papers submitting, as he might be advised, any objection to their use in evidence. See note by John D. Lawson, 15 Fed. Rep. 723; see also *Doe* v. *Kelly*, 4 Dowl. 273; *Key* v. *Russell*, 7 Dowl. 693; *Amey* v. *Long*, 9 East, 483; *Holtz* v. *Schmidt*, 2 Jones & Sp. 28; *Bull* v. *Loveland*, 10 Pick. 9; *Chaplain* v. *Briscoe*, 5 Sm. & M. 198; *Corsen* v. *Dubois*, 1 Holt, 239; *Field* v. *Beaumont*, 1 Swanst. 209; *Mitchell's Case*, 12 Abb. Pr. 249; *Doe* v. *Clifford*, 2 C. & K. 448; *In re O'Toole*, 1 Tuck. 39. See also Wigmore on Evidence, § 2200, at page 2979.

Every person subject to the jurisdiction of a competent tribunal is bound to give testimony. This is a "solemn and important duty that every citizen owes to his country." *Ward* v. *State*, *supra*. He is privileged to decline only in case his answers may tend to criminate him. Our system of jurisprudence does not permit a witness to refuse to answer because he prefers not to or even because his answer will tend to degrade him, except, only, where degrading testimony is interposed solely to affect his credibility. 1 Greenl. on Ev. §§ 454, 455. See cases cited. Where the reason of the privilege ceases the privilege also ceases. Broom's Legal Maxims, 654; *Brown* v. *Walker*, 161 U. S. 597, 599.

The protection of the Fourth and Fifth Amendments is based alone upon the personal privilege of the witness. The objections urged by the witness cannot be relied upon for the benefit of the corporation of which he is an officer, and if

the privilege cannot be asserted in behalf of a corporation under the Fifth Amendment it is plain that it may not be so availed under the Fourth Amendment.

Where the question of criminality is not involved, an officer of a corporation having the books of the company in his custody is bound to produce them in obedience to a *subpœna duces tecum*. *Wertheim* v. *Continental R'y & Trust Co.*, 15 Fed. Rep. 718. The same rule applies, even though the production of the evidence may tend to incriminate the corporation; one of its officers may not assert in its behalf the privilege secured to persons by the Fifth Amendment of the Constitution. See **[58]** *United States* v. *Amedy*, 11 Wheat. 412; *Beaston* v. *The Farmers' Bank of Delaware*, 12 Pet. 134. That word in the Fifth Amendment does not include corporations, as the mischief intended to be reached did not apply to corporations.

The privilege embodied in the Amendment is upheld on grounds which vary to some extent; but the privilege is personal and is based upon the consideration of the law for the individual in his capacity as a witness. *Brown* v. *Walker*, 161 U. S. 596; Best on Evidence, 9th ed. p. 113; 3 Taylor on Evidence, § 1453; 1 Greenleaf on Evidence, 16th ed. § 469*d*, and cases cited in notes; *Commonwealth* v. *Shaw*, 4 Cush. 594; Phillipps on Evidence, 4th Am. ed. p. 935; Starkie on Evidence, 10th Am. ed. 4; Wigmore on Evidence, § 2263; *State* v. *Wentworth*, 65 Maine, 234, 241; *Reynolds* v. *Reynolds*, 15 Cox Cr. cases, 108, 115; *Bartlett* v. *Lewis*, 12 C. B. (N. S.) 249, 265.

While sporadic cases look in a different direction, there have been many decisions, both in this country and in England, in which the courts have refused to permit the privilege to be asserted by an officer or employé in behalf of a corporation of which he is the representative. *New York Life Ins. Co.* v. *People*, 195 Illinois, 430; *In re Moser*, 101 N. W. Rep. 591; *In re Peasley*, 44 Fed. Rep. 271; *Gibbons* v. *Waterloo Bridge*, 5 Price, 491; *Rex* v. *Purnell*, Wilson, 239.

Mr. Justice Brown, after making the foregoing statement, delivered the opinion of the court.

Two issues are presented by the record in this case, which are so far distinct as to require separate consideration. They

depend upon the applicability of different provisions of the Constitution, and, in determining the question of affirmance or reversal, should not be confounded. The first of these involves the immunity of the witness from oral examination; the second, the legality of his action in refusing to produce the documents called for by the *subpœna duces tecum*.

1. The appellant justifies his action in refusing to answer the **[59]** questions propounded to him, 1st, upon the ground that there was no specific "charge" pending before the grand jury against any particular person; 2d, that the answers would tend to criminate him.

The first objection requires a definition of the word "charge" as used in this connection, which it is not easy to furnish. An accused person is usually charged with crime by a complaint made before a committing magistrate, which has fully performed its office when the party is committed or held to bail, and it is quite unnecessary to the finding of an indictment by a grand jury; or by an information of the district attorney, which is of no legal value in prosecutions for felony; or by a presentment usually made, as in this case, for an offense committed in the presence of the jury; or by an indictment which, as often as not, is drawn after the grand jury has acted upon the testimony. If another kind of charge be contemplated, when and by whom must it be preferred? Must it be in writing, and if so, in what form? Or may it be oral? The suggestion of the witness that he should be furnished with a copy of such charge, if applicable to him is applicable to other witnesses summoned before the grand jury. Indeed, it is a novelty in criminal procedure with which we are wholly unacquainted, and one which might involve a betrayal of the secrets of the grand jury room.

Under the ancient English system, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order of society. In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration. There was much propriety in this, as the most valuable function of the grand jury was not only to examine into the commission of crimes.

but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.

We are pointed to no case, however, holding that a grand jury **[60]** cannot proceed without the formality of a written charge. Indeed, the oath administered to the foreman, which has come down to us from the most ancient times, and is found in *Rex* v. *Shaftsbury*, 8 Howell's State Trials, 759, indicates that the grand jury was competent to act solely on its own volition. This oath was that "you shall diligently inquire and true presentments make of all such maters, articles, and things as shall be given to you in charge, *as of all other matters, and things as shall come to your own knowledge* touching this present service," etc. This oath has remained substantially unchanged to the present day. There was a difference, too, in the nomenclature of the two cases of accusations by private persons and upon their own knowledge. In the former case their action was embodied in an indictment formally laid before them for their consideration; in the latter case, in the form of a presentment. Says Blackstone in his Commentaries, Book IV, page 301:

"A presentment, properly speaking, is a notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the King, as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it."

Substantially the same language is used in 1 Chitty Crim. Law, 162.

In *United States* v. *Hill*, 1 Brock. 156, it was indicated by Chief Justice Marshall that a presentment and indictment are to be considered as one act, the second to be considered only as an amendment to the first, and that the usage of this country has been to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings.

In a case arising in Tennessee the grand jury, without the agency of the district attorney, had called witnesses before them, whom they interrogated as to their knowledge concerning the then late Cuban expedition. Mr. Justice Catron sustained the legality of the proceeding and compelled the wit-

[61] nesses to answer. His opinion is reported in Wharton's Criminal Pleading and Practice, 8th ed. § 337. He says: "The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses; and the question here is, whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime." His charge contains a thorough discussion of the whole subject.

While presentments have largely fallen into disuse in this country, the practice of grand juries acting upon notice, either of their own knowledge or upon information obtained by them, and incorporating their findings in an indictment, still largely obtains. Whatever doubts there may be with regard to the early English procedure, the practice in this country, under the system of public prosecutions carried on by officers of the State appointed for that purpose, has been entirely settled since the adoption of the Constitution. In a lecture delivered by Mr. Justice Wilson of this court, who may be assumed to have known the current practice, before the students of the University of Pennsylvania, he says (Wilson's Works, vol. II, page 213):

"It has been alleged, that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court; they are appointed for the government and for the people; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment, which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and **[62]** by accusers, marshalled in legal array, should, on full investigation, be secure in that protection, which the law engages that she shall enjoy inviolate.

"The oath of a grand juryman—and his oath is the commission under which he acts—assigns no limits, except those marked by diligence itself, to the course of his inquiries: Why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained?"

Similar language was used by Judge Addison, President of the Court of Common Pleas, in charging the grand jury

at the session of the Common Pleas Court in 1791 (Addison's Pa. Rep. Appx. p. 38):

"If the grand jury, *of their own knowledge*, or the knowledge of any of them, or from the examination of witnesses, know of any offense committed in the county, for which no indictment is preferred to them, it is their duty, either to inform the officer, who prosecutes for the State, of the nature of the offense, and desire that an indictment for it be laid before them; or, if they do not, or if no such indictment be given them, it is their duty to give such information of it to the court; stating, without any particular form, the facts and circumstances which constitute the offense. This is called a presentment."

The practice then prevailing, with regard to the duty of grand juries, shows that a presentment may be based not only upon their own personal knowledge, but from the examination of witnesses.

While no case has arisen in this court in which the question has been distinctly presented, the authorities in the state courts largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses without a formal indictment, or other charge previously laid before them. An analysis of cases approving of this method of procedure would unduly burden this opinion, but the following are the leading ones upon the subject: *Ward* v. *State*, 2 Missouri, 120; *State* v. *Terry*, 30 Missouri, 368; *Ex* **[63]** *parte Brown*, 72 Missouri, 83; *Commonwealth* v. *Smyth*, 11 Cushing, 473; *State* v. *Wolcott*, 21 Connecticut, 272, 280; *State* v. *Magrath*, 44 N. J. L. 227; Thompson & Merriam on Juries, §§ 615–617. In *Blaney* v. *Maryland*, 74 Maryland, 153, the court said:

"However restricted the functions of the grand juries may be elsewhere, we hold that in this State they have plenary inquisitorial powers, and may lawfully themselves, and upon their own motion, originate charges against offenders though no preliminary proceedings have been had before a magistrate, and though neither the court not the state's attorney has laid the matter before them."

The rulings of the inferior Federal courts are to the same effect. Mr. Justice Field, in charging a grand jury in California (2 Sawy. 667), said to the grand jury acting upon their own knowledge:

"Not by rumors or reports, but by knowledge acquired from the evidence before you, and from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury."

Similar language was used in *United States* v. *Kimball*, 117 Fed. Rep. 156, 161; *United States* v. *Reed*, 2 Blatch. 435, 449; *United States* v. *Terry*, 39 Fed. Rep. 355. And in *Frisbie* v. *United States*, 157 U. S. 160, it is said by Mr. Justice Brewer:

"But in this country it is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the suspected party on trial, to direct the preparation of the formal charge or indictment."

There are doubtless a few cases in the state courts which take a contrary view, but they are generally such as deal with the abuses of the system, as the indiscriminate summoning of witnesses with no definite object in view and in a spirit of meddlesome inquiry. In the most pertinent of these cases, *In re Lester*, 77 Georgia, 143, the Mayor of Savannah, who was also *ex* **[64]** *officio* the presiding judge of a court of record, was called upon to bring into the Superior Court the "Information Docket" of his court, to be used as evidence by the State in certain cases pending before the grand jury. It was held "that the powers of the body are inquisitorial to a certain extent is undeniable; yet they have to be exercised within well defined limits. * * * The grand jury can find no bill nor make any presentment except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specified offense."

This case is readily distinguishable from the one under consideration, in the fact that the subpœna in this case did specify the action as one between the United States and the American Tobacco Company and the MacAndrews-Forbes Company; and that the Georgia Penal Code prescribed a form of oath for the grand jury, "that the evidence you shall give the grand jury on this bill of indictment (or presentment, as the case may be, here state the case), shall be the truth," etc. This seems to confine the witness to a charge already laid before the jury.

In *Lewis* v. *Board of Commissioners*, 74 N. Car. 194, the English practice, which requires a preliminary investigation where the accused can confront the accuser and witnesses with testimony, was adopted as more consonant to principles

of justice and personal liberty. It was further said that none but witnesses have any business before the grand jury, and that the solicitor may not be present, even to examine them. The practice in this particular in the Federal courts has been quite the contrary.

Other cases lay down the principle that it must be made to appear to the grand jury that there is reason to believe that a crime has been committed, and that they have not the power to institute or prosecute an inquiry on the chance that some crime may be discovered. *In Matter of Morse*, 18 N. Y. Criminal Rep. 312; *State* v. *Adams*, 70 Tennessee, 647 (an unimportant case, turning upon a local statute). In Pennsylvania grand juries are somewhat more restricted in their powers than is usual in other States, *McCullough* v. *Commonwealth*, 67 Pa. St. [65] 30; *Rowand* v. *Commonwealth*, 82 Pa. St. 405; *Commonwealth* v. *Green*, 126 Pa. St. 531, and in Tennessee inquisitorial powers are granted in certain cases and withheld in others. *State* v. *Adams*, *supra; State* v. *Smith*, Meigs, 99.

We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. So valuable is this inquisitorial power of the grand jury that, in States where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impanelling grand juries for the investigation of riots, frauds and nuisances, and other cases where it is impracticable to ascertain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall

be indicted. As criminal prosecutions are instituted by the State through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to their attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings. Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them. While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own obser- [66] vations or upon the evidence of witnesses given before them.

2. Appellant also invokes the protection of the Fifth Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and in reply to various questions put to him he declined to answer, on the ground that he would thereby incriminate himself.

The answer to this is found in a proviso to the General Appropriation Act of February 25, 1903, 32 Stat. 854, 904, that "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts," of which the Anti Trust Law is one, providing, however, that "no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a "proceeding" within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry, whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them. The word "proceeding" is not a technical one, and is aptly used

by courts to designate an inquiry before a grand jury. It has received this interpretation in a number of cases. *Yates* v. *The Queen*, 14 Q. B. D. 648; *Hogan* v. *State*, 30 Wisconsin, 428.

The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may ex- [67] pose him to prosecution. If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply.

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply. The criminality provided against is a present, not a past criminality, which lingers only as a memory and involves no present danger of prosecution. To put an extreme case, a man in his boyhood or youth may have committed acts which the law pronounces criminal, but it would never be asserted that he would thereby be made a criminal for life. It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the Amendment ceases to apply. The extent of this immunity was fully considered by this court in *Counselman* v. *Hitchcock*, 142 U. S. 547, in which the immunity offered by Rev. Stat. section 860, was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This act was declared by this court in *Brown* v. *Walker*, 161 U. S. 591, to afford absolute immunity against prosecution for the offense to which the question related, and

deprived the witness of his constitutional right to refuse to answer. Indeed, the act was passed apparently to meet the declaration in *Counselman* v. *Hitchcock*, p. 586, that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." If the constitutional Amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost [68] any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith.

We need not restate the reasons given in *Brown* v. *Walker*, both in the opinion of the court, and in the dissenting opinion, wherein all the prior authorities were reviewed, and a conclusion reached by a majority of the court, which fully covers the case under consideration.

The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. He would have not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony or that any serious conflict would arise therefrom. In any event, it is a question relating to the weight of the testimony, which could scarcely be considered in determining the effect of the immunity statute. The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony. It judges of the law by the facts which each party claims, and not by what he may ultimately establish.

The further suggestion that the statute offers no immunity from prosecution in the state courts was also fully considered

in *Brown* v. *Walker* and held to be no answer. The converse of this was also decided in *Jack* v. *Kansas*, 199 U. S. 372, namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held both by this court and by the Supreme Court of Kansas that **[69]** the possibilty that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen* v. *Boyes*, 1 B. & S. 311; *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.), 1049, 1068; *State* v. *March*, 1 Jones (N. Car.), 526; *State* v. *Thomas*, 98 N. Car. 599.

The case of *United States* v. *Saline Bank*, 1 Pet. 100, is not in conflict with this. That was a bill for discovery, filed by the United States against the cashier of the Saline Bank, in the District Court of the Virginia District, who pleaded that the emission of certain unlawful bills took place, within the State of Virginia, by the law whereof penalities were inflicted for such emissions. It was held that defendants were not bound to answer and subject themselves to those penalties. It is sufficient to say that the prosecution was under a state law which imposed the penalty, and that the Federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction.

But it is further insisted that while the immunity statute may protect individual witnesses it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the Fifth

Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even **[70]** though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the meaning of this Amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employés. The Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employés, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered.

3. The second branch of the case relates to the non-production by the witness of the books and papers called for by the *subpœna duces tecum*. The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that under the circumstances he was under no obligation to produce them; and, finally, because they might tend to incriminate him.

Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time. The last ground we have already held untenable. While the

second ground does not set forth with technical accuracy the real rea- [71] son for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpœna was an infringement upon the Fourth Amendment to the Constitution, which declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The construction of this amendment was exhaustively considered in the case of *Boyd* v. *United States*, 116 U. S. 616, which was an information *in rem* against certain cases of plate glass, alleged to have been imported in fraud of the revenue acts. On the trial it became important to show the quantity and value of the glass contained in a number of cases previously imported; and the district judge, under section 5 of the act of June 22, 1874, directed a notice to be given to the claimants, requiring them to produce the invoice of these cases under penalty that the allegations respecting their contents should be taken as confessed. We held (p. 622) "that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be," and that the order in question was an unreasonable search and seizure within that Amendment.

The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime or a forfeiture of his goods, is illegal (p. 634), "is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the Fourth Amendment.

[72] Subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and per-

forming separate functions. Thus in the case of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, the constitutionality of the Interstate Commerce Act, so far as it authorized the Circuit Courts to use their processes in aid of inquiries before the Commission, was sustained, the court observing in that connection:

"It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case."

The case of *Adams* v. *New York*, 192 U. S. 585, which was a writ of error to the Supreme Court of the State of New York, involving the seizure of certain gambling paraphernalia, was treated as involving the construction of the Fourth and Fifth Amendments to the Federal Constitution. It was held, in substance, that the fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered, was not a valid objection to their admissibility; that the admission, as evidence in a criminal trial of papers found in the execution of a valid search warrant prior to the indictment, was not an infringement of the Fifth Amendment, and that by the introduction of such evidence defendant was not compelled to incriminate himself. The substance of the opinion is contained in the following paragraph. It was contended that "if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these Amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the house of the citizen or the unwarranted seizure of his papers and property, and to [73] render invalid legislation or judicial procedure having such effect."

The Boyd case must also be read in connection with the still later case of *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, which arose upon the petition of the Commission for orders requiring the testimony of witnesses and

the production of certain books, papers and documents. The case grew out of a complaint against certain railway companies that they charged unreasonable and unjust rates for the transportation of anthracite coal. Objection was made to the production of certain contracts between these companies upon the ground that it would compel the witnesses to furnish evidence against themselves in violation of the Fifth Amendment, and would also subject the parties to unreasonable searches and seizures. It was held that the Circuit Court erred in holding the contracts to be irrelevant, and in refusing to order their production as evidence by the witnesses who were parties to the appeal. In delivering the opinion of the court the Boyd case was again considered in connection with the Fourth and Fifth Amendments, and the remark made by Mr. Justice Day that the immunity statute of 1893 "protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate."

Having already held that by reason of the immunity act of 1903, the witness could not avail himself of the Fifth Amendment, it follows that he cannot set up that Amendment as against the production of the books and papers, since in respect to these he would also be protected by the immunity act. We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpœna duces tecum*, the production, upon a trial in court, of documentary evidence. As remarked in *Summers* v. *Moseley*, 2 Cr. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this question: *Amey* v. *Long*, 9 East, 473; *Bull* v. *Love-* **[74]** *land*, 10 Pick. 9; *U. S. Express Co.* v. *Henderson*, 69 Iowa, 40; Greenleaf on Evidence, 469*a*.

If, whenever an officer or employé of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness

was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to **[75]** act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposi-

tion is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.

4. Although, for the reasons above stated, we are of the [76] opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. *Gulf &c. Railroad Company* v. *Ellis*, 165 U. S. 150, 154, and cases cited. Corporations are a necessary

feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Com- [77] pany, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union.

If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be caried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpœna. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of

such a mass of papers. A general subpœna of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown*, 72 Missouri, 83; *Shaftsbury* v. *Arrowsmith*, 4 Ves. 66; *Lee* v. *Angas*, L. R. 2 Eq. 59.

Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment.

But this objection to the subpœna does not go to the validity of the order remanding the petitioner, which is, therefore,

Affirmed.

Mr. Justice Harlan, concurring.

I concur entirely in what is said in the opinion of the court [78] in reference to the powers and functions of the grand jury and as to the scope of the Fifth Amendment to the Constitution. I concur also in the affirmance of the judgment, but must withhold my assent to some of the views expressed in the opinion. It seems to me that the witness was not entitled to assert, as a reason for not obeying the order of the court, that the *subpœna duces tecum* was an infringement of the Fourth Amendment, which declares that "the right of the *People* to be secure in their *persons*, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized." It may be, I am inclined to think as a matter of procedure and practice, that the *subpœna duces tecum* was too broad and indefinite. But the action of the court in that regard was, at the utmost, only error, and that error did not affect its jurisdiction to make the order, nor authorize the witness—whose personal rights, let it be observed, were in no wise involved in the pending inquiry—to refuse compliance with the subpœna, upon the ground that it involved an unreasonable search and seizure of the books, papers and records of the corporation whose conduct, so far as it related to the Sherman Anti Trust Act, was the subject of examination. It was

not his privilege to stand between the corporation and the Government in the investigation before the grand jury. In my opinion, a corporation—"an artificial being, invisible, intangible and existing only in contemplation of law"—cannot claim the immunity given by the Fourth Amendment; for, it is not a part of the "People," within the meaning of that Amendment. Nor is it embraced by the word "persons" in the Amendment. If a contrary view obtains, the power of the Government by its representatives to look into the books, records and papers of a corporation of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will be greatly curtailed, if not destroyed. If a corporation, when its affairs are under examination by a grand jury [79] proceeding in its work under the orders of the court, can plead the immunity given by the Fourth Amendment against unreasonable searches and seizures, may it not equally rely upon that Amendment to protect it even against a statute authorizing or directing the examination by the agents of the Government creating it, of its papers, documents and records, unless they specify the particular papers, documents and records to be examined? If the order of the court below is to be deemed invalid as an unreasonable search and seizure of the papers, books and records of the corporation, could it be deemed valid if made under the express authority of an act of Congress? Congress could not, any more than a court, authorize an unreasonable seizure or search in violation of the Fourth Amendment. In my judgment when a grand jury seeking, in the discharge of its public duties, to ascertain whether a corporation has violated the law in any particular, requires the production of the books, papers and records of such corporation, no officer of that corporation can rightfully refuse, when ordered to do so by the court, to produce such books, papers and records in his official custody, upon the ground simply that the order was, as to the corporation, an unreasonable search and seizure within the meaning of the Fourth Amendment.

Mr. Justice McKenna, also concurring.

I concur in the judgment but not in all the propositions declared by the court. I think the subpœna is sufficiently

definite. The charge pending was a violation of the Anti Trust Act of 1890. The documents and papers sought were the understandings and agreements of the accused companies. That the documents commanded were many or evidenced transactions occurring through a period of time are not circumstances fatal to the validity of the subpœna. If there was a violation of the Anti Trust Act, that is, combinations in restraint of trade, it would be probably evidenced by formal agreements, but it might also be evidenced or its transactions alluded to in tele- **[80]** grams and letters sent during the time the combination operated. Each telegram, each letter, would contribute proof, and therefore material testimony. Why then should they not be produced? What answer is given? It is said the subpœna is tantamount to requiring all the books, papers and documents found in the office of the MacAndrews & Forbes Company, and an embarrassment is conjectured as a result to its business. These, then, I assume, are the detrimental consequences that will be produced by obedience to the subpœna. If such consequences could be granted they are not fatal to the subpœna. But they may be denied. There can be at most but a temporary use of the books, and this can be accommodated to the convenience of parties. It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of parties or subject them to more inconvenience than the demands of justice may require.

I cannot think that the consequences mentioned are important or necessary to the argument. A more serious matter is the application of the Fourth Amendment of the Constitution of the United States.

It is said "a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner." Nothing can be more direct and plain; nothing more expressive to distinguish a subpœna from a search warrant. Can a subpœna lose this essential distinction from a search warrant by the generality or speciality of its terms? I think not. The distinction is based upon what is authorized or directed to be done—not upon the form of words by which the authority or command is given. "The quest of an officer" acts upon the things themselves—may be secret, intrusive, accompanied by force. The service of a subpœna is but the delivery of a paper to a party—is open and aboveboard. There is no element of trespass or force in it. It does not disturb the possession of property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge. This is a safeguard against abuse the same as it is of other processes of the **[81]** law, and it is all that can be allowed without serious embarrassment to the administration of justice. Of course, it constrains the will of parties, subjects their property to the uses of proof. But we are surely not prepared to say that such uses are unreasonable or are sacrifices which the law may not demand.

However, I may apprehend consequences that the opinion does not intend. It seems to be admitted that many, if not all, of the documents may ultimately be required, but it is said "some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for their production." This intimates a different objection to the order of the court than the generality of the subpœna, and, if good at all, would be good even though few instead of many documents had been required or described ever so specifically. I am constrained to dissent from it. The materiality of his testimony is not open to a witness to determine, and the order of proof is for the court. Besides, if a grand jury may investigate without specific charge, may investigate upon the suggestion of one of its members, must it demonstrate the materiality of every piece of testimony it calls for before it can require the testimony? So limit the power of a grand jury and you may make it impotent in cases where it needs power most and in which its function can best be exercised.

But what does the record show? It shows that Hale refused to give the testimony that, this court says, should have preceded the order under review. He refused to answer what the business of the MacAndrew & Forbes Company was or where its office was, or whether there was an agreement with the company and the American Tobacco Company in regard

to the products of their respective businesses or whether the company he represented sold its products throughout the United States. The ground of refusal was that there was no legal warrant or authority for his examination, not that the documents or tes- [82] timony was not material or not shown to be material. Besides, after objection made to the laying of a foundation, complaint cannot be made that no foundation was laid. And it seems to be an afterthought in the proceedings on *habeas corpus* that the ground objection to examination did not exclusively refer to the want of power in the grand jury.

By virtue of its dominion over interstate commerce Congress has power, the opinion of the court asserts, over corporations engaged in that commerce. And the power is the same as if the corporations had been created by Congress. And yet it is said to be a power subject to the limitation of the Fourth Amendment. To this I am not prepared to assent. I have already pointed out the essential distinction between a *subpœna duces tecum* and a search warrant, and, it may be, the case at bar demands from me no expression of opinion of the Fourth Amendment. And I am mindful, too, of the reservation in the opinion of the court of the power of Congress to require by direct legislation the fullest disclosures of their affairs from corporations engaged in interstate commerce. While recognizing this may be true, and, that until such power is exercised, there may be reasons for holding that corporations are entitled to the protection of the Fourth Amendment, there are reasons against the contention, and I wish to guard against any action which would preclude against their consideration in cases where the Fourth Amendment may be a more determining factor than it is in the case at bar. There are certainly strong reasons for the contention that if corporations cannot plead the immunity of the Fifth Amendment, they cannot plead the immunity of the Fourth Amendment. The protection of both Amendments, it can be contended, is against the compulsory production of evidence to be used in criminal trials. Such warrants are used in aid of public prosecutions (Cooley Constitutional Lim. 6th ed. 364), and in *Boyd* v. *United States*, 116 U. S. 616, a relation between the

Fourth Amendment and the Fifth Amendment was declared. It was said the Amendments throw great light on each other, "for the 'unreasonable searches and seizures' con- [83] demned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd* v. *United States* is still recognized, and if its reasoning remains unimpaired, and the purpose and effect of the Fourth Amendment receives illumination from the Fifth, or, to express the idea differently, if the Amendments are the complements of each other, directed against the different ways by which a man's immunity from giving evidence against himself may be violated, it would seem a strong, if not an inevitable conclusion, that if corporations have not such immunity they can no more claim the protection of the Fourth Amendment than they can of the Fifth.

Mr. Justice Brewer, with whom the Chief Justice concurred, dissenting.

With what is said in the opinion of the court of the necessity of a "charge," with the proposition that the immunity granted by the Federal statute is sufficient protection against both the Nation and the several States, with the holding that the protection accorded by the Fifth Amendment to the Constitution is personal to the individual and does not extend to an agent of an individual or justify such agent in refusing to give testimony incriminating his principal, and also that the *subpœna duces tecum* cannot be sustained, I fully agree.

Further, I desire to emphasize certain truths which in this and other cases decided to-day seem to be ignored or depre-

ciated. The immunities and protection of articles 4, 5 and 14 [84] of the Amendments to the Federal Constitution are available to a corporation so far as in the nature of things they are applicable. Its property may not be taken for public use without just compensation. It cannot be subjected to unreasonable searches and seizures. It cannot be deprived of life or property without due process of law.

It may be well to compare the words of description in articles 4 and 5 with those in article 14:

"Article 4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"Article 5. No person * * * shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Article 14. * * * Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394, 396, Mr. Chief Justice Waite said:

"The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

See also *Pembina Mining Company* v. *Pennsylvania*, 125 U. S. 181; *Missouri Pacific Railway Company* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway Company* v. *Beckwith*, 129 U. S. 26; *Charlotte &c. Railroad* v. *Gibbes*, 142 U. S. 386; *Monongahela Navigation Company* v. *United States*, 148 U. S. 312; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 154, [85] and cases cited; *Chicago, Burlington & Quincy Railroad Company* v. *Chicago*, 166 U. S. 226.

These decisions were under the Fourteenth Amendment, but if the word "person" in that Amendment includes corporations, it also includes corporations when used in the Fourth and Fifth Amendments.

By the Fourth Amendment the "people" are guaranteed protection against unreasonable searches and seizures.

"Citizens" is a descriptive word; no broader, to say the least, than "people."

As repeatedly held, a corporation is a citizen of a State for purposes of jurisdiction of Federal courts, and, as a citizen, it may locate mining claims under the laws of the United States, *McKinley* v. *Wheeler*, 130 U. S. 630, and is entitled to the benefit of the Indian Depredation Acts. *United States* v. *Northwestern Express Company*, 164 U. S. 686. Indeed, it is essentially but an association of individuals, to which is given certain rights and privileges, and in which is vested the legal title. The beneficial ownership is in the individuals, the corporation being simply an instrumentality by which the powers granted to these associated individuals may be exercised. As said by Chief Justice Marshall in *Providence Bank* v. *Billings*, 4 Pet. 514, 562: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

United States v. *Amedy*, 11 Wheat. 392, was the case of an indictment under an act of Congress for destroying a vessel with intent to prejudice the underwriters. The act of Congress declared that "if any person shall * * * willfully and corruptly cast away * * * any ship or vessel * * * with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy," etc. The indictment charged an intent to defraud an incorporated insurance company, and the court held that a corporation is a person within the meaning of the act, saying (p. 412):

"The mischief intended to be reached by the statute is the [86] same, whether it respects private or corporate persons. That corporations are, in law, for civil purposes, deemed persons, is ununquestionable. And the citation from 2 Inst. 736, establishes that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz. c. 7, respecting the erection of cottages, where the word used is, 'no person shall,' etc., says, 'this extends as well to persons politic and incorporate, as to natural persons whatsoever.'"

Neither does the fact that a corporation is engaged in interstate commerce in any manner abridge the protection and applicable immunities accorded by the Amendments. The

corporation of which the petitioner was an officer was chartered by a State, and over it the General Government has no more control than over an individual citizen of that State. Its power to regulate commerce does not carry with it a right to dispense with the Fourth and Fifth Amendments, to unreasonably search or seize the papers of an individual or corporation engaged in such commerce, or deprive him or it of any immunity or protection secured by either Amendment.

It is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a State has chartered it, the power is lodged in the State. If the Nation, then in the Nation, and it cannot be exercised by any other authority. It is in the nature of the power of visitation.

In Angell & Ames on Corporations, 9th ed. c. 19, §§ 684, 685, the authors say:

"To render the charters or constitutions, ordinances and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation; or, in other words, to the inspection and control of tribunals recognized by the laws of the land. Civil corporations are visited by the Government itself, through the medium of the courts of justice; but the internal affairs of ecclesiastical and eleemosynary corporations are, in general, inspected and controlled by a private visitor.

[87] "In this country, where there is no individual founder or donor, the legislature are the visitors of all corporations founded by them for public purposes, and may direct judicial proceedings against them for abuse or neglects which at common law would cause a forfeiture of their charters."

The matter is discussed in Blackstone's Commentaries, in par. 3, chap. 18, Book I, and he says:

"I proceed, therefore, next to inquire how these corporations may be visited. For corporations, being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil or eleemosynary."

And in respect to civil corporations he adds, same paragraph and chapter (*782):

"The law having by immemorial usage appointed them to be visited and inspected by the King, their founder, in His Majesty's Court of King's Bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority."

In 2 Kent, *300, the author says:

"The visitation of civil corporations is by the Government itself, through the medium of the courts of justice."

In *Amherst Academy* v. *Cowls*, 6 Pick. 427, 433, it was held that:

"Without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects which by common law would cause a forfeiture of their charters."

The right of visitation is for the purpose of control and to see that the corporation keeps within the limits of its powers. It would be strange if a corporation doing business in a dozen States was subject to the visitation of each of those States, and [88] compelled to regulate its actions according to the judgments—perhaps the conflicting judgments—of the several legislatures. The fact that a state corporation may engage in business which is within the general regulating power of the National Government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments. The National Government has jurisdiction over crimes committed within its special territorial limits. Can it dispense in such cases with these immunities and protections? No more can it do so in respect to the acts and conduct of individuals coming within its regulating power. It has the same control over commerce with foreign nations as over that between the States. *Boyd* v. *United States*, 116 U. S. 616, arose under the Revenue Acts, and the applicability of the Fourth and Fifth Amendments was sustained. In that case is an elaborate opinion by Mr. Justice Bradley, speaking for the court, in which the origin of the Fourth and Fifth Amendments is discussed, their relationship to each other shown, and the necessity of a constant adherence to the underlying thought of protection expressed in them strenuously insisted upon. I quote his words (p. 635):

"It may be that it (the proceeding in question) is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that con-

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stitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Finally, as the *subpœna duces tecum* was the initiatory step in the proceedings before the grand jury against this petitioner, [89] as that is the major fact in those proceedings, and as it is agreed that it is not sustainable, it seems to me that the order adjudicating him in contempt should be set aside, and this notwithstanding that subsequently he improperly refused to answer certain questions.

The case is not parallel to that of an indictment in two counts upon which a general judgment is entered, and one of which counts is held good and the other bad, for a writ of *habeas corpus* is not a writ of error, and the order to be entered threon is for a discharge or a remand to custody. If a discharge is ordered no punishment can be inflicted under the judgment as rendered, and if a new prosecution is instituted containing the good count a plea of former conviction will be a full defense. But in the case at bar an order for a discharge will have no such result. The *habeas corpus* statute, Rev. Stat., § 761, provides that "the court, or justice, or judge shall proceed in a summary way * * * to dispose of the party as law and justice require." Justice requires that he should not be subjected to the costs of this *habeas corpus* proceeding, or be punished for contempt when he was fully justified in disregarding the principal demand made upon him.

The order of the Circuit Court should be reversed and the case remanded with instructions to discharge the petitioner, leaving to the grand jury the right to initiate new proceedings not subject to the objections to this.

I am authorized to say that the CHIEF JUSTICE concurs in these views.

Opinion of the Court.

[90] McALISTER *v.* HENKEL, UNITED STATES MARSHAL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 341. Argued January 4, 5, 1906.—Decided March 12, 1906.

[201 U. S., 90.]

Hale v. *Henkel*, *ante*, p. 874, followed, as to the inquisitorial powers of the Federal grand jury and the extent of privilege and immunity of a witness under the Fifth Amendment.[a]

[The privilege against self-incrimination afforded by United States Constitution, Fifth Amendment, is purely personal to the witness, and he cannot claim the privilege of another person or of the corporation of which he is an officer or employee. (50 L. ed., 671.)] [b]

THE facts are stated in the opinion.

Mr. De Lancey Nicoll, with whom *Mr. Junius Parker* and *Mr. John D. Lindsay*, were on the brief, for appellant.[c]

Mr. Henry W. Taft, Special Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Felix H. Levy*, Special Assistant to the Attorney General, were on the brief, for the United States.[c]

MR. JUSTICE BROWN delivered the opinion of the court.

This case involves many of the questions already passed upon in the opinion in *Hale* v. *Henkel*, differing from that case, however, in two important particulars: First, in the fact that there was a complaint and charge made on behalf of the United States against the American Tobacco Company and the Imperial Tobacco Company under the so-called Sherman Act, and, second, that the subpœna pointed out the particular writings sought for (three agreements), giving in each case the date, the names of [91] the parties, and, in one instance, a suggestion of the contents.

The witness McAlister, who was secretary and a director of the American Tobacco Company, refused to answer or produce the documents for practically the same reasons assigned

[a] Copyrighted, 1906, by The Banks Law Publishing Co.

[b] Copyrighted, 1906, by The Lawyers' Co-Operative Publishing Co.

[c] See abstracts of argument in *Hale* v. *Henkel*, *ante*, p. 874, argued simultaneously herewith.

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by the appellant Hale, demanding to be advised what the suit or proceeding was, and to be furnished with a copy of the proposed indictment. A copy of one of the agreements with three English companies and certified by the Consul General of the United States is contained in the record.

For reasons already partly set forth, we think that the immunity provided by the Fifth Amendment against self-incrimination is personal to the witness himself, and that he cannot set up the privilege of another person or of a corporation as an excuse for a refusal to answer—in other words, the privilege is that of the witness himself, and not that of the party on trial. The authorities are practically uniform on this point. *Commonwealth* v. *Shaw*, 4 Cush. 594; *State* v. *Wentworth*, 65 Maine, 234, 241; *Ex parte Reynolds*, 15 Cox Criminal Cases, 108, 115. In *New York Life Insurance Co.* v. *People*, 195 Illinois, 430, the privilege was claimed by a corporation, but the agent of an insurance company was permitted to testify, in a suit for the recovery of a statutory penalty, to facts showing the performance by the corporation of the act prohibited. Indeed, the authorities are numerous to the effect that an officer of a corporation cannot set up the privilege of a corporation as against his testimony or the production of their books.

The questions are the same as those involved in the *Hale* case, without the objectionable feature of the subpœna, and the order of the Circuit Court is, therefore,

Affirmed.

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[92] NELSON *v.* UNITED STATES.

BOSSARD *v.* SAME.

McNAIR *v.* SAME.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Nos. 490, 491, 492. Argued January 5, 8, 1906.—Decided March 12, 1906.

[201 U. S., 92.]

In a suit in the Circuit Court of the United States brought by the United States against corporations for violations of the Anti-trust

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Law of July 2, 1890, a witness refused to answer questions or submit books to inspection before an examiner appointed by the court on the ground of immateriality, also pleading the Fifth Amendment; after the court had overruled the objections and directed him to answer he again refused and judgment in contempt was entered against him. On appeal to this court *held*, that:

Questions under the Constitution of the United States were involved and this court has jurisdiction of an appeal direct from the Circuit Court.

In such an action the books of the various defendants both before and after the alleged combination, and the contracts between them, as well as other papers referred to in the opinion, are all matters of material proof, but whether material or not the testimony must be taken and exceptions can be noted by the examiner and the materiality of the evidence passed on by the court.

Witnesses cannot take objections to materiality of evidence in order to be relieved from testifying. The tendency or effect of the testimony on the issues between the parties is no concern of theirs.

Documentary evidence in the shape of books and papers of corporations are in the possession of the officers thereof, who cannot refuse to produce them on the ground that they are not in their possession or under their control.

Hale v. *Henkel*, *ante*, p. 874, followed to the effect that officers and employés of corporations cannot, under the Fourth and Fifth Amendments, refuse to testify or produce books of corporations in suits against the corporations for violations of the Anti-trust Law of July 2, 1890, in view of the immunity given by the act of February 25, 1903.[a]

[50 L. ed., 673.][b]

[Evidence, whether documentary or oral, sought to be elicited from witnesses summoned in an action brought by the United States to enjoin an alleged conspiracy by manufacturers of paper to suppress competition, in violation of the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), by creating a general selling and distributing agent, is material, where it would tend to establish the manner in which such agent executed its functions.]

[The immateriality of the evidence sought to be elicited can not justify the refusal of witnesses to obey the orders of the Federal circuit court, requiring them to answer the questions put to them, and to produce written evidence in their possession, on their examination before a special examiner.

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[a] The foregoing syllabus and the abstracts of arguments copyrighted, 1906, by The Banks Law Publishing Co.

[b] The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 50, p. 673. Copyrighted, 1906, by the Lawyers' Co-Operative Publishing Co.

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[Objections to the materiality of the testimony are not open to consideration on a writ of error sued out by witnesses to review a judgment for contempt, entered against them for disobeying an order to testify.]

[The refusal of corporate officers to obey orders of a Federal circuit court, requiring them to produce certain documentary evidence, on their examination before a special examiner, can not be justified on the theory that such evidence was not in their possession or under their control, because their possession was not personal, but was that of the corporations.]

[The right of a witness to claim his privilege against self-incrimination, afforded by U. S. Const., 5th Amend., when examined concerning an alleged violation of the antitrust act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), is taken away by the proviso to the act of February 25, 1903 (32 Stat. L., 904, chap. 755, U. S. Comp. Stat. Supp., 1903, pp. 366, 367), that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the antitrust act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional gauranty, although it may not afford immunity from prosecution in the state courts for the offense disclosed.]

THESE writs of error submit for review a judgment in contempt entered in the case of *United States* v. *General Paper Company*, described in *Alexander* v. *United States*, *post*, p. 117. The judgment was based upon the disobedience by the plaintiffs in error to orders of the court requiring them to answer certain **[93]** questions and to produce certain books, documents and papers in their examination before the special examiner in pursuance to a *subpœna duces tecum* duly issued and served. The orders requiring the plaintiffs to answer were made upon petition of the United States, which exhibited the issues in the suit of *United States* v. *General Paper Company et al.*, stated the questions asked plaintiffs in error, and the books, documents and papers required of them.

Plaintiffs in error refused to obey the orders, and the examiner reported their disobedience to the court "for such action as the court might take for the further enforcement of its orders." In defense plaintiffs in error filed separate answers, which respectively alleged that Nelson was the president and manager of the Hennepin Paper Company; Brossard, manager and treasurer of the Itasca Company, and McNair, a director and general manager of the Northwest Paper Company. In other particulars the answers are identical except so far as the relations of plaintiffs in error to their respective corporations made a difference. Plaintiffs in error are also directors of the General Paper Company. We insert the answer of Nelson in the margin.[a]

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[a] Now comes Benjamin F. Nelson and answering the order to show cause made in the above-entitled matter on the 15th day of September, A. D. 1905, and the petition heretofore filed in said matter by said complainant upon which said order to show cause was made, alleges and shows unto the court as follows:

That this respondent is a director and the president of Hennepin Paper Company, one of the defendants in the above-entitled matter, and is also the owner and holder of stock in said company of the par value of forty-nine thousand ($49,000.00) dollars, and that the books and papers referred to in said order to show cause and in the petition and schedules thereto attached, upon which said order to show cause was made, are the books and papers of said Hennepin Paper Company and not of this respondent, and are subject to the control of said Hennepin Paper Company and not of this respondent; that this respondent is also a director of General Paper Company, another of the defendants in the above entitled matter, and the owner and holder of stock in said General Paper Company of the par value of two thousand two hundred and fifty dollars; that said Hennepin Paper Company and said General Paper Company have objected and do object, and this respondent has objected and does object, to the production of said books and papers for inspection by counsel for said complainant for the purpose of being offered in evidence in said cause. Said objections are based upon the following reasons:

1. That the materiality of said books and papers in the case mentioned in said order to show cause now pending in said court has not been established so as to authorize a court of equity to order their inspection, production and introduction in evidence, and that the same are not material, relevant or competent evidence in said cause; that said books and papers contain matters of importance relating to the business of said Hennepin Paper Company and said General Paper Company in no way bearing upon or touching the issues in said cause, which it would be highly injurious to the business interests of both of said companies to make public, and this respondent submits that he ought not to be required to disclose any portions of said books or papers except on a proper showing that the same are material to said cause to establish some issue therein, and a showing that the same are not privileged for the protection of the defendants above named.

2. That one of the purposes of said complainant in instituting said

[94] The court required the questions to be answered and the books and documents to be produced and, being of opinion that the order did not constitute a final decision, refused to allow an appeal on the part of either of the plaintiffs in

cause and in making the requests mentioned in said order to show cause for the inspection, production and introduction as evidence of said books and papers, is to establish and to compel said Hennepin Paper Company and said General Paper Company, and this respondent as such director or officer of each of said defendants, to furnish to said complainant evidence tending to establish that said Hennepin Paper Company and said General Paper Company have been guilty of certain violations of the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and the acts amendatory thereof or supplemental thereto, and to subject said Hennepin Paper Company and said General Paper Company to the penalties for such violations imposed by said act, and that to compel the production by said Hennepin Paper Company or said General Paper Company, through their officers or otherwise, of said books and papers for inspection and introduction as evidence in said cause, would be contrary to the provisions of the Fifth Amendment to the Constitution of the United States, which provides that no person shall be compelled in any criminal case to be a witness against himself, and also contrary to the provisions of the Fourth Amendment to the Constitution of the United States, which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

3. That the alleged acts of said Hennepin Paper Company complained of by said complainant in its said original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by said Hennepin Paper Company, be violations of the laws of the State of Minnesota, and would subject said Hennepin Paper Company to forfeiture of its charter and other penalities under said laws; that to compel said Hennepin Paper Company, through this respondent as one of its officers or otherwise, to produce said books and papers for inspection and introduction as evidence in said cause would be to compel it to furnish evidence tending to establish that it has been guilty of such acts and subject it to the forfeiture of its charter and other penalties aforesaid, contrary to the provisions hereinbefore mentioned of the Fourth and Fifth Amendments to the Constitution of the United States.

4. That in addition to the matters above set forth, the purpose of the complainant in instituting said cause and in making the requests mentioned in said order to show cause is to obtain from said court a decree enjoining said General Paper Company from carrying on the business for which it was incorporated, and to enjoin the carrying

error or either of [95] the defendants in the suit or on the part of all of them jointly.

Plaintiffs in error refused to obey the order of the court, and upon the report of the examiner the judgment under re-

out of and operation under certain agency contracts and agreements existing between it and said Hennepin Paper Company, on the alleged ground that said contracts and agreements were made and are in violation of the provisions of said act of Congress; that said contracts and agreements are of great value, not only to said General Paper Company whose entire business practically rests upon them, but are also of great value to and constitute valuable property rights in each of the defendants respectively parties thereto, including the said Hennepin Paper Company, and that such injunction from carrying out said contracts and agreements and their virtual annulment thereby occasioned would result in great injury, damage or loss, not only to said General Paper Company but also to said Hennepin Paper Company and to this respondent as a stockholder in each of said companies; and that to compel the production by said Hennepin Paper Company or said General Paper Company, or either of them, through this respondent as such director or officer or otherwise, of said books and papers for inspection and introduction as evidence in said cause for the purpose aforesaid, would be contrary not only to the provisions of said Fourth and Fifth Amendments to the Constitution of the United States, but also contrary to the well established rule of the common law, as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions, which may subject him, either directly or eventually, to prosecution for a crime or to a forfeiture or penalty, or anything in the nature of a forfeiture or penalty.

Further answering, this respondent alleges and shows unto this court that all the matters concerning which the questions referred to in said petition and schedules thereto annexed were asked, and which this respondent refused to answer, as stated in said petition, came to this respondent's knowledge exclusively as president and a director of said Hennepin Paper Company, or as a director of said General Paper Company, in the conduct of matters entrusted to him as such director or president, and which said companies, from the nature of the case, were compelled to entrust to this respondent as such director or officer, and that said Hennepin Paper Company and said General Paper Company have objected and do object, and this respondent has objected and does object, to said questions and to his being required to answer the same, for reasons similar to those already set forth in respect to the production, inspection and introduction in evidence of the books and papers above mentioned, that is to say:

1. That the materiality of said questions in the cause above mentioned has not been established so as to authorize a court of equity

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view was [96] entered, fining plaintiffs in error severally $100 "for their said disobedience of the said order, said fines to be paid to the clerk of this court for the use of the United States, as punishment for such contempt," and sen-

to order them to be answered, and that the same are not material, relevant or competent evidence in said cause.

2. That the purpose of said complainant in instituting said cause and in asking said questions is to establish and to compel said Hennepin Paper Company and said General Paper Company, through this respondent as such director or officer, to furnish to said complainant evidence tending to establish that said Hennepin Paper Company and said General Paper Company have been guilty of certain violations of the acts of Congress above referred to, and to subject them to the penalties for such violations imposed by said acts, and that to compel said defendants hereinbefore named, or either of them, through this respondent, to answer said questions would be contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

3. That the alleged acts of said Hennepin Paper Company complained of by said complainants in its original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by it, be violations of the laws of the State of Minnesota, and would subject it to forfeiture of its charter and other penalties under said laws; that to compel it through this respondent to answer the questions aforesaid would be to compel it to furnish evidence tending to establish that it has been guilty of such acts and subject it to the forfeiture of its charter and other penalties aforesaid, contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

4. That in addition to the matters above set forth, the purpose of the complainant in instituting said cause and in asking the questions mentioned in said order to show cause is to obtain a decree enjoining said General Paper Company from carrying on the business for which it was incorporated and to enjoin the carrying out of and operation under certain agency contracts and agreements existing between it and said Hennepin Paper Company, on the alleged ground that said contracts and agreements were made and are in violation of the provisions of said acts of Congress; that said contracts and agreements are of great value not only to said General Paper Company, whose entire business practically rests upon him, but are also of great value to and constitute valuable property rights in each of the defendants respectively parties thereto, including the Hennepin Paper Company, and that such injunction from carrying out said contracts and agreements and their virtual annulment thereby occasioned would result in great injury, damage and loss, not only to said Hennepin Paper Company or said

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tencing them to be imprisoned until [97] the order of the court requiring them to testify should be complied with.

The questions on the merits in these cases are the same as those on the merits in *Alexander* v. *United States*, *post*, p. 117,

General Paper Company, and that to compel said Hennepin Paper Company or said General Paper Company, through this respondent, to answer the questions aforesaid in aid of the purposes aforesaid would be contrary not only to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States, but also contrary to the well established rule of the common law as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions, which may subject him, either directly or indirectly, to prosecution for a crime or to a forfeiture or penalty or anything in the nature of a forfeiture or penalty.

Further answering this respondent alleges that he ought not to be required to answer the questions or comply with the requests, or produce for inspection by counsel for the complainant or for the purpose of being offered in evidence the cause above referred to, the books and papers referred to in said order to show cause and in the petition and schedules thereto annexed, upon which said order to show cause was made, not only for the reasons hereinabove set forth, but also for the following reasons, that is to say:

1. That one of the purposes of said complainant in instituting said cause and in seeking to require this respondent to answer the questions and comply with the requests and produce for inspection by counsel for the complainant, and for the purpose of being offered in evidence in said cause the books and papers aforesaid, is to establish and to compel this respondent to furnish to said complainant evidence tending to establish that he has been guilty of certain violations of the acts of Congress hereinbefore mentioned and referred to, and to subject him to the penalties for such violations imposed by said acts, and that to compel him to answer said questions or comply with said requests or to produce for inspection or for the purpose of being offered in evidence in said cause the said books and papers would be contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

2. That the alleged acts of said Hennepin Paper Company and of said General Paper Company complained of by the complainant in its said original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by said defendant companies, involve certain violations of the laws of the State of Minnesota by this respondent, and would subject him to penalties and forfeiture under said laws, and that to compel him to answer the questions or comply with the requirements aforesaid, or to produce for inspection, or for the purpose of being offered in evi-

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[98] decided this day. In those cases, however, this court had no jurisdiction and the appeals were dismissed. In the present cases we have jurisdiction, *Bessette* v. *W. B. Conkey*

dence in said cause, the said books and papers, would be to compel him to furnish evidence tending to establish that he has been guilty of such violations of the laws of the State of Minnesota and to subject him to the penalties and forfeitures aforesaid, contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

3. That one of the purposes of said complainant in instituting said cause and in seeking to require this respondent to answer the questions and comply with the requests, and produce for inspection by counsel for the complainant and for the purpose of being offered in evidence in said cause, the books and papers above referred to, is to establish and compel this respondent to furnish to said complainant evidence tending to establish the allegations of the original petition or bill of complaint in said cause, which, if established, will result in subjecting this respondent to loss or detriment in the nature of a penalty or forfeiture, in that the said Hennepin Paper Company, of which this respondent is a stockholder as aforesaid, will be subjected under the laws of the State of Minnesota to the forfeiture of its charter, resulting in the virtual forfeiture of the stock of this respondent in said defendant company, and to be the loss and forfeiture to a large extent of the value of the interest of this respondent in said corporation, and in that the contracts made through said General Paper Company as its sales agent by said Hennepin Paper Company under and pursuant to the agency contracts herein referred to between said Hennepin Paper Company and said General Paper Company will be virtually annulled and the property rights of said Hennepin Paper Company in said contracts destroyed; that there are a large number of such contracts outstanding under which large sums of money are due to said Hennepin Paper Company, all of which, as this respondent is advised and believes, will be or may be forfeited and lost to said defendant and to this respondent as a stockholder therein in case the illegal combination alleged in said original petition or bill of complaint is established by the decree or judgment in said cause; and this respondent alleges that to compel him to answer the questions and comply with the requests and produce for inspection and for purpose of being offered in evidence the books and papers referred to in said order to show cause and the petition and schedules aforesaid, and which he has declined to answer and comply with or produce, if material to said cause, would be contrary to the provisions of said Fourth and Fifth Amendments to the Constitution of the United States, and also contrary to the well established rule of the common law and of equity jurisprudence, that no person will be compelled to discover any fact or matter which may subject him to forfeiture or penalty or anything in the nature of a forfeiture or penalty.

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Co., 194 U. S. 324, and directly from the Circuit Court, as questions under the Constitution of the United States are involved.

[99] In the pleadings in the original suit brought in the Circuit Court of the United States for the District of Minnesota it is respectively alleged and denied that the defendant corporations, of which plaintiffs in error are officers, had entered into an agreement, combination and conspiracy to control, regulate and monopolize not only the manufacture of newsprint and other papers, but the distribution and shipment thereof through the Middle, Southern and Western States, in violation of the Anti Trust Act of July 2, 1890. The United States sought to establish by plaintiffs in error the truth of the charge, and the subpœna served upon them was explicit as to what was required of them.

The subpœnas required plaintiffs in error to produce the account books, including the journals, ledgers and other books kept by or under the control of the companies respectively, of which plaintiffs in error were respectively officers, (*a*) showing the amounts, kinds and grades of paper manufactured by the respective companies and sold by or through the General Paper Company, and were shipped since the fifth of July, 1900; (*b*) the prices, amounts or credits received for such paper from the paper company between the fifth of July and the present time, including entries, showing the manner in which the prices and amounts received by the respective companies for any and all [100] of its products so sold have been equalized with the prices and amounts received or realized of any and all of the other defendant companies for which the paper company is or has been the exclusive agent; (*c*) the amounts and proportions of earnings or profits of the paper company received by the respective companies from and through the paper company, either in the form of rebates, credits or otherwise.

Second. All contracts, agreements, writings and account books, including journals, ledgers and other books, kept by or under the control of the respective companies, showing the agreement, arrangement or understanding under and pursuant to each, and the manner in which the prices and

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amounts realized by the respective companies upon the various kinds and grades of paper manufactured by it and sold by and through the paper company, are and have been, since July 5, 1900, equalized, or the profits arising from the sale of such paper distributed or apportioned, as between the respective companies and other defendants manufacturing and selling through the paper company similar kinds or grades of paper, or among all of the defendants manufacturing similar kinds or grades of paper, and then and there to testify and the truth to say, in a certain matter in controversy in said court, between the United States as complainant against the General Paper Company *et al.*, defendants, on the part of the complainant.

There is no uncertainty, therefore, either in the issue or the means of proof. In other words, the United States charges a conspiracy upon the part of the defendant corporations for the cessation of competition between the manufacturing defendants by creating a general selling and distributing agent, the General Paper Company, which restricts the output of the mills, fixes the prices of their products, determines to whom, and the terms and conditions upon which, such products shall be sold, into what States and places they shall be shipped, and what publishers and customers each mill shall supply. The means of proof of the charge are obviously the conditions of the companies before and after the formation of the paper company, **[101]** its organization and the purpose of its organization, the means of its operation, how and by what means it equalizes the output and price of products, and the distribution of the proceeds of their sale, and the relations and accounts between it and the other defendant companies, and their books, accounts and minutes of proceedings.

The questions were directed to these ends. They were directed to ascertain whether the prices received for the various paper materials were equalized, and whether during the time the General Paper Company was the selling agent of the materials there was in existence an arrangement whereby the prices received through the paper company were equalized between the other defendant companies. The questions were put in various ways to show such equalization and the arrangements to equalize, and to show the allowances to each mill, the fixing of definite prices, and the distribution of the balances received among the companies on the basis of their average daily output of the grade of paper inquired about. And there were also questions asked as to whether the board of directors or the executive committee of the paper company fixed the prices of paper to be paid to each of the mills by or through the paper company, and the compensation to be paid to the mills making butchers' fibre paper, because it was less profitable, and other questions as to conversations between gentlemen representing the different mills in regard to the organization of a corporation to act as general selling agent in order to eliminate competition. There were also questions as to whether the books showed the things expressed in the other questions. The objection made to each of the questions before the examiner was that the testimony sought was irrelevant, incompetent and immaterial, and counsel advised the witnesses not to answer. As to the books and papers the following is a sample of the proceedings:

Argument for plaintiffs in error.

"Q. Do the books, journals or ledgers of the Hennepin Paper Company show any agreement or arrangement or understanding under and pursuant to which and the manner in which the prices and amounts realized by the Hennepin Paper Company **[102]** upon various grades of paper manufactured by it and sold by or through the defendant the General Paper Company, are and have been, since the 5th day of July, 1900, equalized or the profits arising from the sale of such paper distributed or apportioned as between the defendants?

"MR. FLANDERS: All objections renewed, and I give the witness the same advice.

"(No answer.)

"Q. Do you refuse, Mr. Nelson, to produce the books?

"MR. FLANDERS: As I said before, you may assume for the purposes of these questions that the books and all the papers called for are present in court, but on behalf of the Hennepin Paper Company and the witness and the General Paper Company I decline to submit those to the inspection of the Government counsel.

"MR. KELLOGG: Or to allow them or any part of them to be put in evidence, Mr. Flanders?

"MR. FLANDERS: Yes."

Other facts will appear in the opinion.

Mr. James G. Flanders, with whom *Mr. Charles F. Fawsett* and *Mr. William Bruce* were on the brief, for plaintiffs in error in these cases and for appellants in Nos. 381, 382, 383, 384 and 385 argued simultaneously herewith.[a]

[a] *Alexander* v. *United States*, *post*, p. 945.

Argument for plaintiffs in error.

The evidence, documentary and oral, which the witnesses were required to produce was not shown to be material to plaintiff's case.

The documentary evidence called for is the property of the General Paper Company or some other of the defendant corporations. The proceeding, therefore, is a method of compelling the production of books and documents belonging to parties to the suit, and it is governed by the rules prescribed for the protection of parties from whom a discovery is demanded.

The right of a plaintiff in equity to the benefit of a defendant's oath is limited to a discovery of such material facts as relate **[103]** to the plaintiff's case and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established. 1 Daniell's Ch. Pl. & Pr. 5 Am. ed. *579, 580; Wigram's Law of Discovery, 1st Am. ed. 15; Story's Eq. Pl. §§ 565, 568.

The plaintiff must show by clear averment the materiality of the documents sought to be disclosed. This rule applies to proceedings under a statute to compel production upon or in preparation for trial. 23 Am. & Eng. Ency. of Law, 176; *Owhyee L. & I. Co.* v. *Tautphaus*, 109 Fed. Rep. 547; *Condict* v. *Wood*, 25 N. J. L. 319; *Bank* v. *Mansfield*, 48 Illinois, 494; *Lester* v. *People*, 150 Illinois, 408; *Bentley* v. *People*, 104 Ill. App. 353; *Wynn* v. *Taylor*, 109 Ill. App. 603; *Walsh* v. *Press Co.*, 48 App. Div. N. Y. 333; *S. F. Copper M. & R. Co.* v. *Humphrey*, 111 Fed. Rep. 772; *Eschbach* v. *Lightner*, 34 Maryland, 528, 533; *Jenkins* v. *Bennett*, 40 S. Car. 393, 400; *Berry* v. *Matthews*, 7 Georgia, 457, 462, 463.

A plaintiff's right to any compulsory production of books is strictly limited to such documents as contain evidence relevant to his case. His right to inspect is never larger than his right to read in evidence. The defendant is not compelled to discover his evidence if it cannot tend to establish affirmatively the case of the plaintiff. Hare on Discovery, 187, 198; *Compton* v. *Earl Gray*, 1 Y. & J. 154; *Bolton* v. *Liverpool*, 3 Sim. 489; *S. C.*, 1 My. & K.; *Harris* v. *Harris*, 3 Hare, 450; *Van Kleeck* v. *Ref. Dutch Ch.*, 6 Paige, 600; *S. C.*, 20 Wend. 458.

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Before the plaintiff is entitled to the production of a given document he must show *aliunde* that its contents are such as to entitle him to read it in evidence. He cannot compel production in order to prove that he is entitled to production. Wigram's Law of Discovery, § 293; *Story* v. *Lennox*, 1 Myl. & Cr. 534; Langdell on Eq. Pl. § 164; *Bligh* v. *Benson*, 7 Price, 205; *Stroud* v. *Deacon*, 1 Vesey, 27; *Barnett* v. *Noble*, 1 Jacob & W. 227.

Any party who is required to produce his books of account or other documents, may seal such portions thereof as he swears **[104]** contain nothing relating to the purposes of the discovery sought, and his affidavit that the parts so sealed do not relate to the matters in litigation is sufficient protection. 23 Am. & Eng. Ency. of Law, 182; 2 Wait's Pr. 548; *Titus* v. *Cortelyou*, 1 Barb. 444; *Robbins* v. *Davis*, 1 Blatch. 238, 242; *Campbell* v. *French*, 2 Cox Ch. Cas. 286; *Girard* v. *Penswick*, 1 Wilson Ch. 222; *Pynchon* v. *Day*, 118 Illinois, 9.

Under Rev. Stat. § 724 it has been held that production will only be ordered where a discovery would be decreed under the same circumstances in chancery. *Jacques* v. *Collins*, 2 Blatch. 23. See *Caspary* v. *Carter*, 84 Fed. Rep. 416; *Birchoffsheim* v. *Brown*, 29 Fed. Rep. 341; *Ryder* v. *Bateman*, 93 Fed. Rep. 31; *Bloede Co.* v. *Bancroft & Sons Co.*, 98 Fed. Rep. 175; *Boyd* v. *United States*, 116 U. S. 616.

The doctrine is not confined to documentary evidence. It applies also to the case of oral testimony. The materiality of any question must be made to appear before a witness can be required to answer it and before he can be adjudged guilty of a contempt of court for a refusal to answer. The leading case is *In re William Judson*, 3 Blatch. 148. See also *In re Allis*, 44 Fed. Rep. 216; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

The evidence, documentary and oral, required to be produced, if material to the plaintiff's case, is in the nature of incriminating evidence which the witnesses and the defendants are privileged from furnishing to the plaintiff under the Fourth and Fifth Amendments of the Federal Constitution and the well recognized principles of equity procedure.

The discovery which by the orders appealed from the witnesses are required to make, might also tend to subject them

to penalties and forfeitures under the laws of the State of Wisconsin. Wisconsin Statutes (1898), §§ 1747*e*, 1747*h*; *Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Saline Bank*, 1 Pet. 100.

It is not within the province of Congress to suspend the operation of these state statutes or to interfere with their enforce- **[105]** ment in their relation to trade within the State, and therefore the immunity clause would be ineffectual to relieve the appellants against liability under the state law.

The jurisdiction of state authority over trade within the State is as exclusive and unqualified as the jurisdiction of Congress over trade between the States. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211 (where injunction previously issued was modified to make it conform to this rule); *Allen* v. *Pullman Co.*, 191 U. S. 171; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115.

It is the settled law of this court that the Fifth Amendment has no application to state courts and their proceedings under state laws. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Brown* v. *Walker*, 161 U. S. 591, distinguished.

These Amendments to the Constitution were merely declaratory of the equity and common law rules of evidence, and it was firmly settled by them at the time of the adoption of the Amendments that no person could be compelled to discover any fact, either by producing documents or answering questions, which might subject him either directly or eventually to liability to a penalty or forfeiture, or anything in the nature of a penalty or forfeiture. 1 Daniell's Chancery Pleading & Practice, 5th Am. ed. *562, 563; 2 Story's Eq. Jur. § 1494; 1 Pomeroy's Eq. Jur. 202; *Livingston* v. *Harris*, 3 Paige, 527; aff'd 11 Wend. 329; *Northrop* v. *Hatch*, 6 Connecticut, 361, 363; *Livingston* v. *Tompkins*, 4 Johns. Ch. 432, and cases there cited; *Vanderveer* v. *Holcomb*, 17 N. J. Eq. 91; *United States* v. *National Lead Co.*, 75 Fed. Rep. 94; *Newgold* v. *American Electrical &c. Co.*, 108 Fed. Rep. 341; *United States* v. *Boyd*, 116 U. S. 631.

The consequences which must result to the appellants from the passing of the decree prayed for in the complaint are in the nature of a forfeiture. They should not be required to

furnish the evidence to subject them to such forfeiture. 13 Am. & Eng. Ency. of Law, 54.

The witnesses were entitled to decline to answer not only on **[106]** the ground of personal privilege, but also on the ground that their answers would be the answers of the General Paper Company and the other defendants whose officers and directors they were, and might tend to subject said defendants to fines, penalties and forfeitures and to loss or damage in the nature of a forfeiture. A corporation is a person and as such entitled to the privileges and immunities of persons. *Covington Turnpike Co.* v. *Sanford*, 164 U. S. 578. It performs its functions only through its officers and agents and they cannot be compelled to testify. *State* v. *Simmons Hardware Co.*, 15 L. R. A. 676; *Davis* v. *Lincoln Natl. Bank*, 4 N. Y. Supp. 373; *Bank of Oldtown* v. *Houlton*, 21 Maine, 502.

The orders are appealable under the judiciary act of March 3, 1891, and under the act of February 11, 1903, to expedite the determination of suits in equity under the Anti Trust Act and the Interstate Commerce Act.

In appealing from the order of the Circuit Court appellants have followed the practice indicated in the two cases of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, and *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25. In each case it was held that the application by the Interstate Commerce Commission made a "case" and that the order denying the application was a final order and therefore appealable.

The two cases cited differ from the present ones only in this: that no action was there pending in any Circuit Court to which the proceedings to compel the testimony of witnesses and the production of books and papers could be said to be ancillary. Otherwise, however, the proceeding itself was in every substantial respect the same as that adopted in the present cases.

The words "final decree" have been given a liberal and reasonable construction as respects the right of appeal. *Eau Claire* v. *Payson*, 107 Fed. Rep. 552.

There may be more than one final order and more than one appeal in the same suit. *Trustees* v. *Greenough*, 105

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U. S. 527; *Tuttle* v. *Claflin*, 88 Fed. Rep. 122; *Rouse* v. *Letcher*, 156 U. S. 47.

[107] These proceedings are not properly incidental, but collateral, having a distinct and independent character. They belong to the class known as ancillary, in which the form is determined by the circumstances of each case. So far as the question of appealability goes, they are subject to the same rules as original and independent actions. *Krippendorf* v. *Hyde*, 110 U. S. 276, 280, 287; *Freeman* v. *Howe*, 24 How. 450, 460; *Christmas* v. *Russell*, 14 Wall. 69, 80; *Rouse* v. *Letcher*, 156 U. S. 47, 50; *Stewart* v. *Dunham*, 115 U. S. 61, 64; *Carey* v. *Houston &c. Ry. Co.*, 161 U. S. 115, 126; *Pope* v. *Louisville &c. Ry. Co.*, 173 U. S. 573.

The present proceedings have all the distinguishing characteristics of any suit in equity or action at law.

The test of finality as to any particular order, under the decisions of this court, is this: An order, to be appealable, or final for the purposes of appeal, must be conclusive upon the merits and must leave the matter in controversy in such a condition that if there be an affirmance here the court will have nothing to do but to execute the order it has already entered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *St. L. &c. R. Co.* v. *Southern Expr. Co.*, 108 U. S. 24; *Winthrop I. Co.* v. *Meeker*, 109 U. S. 180; *Mower* v. *Fletcher*, 114 U. S. 127; *Trustees* v. *Greenough*, 105 U. S. 527.

It has been held that the final order or decree in ancillary proceedings is governed by the same rules, in respect of appeals to the Supreme Court, as the decree in the principal suit. *Pope* v. *Louisville &c. Ry. Co.*, 173 U. S. 573; *Carey* v. *Houston &c. Ry. Co.*, 161 U. S. 115; *Rouse* v. *Letcher*, 156 U. S. 47.

If, however, there is any question whether the act of February 11, 1903, applies to appeals in such cases as the present, there can be no doubt of the right of appellants to obtain a review of the orders appealed from by direct appeal to the Supreme Court under the provisions of section 5 of the act of March 3, 1891. *Loeb* v. *Township Trustees*, 179 U. S. 472; *W. U. Tel. Co.* v. *A. A. R. R. Co.*, 178 U. S. 239; *Penn. Mut. L. Ins. Co.* v. *Austin*, 168 U. S. 685.

Argument for the United States.

[108] *Mr. Frank B. Kellogg* and *Mr. James M. Beck*, Special Assistants to the Attorney General, with whom *The Attorney General* was on the brief, for the United States in these cases and in Nos. 381, 382, 383, 384 and 385:

Whether finally admissible or not, the evidence should be given and received before the examiner, inasmuch as all questions of materiality, relevancy and competency must be left primarily for determination upon final hearing by the United States Circuit Court for the District of Minnesota where the cause is pending, and ultimately for decision by this court when the suit shall be considered here on appeal. *Blease* v. *Garlington*, 92 U. S. 1.

Had the witnesses, instead of appealing from the order and taking a writ of error from the judgment of contempt, sued out a writ of *habeas corpus*, this court would have had jurisdiction on appeal from a judgment discharging the writ. *Ekiu* v. *United States*, 142 U. S. 651; *Horner* v. *United States*, 146 U. S. 120. And it is only the question of the validity of the judgment overruling their plea under the Constitution that can be considered. *In re Tyler*, 149 U. S. 164; *In re Lennon*, 166 U. S. 552. A writ of error from the judgment of contempt will bring up no other question. *Bessette* v. *Conkey Co.*, 194 U. S. 324.

The rule in *Blease* v. *Garlington* has been followed in numerous cases. *In re Allis*, 44 Fed. Rep. 216, *contra*, is not in point, and it does not appear that *Blease* v. *Garlington* was called to the attention of the judge deciding the case.

The evidence was material and admissible. Where the existence of the books and papers desired is established, the ability to produce them is shown, and the books and papers are apparently important and material to the case of the moving party, their production will be required. It is obviously impossible in applications of this character to determine the materiality of all of the contents of the books and papers in advance. *United States* v. *Babcock*, Fed. Cas. No. 14484; *Coit* v. *North Carolina Gold &c. Co.*, 9 Fed. Rep. 577.

There is no doubt that as a witness a party can be compelled **[109]** by a *subpœna duces tecum* to produce books, documents and papers in his possession in the same manner as any other witness. *Bischoffsheim* v. *Brown*, 29 Fed. Rep.

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341, 343. And the officers of a corporation may be required as witnesses to produce its books when the books are necessary evidence. *Wertheim* v. *Continental Ry. & Trust Co.*, 15 Fed. Rep. 716; *Johnson Steel Street-rail Co.* v. *North Branch Steel Co.*, 48 Fed. Rep. 196; *Edison Electric Light Co.* v. *U. S. Electric Ltg. Co.*, 44 Fed. Rep. 294; *S. C.*, 45 Fed. Rep. 55; *Johnson Co.* v. *North Branch Co.*, 48 Fed. Rep. 191.

Under issues of the character raised in this cause, the entire manner of conducting the business of the General Paper Company is competent and material evidence. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25.

The claim of privilege is solely a personal one. Wigmore on Evidence, §§ 2195–2210; *Brown* v. *Walker*, 161 U. S. 597.

These witnesses cannot claim the privilege of silence either under the general principles of common law and equity jurisprudence and procedure, or under the Fourth and Fifth Amendments.

It is true that under the ancient practice in actions at common law a party might not compel his opponent to furnish evidence as a witness. His only remedy was by way of a bill of discovery in equity. Wigmore on Evidence, §§ 2217, 2218. This limitation, however, never existed in equity. 1 Greenleaf on Evidence, 15th ed. § 361; 1 Daniells on Ch. Prac. 5th ed. 885, note 6; Adams on Equity, 7th ed. 36; Wigmore on Evidence, §§ 2218, 2219, pp. 3012, 3014–3016.

A party will be compelled to make a disclosure of all facts within his knowledge, or books and documents in his possession, which tend either to establish his opponent's case or to refute the position which he himself takes. *Bustros* v. *White*, Eng. Law Rep. Q. B. Div. 423; *Atty. Gen.* v. *Emerson and another*, Law Rep. 10 Q. B. Div. 191; *Arnold* v. *Pawtuxet Valley Water Co.*, 18 R. I. 189.

Modern legislation has made the bill of discovery an unnec- **[110]** essary adjunct even in actions at law. Material evidence may now be required of a party in such actions, without resorting to this cumbersome proceeding. 1 Pomeroy on Eq. Jur. 2d ed. § 193; Wigmore on Evidence, § 2219; 14 and 15 Victoria, c. 99, § 6; Rev. Stat. of Wisconsin (1898), § 4183, as amended by c. 244, Laws of 1901; Rev. Stat. § 858.

Opinion of the Court.

The guaranty of the Fifth Amendment that no person shall be compelled in a criminal case to be a witness against himself does not protect corporations. *Brown* v. *Walker*, 161 U. S. 591; *Interstate Com. Com.* v. *Baird*, 194 U. S. 25; *Morgan* v. *Halberstadt*, 60 Fed. Rep. 592; *N. Y. Life Ins. Co.* v. *People*, 195 Illinois, 430; *State* v. *Jack*, 69 Kansas, 387.

In so far as the penalty or forfeiture may be criminal in its character the guaranty of the Fifth Amendment applies, and is entirely saved by the immunity statute; in so far as the penalty or forfeiture is other than criminal, in so far as it involves the loss or forfeiture of the claim to a continued violation of the laws of the land, there is no principle either of constitutional law or of equity jurisprudence which may be invoked to relieve against it.

It was settled at an early date that pecuniary loss to the witness was not one of the penalties or forfeitures intended to be protected against by the Constitution. See opinion of Chief Justice Shaw in *Bull* v. *Loveland*, 10 Pick. 9, which has been followed uniformly by all of the courts in the United States. 1 Greenleaf on Evidence, 15th ed. § 452; *Lowney* v. *Perham*, 20 Maine, 240; *Ward* v. *Sharp*, 15 Vermont, 115; *Harper* v. *Borough*, 6 Ired. 30; *Robinson* v. *Neal*, 21 Kentucky, 212.

It is also held that a penalty of forfeiture must be penal in its nature, as distinguished from pecuniary loss suffered as a consequence of civil liability. *Boyd* v. *United States*, 116 U. S. 616; *Lees* v. *United States*, 150 U. S. 476; *Huntington* v. *Attrill*, 146 U. S. 657; *Brady* v. *Daly*, 175 U. S. 148; *City of Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 Fed. Rep. 900; *State* v. *Jack*, 69 Kansas, 387; *State* v. *Standard Oil Co.*, 61 Nebraska, 28; *Southern Ry. Co.* v. *Bush*, 122 Alabama, 470; *Levy* v. *Supe-* **[111]** *rior Court*, 105 California, 600; *Ames* v. *Kansas*, 111 U. S. 449; 3 Wigmore on Evidence, § 256; 2 Beach on Private Corporations, § 840.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

Plaintiffs in error urge three main contentions, which we will consider in their order.

I. That the evidence, documentary and oral, which the witnesses were required to produce, was not shown to be material to plaintiff's case.

1. There are three answers to this contention. (1) The evidence is clearly material. The charge of the bill is that the defendant manufacturing corporations entered into a conspiracy and combination in violation of the act of July 2, 1890, to suppress competition between themselves, and that they accomplished this purpose by organizing the General Paper Company, and gave it certain controlling powers over the output of the mills and the prices and distribution of their products.

Before the application to the court for the orders under review there were certain facts established. It was established that in the fall of 1889 and the spring of 1900 there were preliminary meetings of the parties to ultimately form the paper company, and that it was subsequently formed by those representing the manufacturing companies, who subscribed for the stock. In July, 1900, the corporations as represented in the paper company, fourteen in all, entered into contracts with it, making it their exclusive selling agent; that each constituent manufacturing company was represented by one of its principal officers upon the board of directors of the paper company, and the number of directors have been increased as other corporations have made the paper company their selling agent. A table of the constituent companies was given and the times the companies became members of the paper company. And it was established that there was an executive committee, comprised **[112]** substantially of the same persons who constituted the board of directors, and that the paper company had books and records containing the minutes of the meetings of stockholders, directors and the executive committee, and that the treasurers and sales agents had presented reports to the stockholders, directors and executive committee. It was stipulated that all the subscriptions to stock of the paper company were for the benefit of some paper manufacturing company and in its name, that it was the beneficial owner thereof, and that the dividends declared thereon were its property; that said stock was from time to time allotted to

such corporations as made contracts with the paper company, making it their exclusive selling agent upon the basis of estimated relative productions of paper. A list of the individuals to whom stock was issued, the names of the corporations represented by them, and the days of the issuances of the stock were given.

The questions were framed to prove the combination charged in the bill, and the powers and operation of the General Paper Company and the relations of the other companies to it. What the answers will show we do not know, nor what the books and documents will disclose. The organization of the paper company had a purpose, and whether it was a legal or illegal instrument for competing companies to use we do not have now to determine. By the admissions of the answers the paper company entered into contracts with those companies, became their selling agent, and was entitled to a certain percentage of the sales. Presumably it exercised its powers, made sales and received profits. In all that it did the manufacturing corporations were interested; they owned its stock, were entitled to its dividends. This we may admit for argument's sake, not prejudging in any way, may be consistent with continued competition between the companies, but it may be otherwise. At any rate, the manner in which the paper company executed its functions may be links in the evidence adduced by the United States, and this is enough to establish the materiality of the evidence.

It must not be overlooked that not only an inspection of the **[113]** books was refused, but questions directed to ascertain the contents of the books were objected to, not answered. We have given one illustration; we will give another. Counsel for defendant corporations stated at the examination: "That for the purpose of any question the Government counsel see fit to ask it may be assumed that all the books, papers and documents" described in the subpœna "are present here in court, and we decline to submit them to the inspection of the Government counsel." The following then took place:

"Q. State whether those books show the amounts, kinds or grades of paper manufactured by the defendant Northwest Paper Company and sold by or through the defendant General Paper Company as the ex-

clusive sales agent of the defendant Northwest Paper Company since the 8th day of April, 1902, or since about the 1st of May, 1902, if that is the date the business commenced.

"Same objections by defendants, and the witness given the same advice.

"Q. You decline to answer?

"A. I decline on advice of attorney.

"Q. Do the books also show where the said paper so manufactured was sold and into what States and Territories it was shipped since the 8th day of April, 1902, or the 1st day of May, 1902?

"MR. FLANDERS: I wish to make the same objections, and I give the witness the same advice.

"A. Same answer."

And counsel for the United States, not only as to the matters expressed in the foregoing questions, but as to other matters which the bill charged against the companies, and which had been inquired about, said, that he desired to use the books and offer them in evidence to show such matters. An inspection of the books was refused, and all evidence of their contents withheld.

Necessarily the books contained the information. The paper company was the selling agent of the Northwest Paper Com- **[114]** pany and must have kept an account of its sales and into what States the paper of the company was shipped and sold. Such accounts are material and relevant to complainant's case. They may or may not, in connection with other evidence, sustain the charge of the United States, but they are elements in the proof, having tendency enough to sustain the charge to be considered material.

2. The claim of immateriality of the testimony cannot avail plaintiffs against the orders of the Circuit Court. The procedure before an examiner and his powers are explained in *Blease* v. *Garlington*, 92 U. S. 1. It is there said: "The examiner before whom the witnesses are orally examined is required to note exceptions; but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court with the objections noted. So, too, when depositions are taken according to the acts of Congress or otherwise, under the rules, exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them; and when the testimony, as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken.

Thus both the exceptions and the testimony objected to are all before the court below, and come here upon the appeal as part of the record and proceedings there."

And an application to a court to compel the delivery of testimony in aid of the examination does not change the rule. The testimony is taken to be submitted to the court where the suit is pending and all questions upon the evidence, its materiality and sufficiency, are to be determined by it and after it by an appellate court. Even if the trial court permit the examination of witnesses orally in open court upon the hearing in cases in equity, as further said in *Blease* v. *Garlington*, the testimony must be taken "down or its substance stated in writing and made part of the record, or it will only be disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record subject to the objec- **[115]** tion, or the ruling will not be considered by us." *Blease* v. *Garlington* has been applied at Circuit in a number of cases.[a]

3. These writs of error are not prosecuted by the parties in the original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal, as we shall presently see.

II. That the documentary evidence called for was not shown to be in the possession or under the control of the witnesses. This contention is untenable. The ground of it is that the possession of the witnesses was not personal, but was that of the respective corporations of which they were

[a] *Thomson-Houston Elec. Co.* v. *Jeffrey Mfg. Co.*, 83 Fed. Rep. 614; *Maxim-Nordenfelt Guns & Am. Co., Ltd.*, v. *Colt's Patent Fire-arms Mfg. Co.*, 103 Fed. Rep. 39; *Parisian Comb Co.* v. *Eschwege*, 92 Fed. Rep. 721; *Fayerweather* v. *Ritch*, 89 Fed. Rep. 529; *Appleton* v. *Ecaubert*, 45 Fed. Rep. 281; *Edison Elec. Lt. Co.* v. *U. S. Elec. Ltg. Co.*, 45 Fed. Rep. 55, 59; *Johnson Steel Street Rail Co.* v. *North Branch Steel Co.*, 48 Fed. Rep. 196; *Adee* v. *J. L. Mott Iron Works*, 46 Fed. Rep. 39; *Lloyd* v. *Pennie*, 50 Fed. Rep. 4; *Brown* v. *Worster*, 113 Fed. Rep. 20; *MacWilliam* v. *Conn. Web. Co.*, 119 Fed. Rep. 509; *Whitehead & Hoag Co.* v. *O'Callahan*, 139 Fed. Rep. 243.

officers. Granting this to be so and that the witnesses could have set up whatever privileges the corporations had, nevertheless they had the custody (actual possession) of the books and were summoned from necessity as representing the corporations. It is hardly necessary to observe that the witnesses had all the possession human beings could have had or can have, and if the objection is to prevail the books of a corporation can be withdrawn from the reach of compulsory process.

It is as useless as attempting to demonstrate that twice two make four, to say that a corporation can have possession of nothing except by the human beings who are its officers, and it is to them, not the intangible being they represent and act for, **[116]** that the law directs its process of subpœna and must procure its evidence.

III. That the evidence, documentary and oral, required to be produced, was in the nature of incriminating evidence which the witnesses and the defendants are privileged from furnishing to the plaintiff under the provisions of the Federal Constitution and the well recognized principles of equity procedure.

This contention asserts rights personal to the plaintiffs and rights of the corporation defendants in the suit. The basis of both rights is the protection of the Fourth and Fifth Amendments to the Constitution of the United States.

The argument submitted is substantially the same as that made by appellants in *Hale* v. *Henkel* and *McAlister* v. *Henkel*. It is insisted that the immunity [a] given by the act of February 25, 1903, is not as broad as the penalties and forfeitures to which the plaintiffs in error or the corporations of which they are officers will be subjected. If the immunity, it is urged, protects from the penalties of the Anti Trust Act of 1890 it does not protect, nor has Congress

[a] "Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts: Provided further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." Act February 25, 1903; Comp. Stats., Sup. 1903, pp. 366, 367.

the power to protect, from the penalties of the Minnesota laws, which make criminal a combination and conspiracy in restraint of trade and subject to forfeiture the charters of corporations who become parties to such combination and conspiracy. Sections 6955, 6956, 5962, Statutes of Minnesota, 1894.

The extent of the immunity and its application to corporations was considered in *Hale* v. *Henkel* and *McAlister* v. *Henkel*, and decided adversely to the contention of plaintiffs in error.

Judgment affirmed.

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[117] ALEXANDER *v.* UNITED STATES.

WHITING *v.* SAME.

STUART *v.* SAME.

GENERAL PAPER COMPANY *v.* SAME.

HARMON AND GENERAL PAPER COMPANY *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

Nos. 381, 382, 383, 384, 385. Argued January 5, 8, 1906.—Decided March 12, 1906.

[201 U. S., 117.]

In a suit in a Circuit Court of the United States brought by the United States against corporations for violations of the Anti Trust Law of July 2, 1890, a witness refused to answer questions or produce books before the examiner on the ground of immateriality, also pleading the privileges of the Fifth Amendment; the court overruled the objections and ordered the witness to answer the questions and produce the books; an appeal was taken to this court. *Held*, that:

While such an order might leave the witness no alternative except to obey or be punished for contempt it is interlocutory in the principal suit and not a final order, nor does it constitute a practically independent proceeding amounting to a final judgment, and an appeal will not lie therefrom to this court.

Opinion of the Court.

If the witness refuses to obey and the court goes further and punishes him for contempt there is a right of review, and this is adequate for his protection without unduly impeding the process of the case.[a]

[50 L. ed., 686.] [b]

[Orders of a Federal circuit court directing witnesses to answer the questions put to them, and produce written evidence in their possession, on their examination before a special examiner appointed in a suit brought by the United States to enjoin an alleged violation of the antitrust act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200) lack the finality requisite to sustain an appeal to the Supreme Court.]

THE facts are stated in the opinion.

Mr. James G. Flanders, with whom *Mr. Charles F. Fawsett* and *Mr. William Brace* were on the brief, for appellants.[c]

Mr. Frank B. Kellogg and *Mr. James M. Beck*, Special Assistants to the Attorney General, for the United States.[a]

[118] MR. JUSTICE MCKENNA delivered the opinion of the court.

At the very beginning we encounter a quesion of jurisdiction. Are the orders of which the appellants complain appealable? The orders direct the appellants respectively to appear before Robert F. Taylor, special examiner in the case, at the time and place to be designated, and directs each of them to "answer each and every question put to them respectively by the counsel for the complainant, the United States of America," and to produce before such commissioner certain books, papers, records, documents, reports and contracts, "for the purpose of their respective examination in said cause, and for use in evidence of the complaint of the United States of America in said examination." And

[a] The foregoing syllabus copyrighted, 1906, by The Banks Law Publishing Co.

[b] The following paragraph comprises the syllabus to this case in the U. S. Supreme Court Reports, Book 50, p. 686. Copyrighted, 1906, by The Lawyers' Co-Operative Publishing Co.

[c] For abstracts of arguments see abstracts in *Nelson* v. *United States*, *ante*, p. 920, argued simultaneously herewith.

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it is ordered that the complainant's counsel shall have the right to inspect the said books, etc., and to introduce them or any of them in evidence; but, except as necessary for such purposes, the books, etc., to remain in the custody of the appellants.

A brief statement of the proceedings is all that is necessary. The United States by its proper officers brought suit in the Circuit Court of the United States for the District of Minnesota against the General Paper Company and twenty-three other corporations, defendants, under and pursuant to the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." It is alleged in the bill that the defendants, other than the General Paper Company and the Manufacturers' Paper Company, were engaged in the manufacture of manilla and fibre papers in active competition with one another, and that they entered into an agreement, combination and conspiracy to control, regulate and monopolize, not only the manufacture of news print, manilla, fibre and other papers, but also the distribution and shipment thereof among and throughout the Middle, Southern and Western States. The General Paper Company was the means employed to execute the combination and conspiracy. That company is a corporation organized, the bill alleges, by **[119]** the other defendants, under the laws of the State of Wisconsin, with a capital stock of $100,000, divided into one thousand shares, which were distributed among and owned and held by the other defendants, in proportions based upon the average daily output of the mills of each defendant. It is authorized to become at its principal place of business the sales agent of the products of the defendants' mills in the State of Wisconsin and elsewhere. Absolute power is conferred upon it to control and restrict the output of the mills, fix the price of their products, and determine to whom and the terms and conditions upon which such products shall be sold, into what States and places they shall be shipped, and what publishers and customers each mill shall supply.

The Manufacturers' Paper Company, it is alleged, is a New York corporation, with its principal place of business in

Chicago, and from about the year 1897 to 1902, acted as the sales agent of various manufacturers of paper for the sale of newsprint and other papers; that in 1902 it became a party to the combination and conspiracy alleged in the bill and agreed with the General Paper Company not to compete with it in certain territories.

It is admitted that, prior to the formation of the General Paper Company, the other defendants except the Manufacturers' Paper Company, were in active competition. The formation of the General Paper Company is also admitted and that it became, by contract with the defendants who manufacture paper, their selling agent. The defendants deny, however, a purpose to violate the act of July 2, 1890. The violation of that law is the issue in the case, and the bill prays an injunction against the defendants and their officers from doing the acts or executing the purpose charged against them.

In trial of the issue thus made the Circuit Court appointed Robert S. Taylor special examiner, with authority to hear and take testimony within and without the District of Minnesota, and made an order fixing the time to take the testimony for the United States the sixteenth day May, 1905, at the city of Mil- **[120]** waukee, State of Wisconsin. The order was duly served on the counsel of the respective parties. Thereupon the United States petitioned the Circuit Court for an order directing the clerk of the Circuit Court to issue a *subpœna duces tecum*. The subpœna was duly issued and served on the appellants as individuals and as officers of certain of the defendant companies. They appeared before the examiner in obedience to the subpœna, but, under the advice of counsel, they refused to permit the use of books or certain parts of them, and refused to answer certain questions put to them, the ground of this action being the immateriality and irrelevancy of the evidence sought to be adduced. The United States then presented a petition to the United States Circuit Court for the District of Wisconsin, which recited the issues in the case and the statement of the questions asked and the parts of the books and documents sought to be used. To this petition the appellants filed separate answers.

The answers may be regarded for our present purpose as

identical. They allege the immateriality of the evidence and that its materiality should be established as a condition precedent to its production; that they are officers of the companies, and as such officers, the custodians of the books, papers and documents, and that the same are of interest and value to the company in its business, and the company forbids their production; that the United States seeks evidence to convict the company and the individual appellants of violations of the act of July 2, 1890, to annul the contracts and agreements of the company, and subject it and the other appellants to the penalties prescribed in that act, and to compel the company and the other appellants to furnish evidence against themselves, contrary to the provisions of the Fifth Amendment to the Constitution of the United States, which provides that no person shall be a witness against himself; also contrary to the Fourth Amendment of the Constitution of the United States, which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. It is also said that the alleged acts of the **[121]** paper company complained of in the original petition of the United States and which the United States is endeavoring to establish would, if committed by the company, be violations of the laws of Wisconsin, and would subject the company to forfeiture of its charter and other penalties under said laws, and to compel it through its officers to produce the books and documents sought would be to compel it to furnish evidence tending to establish that it has violated the law of the State, and such purpose is contrary to the provisions of the Fourth and Fifth Amendments of the Constitution of the United States.

As we have said, the court entered orders requiring the appellants to answer the questions put to them and to produce the books, papers and documents requested. Appeals were allowed to this court. To justify the appeals, appellants contend that the orders of the Circuit Court constitute practically independent proceedings and amount to final judgments. To sustain the contention, *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, and *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, are cited.

Those cases rested on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences. In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and that is adequate for his protection without unduly impeding the progress of the case. Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court? Testimony, at times, must be taken out of court. In instances like those in the case at bar the officer who takes the testimony, having no power to **[122]** issue process, is given the aid of the clerk of a court of the United States; having no power to enforce obedience to the process or to command testimony, he is given the aid of the judge of the court whose clerk issued the process, and if there be disobedience of the process, or refusal to testify or to produce documents, such judge may "proceed to enforce obedience . . . or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court." Sections 868, 869, Revised Statutes. This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit. This is clearly pointed out by Circuit Judge Van Deventer, disallowing an appeal from an order like those under review, in the case of *Nelson* v. *United States* (No. 490), in error to the Circuit Court of the United States for the District of Minnesota. The learned judge said:

"I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to

punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the Government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

See also *Logan* v. *Penn. R. R. Co.*, 132 Pa. St. 403, 410.

This court having no jurisdiction, the appeals must be dismissed, and

It is so ordered.

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[808] UNITED STATES *v.* ARMOUR & CO. ET AL.

(District Court, N. D. Illinois. March 21, 1906.)

[142 Fed., 808.]

CRIMINAL LAW—IMMUNITY TO ONE FURNISHING EVIDENCE OR INFORMATION—STATUTES—CORPORATIONS.—A corporation, whether state or federal, cannot claim immunity from prosecution for violation of the interstate commerce or anti-trust laws of the United States because of testimony given or evidence produced by its officers or agents before the Interstate Commerce Commission or the Commissioner of Corporations, or in any proceeding, suit, or prosecution under such laws; the right to immunity on account of evidence so given in the several cases granted by Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173], and Acts Feb. 14, and Feb. 25, 1903, cc. 552, 755, 32 Stat. 827, 904 [U. S. Comp. St. Supp. 1905, pp. 68, 602], being limited to individuals who as witnesses give testimony or produce evidence.

[809] UNITED STATES—EXECUTIVE DEPARTMENTS—COMMERCE AND LABOR—CREATION—STATUTES—CONSTRUCTION.—The primary purpose of Commerce and Labor Act February 14, 1903, c. 552, 32 Stat. 825 [U. S. Comp. St. Supp. 1905, p. 63], was legislative, to enable Congress by information secured through the work of officers charged with the execution of that law to pass such remedial legislation as might be found necessary, and the act must be construed in view of such purpose.

CRIMINAL LAW—IMMUNITY TO ONE FURNISHING EVIDENCE OR INFORMATION—STATUTES—HEARINGS BEFORE COMMISSIONER OF CORPORA-

Syllabus.

TIONS.—Section 6 of the act creating the Department of Commerce and Labor (Act Feb. 14, 1903, c. 552, 32 Stat. 827 [U. S. Comp. St. Supp. 1905, p. 68]), defining the powers and duties of the Commissioner of Corporations, requiring him to make investigation into the organization, conduct, and management of the business of all corporations or combinations engaged in interstate or foreign commerce, other than common carriers, and giving him the same powers in that respect as is conferred on the Interstate Commerce Commission with respect to carriers, including the power to subpœna and compel the attendance of witnesses, and to administer oaths and require the production of documentary evidence, contemplates that he shall proceed by private hearings; and, having such powers, a person who appears before him on his demand or by his request, and gives testimony or produces documents, although not sworn, is entitled to the same privileges and immunities as though his attendance was compelled by subpœna and his testimony given under oath.

SAME.—Act Feb. 14, 1903, c. 552, creating the Department of Commerce and Labor (32 Stat. 827 [U. S. Comp. St. Supp. 1905, p. 68]) by section 6 requires the Commissioner of Corporations to investigate all corporations and combinations engaged in interstate or foreign commerce, except common carriers, and provides that "all the requirements, obligations, liabilities, and immunities imposed or conferred by said 'Act to regulate commerce' and by 'An act in relation to testimony before the Interstate Commerce Commission' * * * shall also apply to all persons who may be subpœnaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section." The act last mentioned (Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173]), which is supplementary to the interstate commerce act, provides that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise before said commission or in obedience to its subpœna * * * or in any such case or proceeding." Appropriation Act Feb. 25, 1903, c. 755, 32 Stat. 904 [U. S. Comp. St. Supp. 1905, p. 602], making provision for the enforcement of the interstate commerce and anti-trust laws, contains a similar immunity provision relating to persons giving testimony or producing evidence in any proceeding, suit, or prosecution under said acts. By a resolution of the House of Representatives of March 7, 1904, the Commissioner of Corporations was directed to investigate the so-called "Beef Trust," and while proceeding thereunder certain persons by his request, but without being subpœnaed or sworn, furnished testimony and documentary evidence on which he based his report. *Held*, that the immunity provisions of the statutes set out and applicable to such investigation, to be valid, must be construed as being as broad as the privilege given by the fifth constitutional

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amendment, and that the persons so furnishing evidence could not be prosecuted for violation of the anti-trust law, on account of the transactions, matters, or things to which such evidence related.[a]

Criminal Prosecution. On motion by defendants and cross-motion by the United States to direct a verdict on trial of pleas in bar.

On the 1st day of July, 1905, an indictment was returned by the grand jury of the Northern division of the Northern district of Illinois against the de- [810] fendants, charging them with conspiring in restraint of trade and commerce among the states and with foreign nations, and with an attempt to monopolize such trade and commerce, in violation of the Sherman anti-trust act. Pleas in abatement were filed attacking the organization of the grand jury, and the procedure in general, from the time the grand jury was impaneled until it returned the indictment. A demurrer was interposed to these pleas, and on argument was sustained as to all of them. A demurrer was then interposed to the indictment itself, and after full argument it was overruled as to the conspiracy counts and sustained as to the counts charging monopoly. Later, on the 23d day of October, 1905, special pleas in bar were filed, setting up that by virtue of a resolution of the House of Representatives, adopted March 7, 1904, and known as the "Martin Resolution," and also by virtue of the law creating the Bureau of Corporations, James R. Garfield, Commissioner of Corporations, had made an investigation into the business of the defendants and into the matters and things alleged in the indictment, and that the defendants upon the lawful requirement of the Commissioner of Corporations had furnished evidence, documentary and otherwise, of and concerning the matters charged in the indictment. The pleas are numerous, and are varied in form, but the above is the substance of them. Replications were filed by the United States, traversing the averments of the pleas. A jury was impaneled, and the taking of testimony was commenced on the 29th day of January, 1906.

The resolution of the House of Representatives was as follows: "Resolved, that the Secretary of Commerce and Labor be, and he is hereby, requested to investigate the causes of the low prices of beef cattle in the United States since July first, nineteen hundred and three, and the unusually large margins between the prices of beef cattle and the selling prices of fresh beef, and whether the said conditions have resulted in whole or in part from any contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several states and territories or with foreign countries; also, whether said prices have been controlled in whole or in part by any corporation, joint stock company, or corporate combination engaged in commerce among the several states or with foreign nations; and if so, to investigate the organization, capitalization, profits, conduct, and management of the business of such corporations, companies, and corporate combinations, and to make early report of his findings according to law." For the act establishing the Department of Commerce and Labor, passed February 14, 1903, see U. S. Comp. St. Supp. 1905, p. 63 (32 Stat. 825, c. 552). For the interstate commerce act and amendments thereto, portions of which are adopted and made part of the said act of commerce and

[a] Syllabus and statement of the case copyrighted, 1906, by West Publishing Co.

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labor, see Fed. St. Ann. vol. 3, p. 809 et seq. (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]; Act March 2, 1889, c. 382, 25 Stat. 861 [U. S. Comp. St. 1901, p. 3168]). For the act in relation to testimony, etc., being an act supplemental to the interstate commerce acts, passed February 11, 1893, see Fed. St. Ann. vol. 3, p. 855 (27 Stat. L. 443, c. 83 [U. S. Comp. St. 1901, p. 3173]). For the Sherman anti-trust act, being the act under which the indictment was returned, passed July 2, 1890, see Fed. St. Ann. vol. 7, p. 336 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]). For the act appropriating $500,000 for enforcement of the anti-trust and interstate commerce laws, etc., passed February 25, 1903, see 32 Stat. 904 [U. S. Comp. St. Supp. 1905, p. 602].

The resolution of the House of Representatives, set forth above, which is known as the "Martin Resolution," was passed March 7, 1904. Its passage, and the terms thereof, and the fact that the Commissioner of Corporations, Mr. James R. Garfield, was going to Chicago to make the investigation of their business thereby called for, were known to defendants from the public press. Their respective counsel thereupon investigated the law as to the powers and authority of the Commissioner of Corporations, under section 6 of the act creating that bureau (Act Feb. 14, 1903, c. 552, 32 Stat. 827 [U. S. Comp. St. Supp. 1905, p. 68]), to make such investigation and to compel the testimony of witnesses and the production of the books and records of the defendants for the purposes thereof, and advised defendants with respect thereto. Afterwards, on April 13, 1904, the Commissioner of Corporations arrived in Chicago for that purpose. He called upon Charles G. Dawes, president of the Central Trust Company of Chicago, and told him he had come **[811]** to Chicago to meet representatives of the packers and discuss with them this investigation, and stated his purpose in coming to Chicago to meet the representatives of the packing industries, and asked Mr. Dawes if he would introduce him to certain of the defendant packers and bring them together. He also called upon James H. Eckels, president of the Commercial National Bank of Chicago, and made a similar request. Accordingly Mr. Dawes arranged, and the Commissioner on that day had, an interview with Louis C. Krauthoff, general counsel of the Armour companies, who was authorized by his clients to meet the Commissioner, at which interview Mr. McRoberts, assistant treasurer of the Armour companies, and Mr. Dawes, were present; and Mr. Eckels in like manner arranged, and the Commissioner later on the same day held, separate meetings and interviews with Edward Swift, vice president of Swift & Co., with Edward Morris, vice president of the Fairbank Canning Company, and with Jesse P. Lyman, president of the National Packing Company.

At these interviews Mr. Garfield informed the defendants and their representatives whom he met that he was engaged in making this investigation as Commissioner of Corporations. He called to their attention the law creating his bureau and the powers thereby vested in him, and the Martin resolution of the House of Representatives, and informed them that he had come to Chicago to get from the defendants the information possessed by them, and access to their books and records, and called upon them to give him and his authorized agents such information and access. The Commissioner testified, as a witness for the government, that he had substantially the same interview with each of these persons; the interviews with Mr. Swift, Mr. Morris, and Mr. Lyman being, however, briefer than that with Mr. Krauthoff.

The substance of the interviews on April 13, 1904, were stated by the United States Attorney in his argument to the court upon these

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motions, as follows: "The Commissioner secured an introduction to them through their banker and through their mutual friend, Mr. Dawes and Mr. Eckels. He took the matter up with them as a business proposition, and said to them: 'I have come here now as Commissioner, and I wish to make an investigation, and I want you to cooperate with me. I want you to turn over this evidence. You know what my powers are, what my duties are. You know all about it.' 'Yes,' Mr. Krauthoff says, 'we are thoroughly posted on that.' He took or started to take the law from his pocket and hand it to them. Mr. Krauthoff says: 'We understand all about the law. * * * We know exactly what our rights are and we know what your rights are. * * * You need not discuss that Mr. Garfield. * * * Let us know what you want here.' Mr. Garfield said to him, and to the other gentlemen: 'I want to make an investigation. That means that I must go to your books and papers and find out what you have, and in order to make it thorough I must verify what is given to me by the books themselves.' He called for a complete investigation and examination of their affairs."

In these interviews, Mr. Garfield called their attention to the Martin resolution calling for the investigation, as well as to the act of Congress creating his bureau and the powers thereby conferred upon him, and produced the law, intending thereby to show what the powers of the bureau were, but was informed that the defendants were aware of the provisions of the law. He stated in the interview that by this Martin resolution the House of Representatives had indicated certain specific lines of inquiry that it desired made, and in connection with the general investigation he was taking up the Martin resolution in detail; and he stated that without the information to be obtained from the defendants and from their books and records his report would be incomplete. He stated that detective methods would not be used, but said he came and would come directly to headquarters for such information as he wished, and for that purpose had met these men. Mr. Krauthoff stated to him that the Department of Justice of the government had obtained an injunction against the defendant packers, enjoining them from violation of the Sherman anti-trust act; and Mr. Garfield testified that he stated in that connection that his department and bureau were not connected with the Department of Justice; that each department was operating separately, and that the work of the Bureau of Corporations was within its own de- **[812]** partment; that he was not acting with or for the Department of Justice. He testified that he stated practically to the effect that the purpose of Congress in creating his department was not to disclose violations of law or to investigate prosecutions, or to act in connection with any other department of the government, but was for the purpose of developing facts, so that they might be reported to the President, and by him to Congress, for legislative purposes. Mr. Garfield testified that, in stating to Mr. Krauthoff that his department had no connection or co-operation with the Department of Justice, his impression was that that question had to do with whether or not he was acting for the Department of Justice in the collection of information, or whether he was to turn it over to the Department of Justice, and that the statement as to the injunction and as to his connection with the Department of Justice had to do with that subject-matter; that he did not recall saying in this interview (as testified to for defendants) that, if it were known that his department was used in connection with or in assistance of the Department of Justice, it would be the destruction of the usefulness of his department, but that he had stated that, or words to that effect, in his official reports that the main object for which section 6 of the

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act creating the Department of Commerce and Labor was enacted was to report to Congress for legislative purposes; that he stated in the interview with Krauthoff, in connection with his statement as to the purposes of the bureau in the matter of this investigation, that he had conferences with the President and the Secretary of the Department, and spoke with their authority and consent.

The Commissioner testified that he stated to Mr. Krauthoff it would be his duty, under the law, to report the data gathered by him to the President as he might require, who, under the terms of the law, could make such parts public as he should direct; but that he appreciated that there were certain portions of the business of the defendants (private accounts and entries of their profit and loss accounts and of their detailed costs—trade secrets—which they would desire their competitors not to know) that were not the proper subject of public inquiry and should not be made public, and that such data would not be reported even to the President, and that this policy was understood and accepted by the Secretary of the Department, Mr. Cortelyou, and by the President; that Mr. Krauthoff asked him what use the President would make of the report made to him, and he told him as to that he could not answer. He could simply say the President would do what was right. He also testified that he had previously read a pamphlet of Mr. Randolph (being an opinion by Carmen F. Randolph on the status and powers of the Bureau of Corporations, organized under section 6 of the act of Congress creating the Department of Commerce and Labor), and had in mind, in talking with Mr. Krauthoff, that there was a line of privacy which, under the Constitution, Congress could not invade, and that the question as to his investigations invading that line was a matter for discussion between them; that he stated that, on the other hand, there was a great deal of material of a purely statistical character, as to which there would be no question that it would be available for the purposes of the investigation, and that as between those two classes of information or evidence (i. e., that to which the government would be clearly entitled and that to which it would not be entitled) a great many subjects might come up during the investigation as to which there would be question; that he said to the effect that the information in the possession of the defendant packers as to their business would divide itself into three classes, viz., that to which the government was clearly entitled in and for the purposes of said investigation, that to which it was clearly not entitled, and a third class as to which there might be doubt or question; that it was not his purpose to act arbitrarily in connection with those matters; that all matters concerning which inquiry might be made by his agents, and concerning which the packers had any doubt, would be taken up for conference, for determination as to whether or not the question was proper and whether or not the information should be given; that as to all those matters they would be referred to him for conference with the packers; that the determination would result from the conference.

Krauthoff, McRoberts and Dawes testified, in effect, that the statement of Mr. Garfield as to his connection with the Department of Justice was in re- [813] sponse to the inquiry of Mr. Krauthoff as to whether any of the information that he might obtain from the defendants or their books would be used by the Department of Justice or for its purposes and against the defendants, and that Mr. Garfield said it would not be used for that purpose, and that any such use would be guarded against, and that such information would be used solely for the purposes of the Department of Commerce and Labor, and that the defendants were protected in that respect by the law as well as by the policy of the department. These witnesses also testified that the

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Commissioner said (and a number of other witnesses for defendants testified that he said to them) that he had the right and power to get this information by a hearing in the course of which the books of the defendants would have to be brought to him, but the information would be thereby obtained in an indirect and incomplete way. The evidence was that in such interviews Mr. Garfield presented a plan by which he said he desired to carry on the investigation in a way which would be deemed more efficient and thorough and of less inconvenience and interruption to the business of the defendants. He said that he wanted to get at the actual facts and in the best way, and for that purpose desired to get access to the books of the defendants and to get their co-operation for the examination thereof in their own offices, which was the plan he proposed. He said that he could not attempt to do the work personally, but would have agents, men duly accredited, officers of the Bureau of Corporations, who were expert in making an investigation of this kind, to do the work; that he could not accept as final any statement made by the defendants from their books, but would require that the agents of the bureau go to the books and verify those statements, or any statements that might be made from the books of original entry themselves, for the reason that he desired, when his report was completed, to be able to say that the agents of the bureau had examined the books of the original entry. And a large number of witnesses for the defendants testified that in the interviews with the Commissioner, as well as with his agents upon the ground, the Commissioner and his agents referred to and asserted the power of the Commissioner, under the law, to compel the disclosures and testimony of the defendants and the production of their books and records.

At the interviews of April 13, 1904, between Mr. Garfield and the defendants, or their representatives, the defendants and representatives of defendants who took part in said interviews stated to Mr. Garfield that they would take up the matter with the defendants and report to him their conclusion. This was done, and the defendants thereupon consulted their respective counsel as to their legal duty and obligation to comply with the call of the Commissioner of Corporations so made for the disclosure as to their business and for the production of their books and records to the Commissioner and his agents, and were advised by their counsel with respect thereto, and acting upon such advice they reported to the Commissioner that they would comply therewith, and in furnishing information and access to their books and records they acted in accordance with that advice. On the 14th or 15th of April, 1904, the Commissioner brought to the offices of the respective defendants at the Union Stockyards in Chicago, Mr. Durand, a special agent of the Bureau of Corporations, and introduced him to certain of the defendants, officers of the defendant corporations, and stated that Mr. Durand would be in charge of the investigation in Chicago with the authority of the Commissioner to represent him. Thereupon, a few days afterwards, Mr. Durand, with the authority of the Commissioner, presented to the officers of Armour & Co., Swift & Co., and the Fairbank Canning Company written memoranda of the information which he desired from the defendants and from their books and records at that time. These memoranda were first presented to officers of Armour & Co. and to officers of Swift & Co., and were taken up, respectively, by the officers of these companies among themselves and with Mr. Durand, and by an officer of Armour & Co. with Mr. Garfield at Washington, upon certain questions as to the scope of the inquiries and as to whether certain specific parts of the information called for was within and pertinent to the investigation; and, these questions being deter-

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mined, special agents of the Bureau of Corporations were given access to the books and records of those companies containing such information, and a few days later, upon [814] presentation of similar memoranda to the officers of the Fairbank Canning Company, the agents of the bureau also commenced the investigation of the books and records of that company and were given like access thereto. A little later Mr. Robertson, a special agent of the bureau, by the direction of the Commissioner, went to Omaha and applied to the defendant officer of the Cudahy Packing Company and called for access to the books and records of that company for similar information, and this call or request was complied with by Mr. Cudahy; and also by like direction and authority said Robertson went to the office of the Armour Packing Company in Kansas City, and made a similar call or request of that company, and this call was complied with, and access to the books and records of that company given by the direction and authority of Mr. Charles W. Armour, president of that company and vice president of Armour & Co. The investigation continued in the offices of the defendants at Chicago until January 28, 1905, and from time to time at intervals afterwards during the spring and early summer of 1905. In the meantime other communications in writing, signed by the Commissioner, for additional information according to memoranda thereof accompanying the letters, were presented to the defendants, and (after the disposition of objections by certain of the defendants to portions of the information) the information was furnished by the defendants so far as required by the Commissioner. This information was of the facts of costs, expenses, selling prices, and proceeds, and other facts and data from which the Commissioner and his experts were enabled to determine the costs, expenses, selling prices, and margin of profits of the respective defendants in the dressed-beef business, and also information as to the organization, conduct, and management of their business, and much information as to the other branches and departments of their business.

The agents of the bureau also investigated the books of divers subsidiary corporations of the National Packing Company, in compliance with the interview and call of the Commissioner of Corporations therefor with and upon the president of that company, Mr. Lyman, on April 13, 1904, and by and with the authority and direction of the board of directors of that company acting under advice of counsel; and the counsel of that company, at the request of the Commissioner addressed to that company, made a statement of information as to the organization of that company. On January 28, 1905, the Commissioner addressed communications to Armour & Co., Swift & Co., and the Fairbank Canning Company (or Morris & Co., the owners of the Fairbank Canning Company), in which he requested further information "which can best be secured in the form of a written statement to be drawn up on the basis of oral interrogatories of an informal character," and stated that Special Examiner Durand was authorized to address to the proper representatives of those companies questions covering the subjects mentioned in the letter, which were: History, ownership, and organization of the National Packing Company; ownership of the securities of the defendant companies whose representatives should be examined; relation of those companies and stockholders to subsidiary corporations and other corporations connected with the packing business or cattle industry; methods of competition in the purchase of cattle and the sale of meat products; control of the large packers over the prices of live stock and of meat products; relation of the prices of cattle and the prices of beef, and the causes affecting them; cost of killing cattle and of handling the products thereof; capital stock, bonds, total sales, earnings, and dividends of

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the companies whose representatives should be examined; names of private car lines controlled by those companies or their stockholders; the number of cars owned or operated, the mileage made and the cost of operation. And the letter of the Commissioner stated that statements in reply to such interrogatories would be taken down by a stenographer and recast in systematic form by Mr. Durand and submitted to the representatives of the defendant companies for revision, signature, and authentication by oath or affirmation; and if it should then be found necessary to supplement the affidavit in any way Mr. Durand would address inquiries to other representatives in the same manner. Upon Mr. Durand taking up this matter separately with representatives of the different companies addressed, Mr. Durand testified that counsel for one of the companies, to whom certain of the questions to that company were referred, declined to answer certain of those questions [815] under oath or to advise his clients so to do; the evidence as to such refusal and as to the extent and scope thereof and the reasons therefor being conflicting. This being reported by Mr. Durand to the Commissioner, Mr. Durand was instructed by the Commissioner to take all such statements without oath, and he did accordingly examine divers of the defendant officers of the companies orally, but without administering or requiring any oath, and took down and transcribed and submitted to them the statement of their answers for revision, and these statements, being revised and approved, were taken and transmitted by him to the Commissioner of Corporations.

On February 28, 1905, the Commissioner of Corporations, having reached the results of his investigation for the purpose of a report thereof as required by the Martin resolution, came to Chicago with Mr. Durand and called upon the defendants to produce their books showing their profit and loss accounts and the results of their business, for the purpose of comparing therewith and checking the computation of the profits and results of their business at which he and his expert statisticians had arrived. This was complied with by the defendants, and the books and records showing the profits of their business and of the different departments thereof were produced to and examined by the Commissioner and Mr. Durand. Thereupon the Commissioner completed and submitted his report of March 3, 1905, entitled "Report of the Commissioner of Corporations on the Beef Industry," which was transmitted by the President to Congress on that day and published, and is referred to in and made a part of the special pleas herein. The report is accompanied by the letter of the Commissioner stating that it is a report made under the direction of the Secretary of Commerce and Labor, "and upon that portion of the resolution of the House of Representatives adopted March 7, 1904, having to do with the prices of cattle and dressed beef, the margins between said prices, and the organization, conduct, and profits of the corporations engaged in the beef packing industry." The evidence showed that the printed report of the Commissioner of Corporations was used by the United States Attorney before the grand jury which found the indictment herein, in examining a witness as to certain of the subsidiary companies of the National Packing Company.

Commissioner Garfield also testified that certain matter containing tables compiled by Special Examiner Durand, under his direction, from information obtained from the books and records of the defendants in the course of such investigation, showing the numbers of cattle, hogs, and sheep from time to time purchased and killed at the various stockyards by the different defendant companies, which made made up an additional chapter of his report upon the evidence of a combination between the packers, but which was not included in his

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published report, were on October 17, 1905, by the direction of the President, turned over by him in his office to Mr. Pagin, an assistant to the Attorney General, who came to the office of the Commissioner by appointment through the Attorney General, and at his direction, to be taken by Mr. Pagin to Chicago for use in preparation for the trial of the defendants upon this indictment; and that Mr. Durand was sent by him to Chicago to explain to the United States Attorney at Chicago these tables. The evidence showed that these tables were brought to Chicago by Mr. Pagin and turned over to the United States Attorney; Mr. Pagin leaving Washington on the evening of October 17th. Mr. Garfield testified that compilations from these tables, showing the uniformity in the percentages of purchases of live stock by the different defendant packing companies, and the import thereof as tending to show combination among the packers in the purchases of live stock, was the subject of discussion between him and Mr. Meeker, one of the defendants, at an interview in the office of the Commissioner in December, 1904, at which Mr. Meeker was asked by the Commissioner with respect thereto and answered the same. Commissioner Garfield also testified that he had had conferences with the Solicitor General and Attorney General in the summer of 1904 regarding this investigation and the powers of the bureau, and that the matter of turning over to the Department of Justice the information secured in progress of the investigation was involved in the conference with the Attorney General in September, 1904. Mr. Garfield testified that the special agents of the Bureau of Corporations, engaged in obtaining information from the defendants and in the examination of the books and records of the defend- **[816]** ants, were also engaged in obtaining information respecting the matters covered by the investigation from outside sources, and made reports to the bureau, and certain of them included in their reports the names of persons who might be witnesses upon the subject-matter of a combination between the packers.

Under date of August 16, 1904, the United States Attorney at Chicago wrote the Attorney General with reference to obtaining testimony in the "Beef Trust Case," and suggested that he ask the Commissioner of Corporations to give the United States Attorney such additional information as he had upon the subject and request his employés then in Chicago to call upon him and furnish such information as they might have. This letter was communicated to the Commissioner of Corporations, and under date of August 22, 1904, the Commissioner transmitted to the acting Attorney General a memorandum of the names of certain persons from whom the United States Attorney "may be able to obtain statements regarding the allegations that the injunction in the Beef Trust Case is being violated." This memorandum contained the names of some 30 persons and firms. Mr. Garfield testified that these names were obtained by his agents from sources outside of the defendants, but that he did not know personally where his agents got the names, but that it was made up from files in his office; and the testimony of a witness on behalf of defendants, an employé of Swift & Co. who furnished information to the agents of the Bureau of Corporations at their request therefor and upon the direction of his employer, was that four of the names upon this list were given by him to Mr. Carroll, one of the special agents of the Bureau of Corporations engaged in such investigation, at the request of Mr. Carroll. Mr. Garfield also testified that in January, 1905, he turned over to the United States Attorney for said district a similar list of names of persons as witnesses who claimed they knew of alleged facts regarding a combination among the defendants, which list was obtained in the same manner from the agents of the Bureau.

Upon the conclusion of the testimony a motion was entered on behalf of the defendants that the court direct the jury peremptorily to find the issues for the defendants. A cross-motion was also entered on behalf of the United States that the court direct a verdict for the government.

Charge to the Jury.

William H. Moody, Attorney General, and *Charles B. Morrison*, United States Attorney, and Assistant United States Attorneys *Hanchett* and *Godman*.

John S. Miller and *A. R. Urion*, for defendants Armour & Co., Armour Packing Co., J. Ogden Armour, Patrick A. Valentine, Arthur Meeker, Thomas J. Connors, Samuel McRoberts, and Charles W. Armour.

William J. Haynes and *Louis C. Ehle*, for defendants Swift & Co., Louis F. Swift, Edward F. Swift, Charles H. Swift, Lawrence A. Carton, D. Edwin Hartwell, Albert H. Veeder, Robert C. McManus, and Arthur F. Evans.

John C. Cowin, *Brode Davis*, and *Moritz Rosenthal*, for defendants Cudahy Packing Co. and Edward A. Cudahy.

George W. Brown and *M. W. Borders*, for defendants Fairbank Canning Co., Edward Morris, and Ira N. Morris.

HUMPHREY, District Judge (orally).

A number of acts of Congress are involved in the case, and have been discussed upon the arguments on the motion and cross-motion to direct a verdict—the Cullom act, the original interstate commerce act of February 4, 1887 (24 Stat. 379, c. 104), and amendments of March 2, 1889 (25 Stat. 855, c. 382), and February 10, 1891 (26 Stat. 743, c. 128, [U. S. Comp. St. 1901, p. 3154]); the act with regard to testimony of February 11, 1893 (27 Stat. 443, c. 83 [U. S. Comp. 1901, p. 3173]), being supplemental to the Cullom act; the act establishing the Department of **[817]** Commerce and Labor of 1903 (Act Feb. 14, 1903, c. 552, 32 Stat. 825 [U. S. Comp. St. Supp. 1905, p. 63]), and by its terms adopting certain portions of the two first-named acts; the Sherman act (the anti-trust law of 1890); and Appropriation Act Feb. 25, 1903, c. 755, 32 Stat. 904 [U. S. Comp. St. Supp. 1905, p. 602]. The defendants are indicted under the Sherman act

(the anti-trust act), charged with a conspiracy in restraint of trade. They have pleaded that as to them that act is suspended and inoperative and does not exist, because they were compelled to furnish evidence of and concerning the matters contained in the indictment, and that under the law such furnishing of evidence gives them immunity. The question of guilt or innocence is not involved.

As to the corporations, the artificial persons named as defendants, the pleas cannot avail. I regard that contention as having been met and overruled by the late decision of the Supreme Court in the case of *Edwin F. Hale* v. *William Henkel*, United States Marshal, 26 Sup. Ct. 370, 50 L. Ed. ——, decided March 12, 1906, and not yet officially reported. In the typewritten decision of that case forwarded to the Attorney General and by him presented to the court I find the following language:

"But it is further insisted that, while the immunity statute may protect individual witnesses, it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the fifth amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the meaning of this amendment really does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employés. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself, and, if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman anti-trust act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employés, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the Legislature to declare these combinations unlawful, if the judicial power may close the door of access to every available source of information upon the subject? * * *

"If, whenever an officer or employé of a corporation were summoned before a grand jury as a witness, he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. But, conceding that the witness was an officer of the corporation under investigation and that he was entitled to assert the rights of the corporation with respect

to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business [818] or to open his doors to an investigation so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law and in accordance with the Constitution. Among his rights are a refusal to incriminate himself and the immunity of himself and his property from arrest and seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

"It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchises from the Legislature of that state; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations."

I regard this as clearly distinguishing between the corporation and the individual who is an officer of the corporation. I cannot understand the opinion in any other way except as

holding that there can be no immunity for the corporation, but that the officer or agent of the corporation, if the facts bring him within the purview of the law, may plead such immunity. This disposes of the corporations.

Now, as to the individual defendants: There is a provision in the commerce and labor act providing for immunity, and it refers for the immunity to the Cullom act and the act supplemental thereto. The commerce and labor act reads:

"All the requirements, obligations, liabilities, and immunities imposed or conferred by said 'Act to regulate commerce,' and by 'An act in relation to testimony before the Interstate Commerce Commission,' and so forth, approved February eleventh, eighteen hundred and ninety-three, supplemental to said 'Act to regulate commerce,' shall also apply to all persons who may be subpœnaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section." Act Feb. 14, 1903, c. 552, § 6, 32 Stat. 827 [U. S. Comp. St. Supp. 1905, p. 68].

[819] The act supplementary to the Cullom act has an immunity clause in the following words:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding." Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173].

Appropriation Act Feb. 25, 1903, c. 755, § 1, 32 Stat. 904 [U. S. Comp. St. Supp. 1905, p. 602], for the enforcement of the Cullom act, the Sherman act, and the Wilson act, exempts from prosecution persons giving testimony in the following language:

"Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of any transaction, matter or thing concerning which he may testify, or produce evidence documentary or otherwise, in any proceeding, suit or prosecution under said act."

It is necessary to look into the purposes of Congress in passing the commerce and labor act in order that the court may determine what construction will best carry out the legislative intent. It is the duty of the court in construing an act to give it such construction as will carry out the legislative purpose expressed in the act itself. It is clear to my mind that the primary purpose of the commerce and labor act was to enable Congress, by information secured through the work of officers charged with the execution of that law, to pass such remedial legislation as might be found necessary.

I regard this as the primary purpose, the chief purpose, a legislative purpose. It is clear from the act itself that, if there be a secondary purpose, the primary purpose, the legislative purpose, was vastly more important in the mind of Congress than any other. Congress wanted to know how the laws with regard to corporations were operating, how they were being evaded, how to strengthen them, in case they needed strengthening. In my judgment, the purpose of every one of these laws, the high aim of Congress in passing them, was a determined purpose that the corporation, the creature of the law, should not be allowed to grow beyond the law. The commerce and labor act is the repeated attempt of Congress to bring to its aid such information as would enable Congress to do whatever might be necessary for the control of corporations. Perhaps a secondary purpose was the punishment of offenders. It is perfectly clear to my mind that this was not the main purpose, because there were abundant laws already on the statute books for that, and a great department skilled in the work of punishing offenders. And still I am not able to say but that a secondary purpose of the commerce and labor act might have been the punishment of offenders. And I say this because it is not inconsistent with the act, or with the declared primary purpose, that this should be done so far as the corporation itself is concerned. This is made pretty clear by the late decision in the Hale Case. If the statute is to be so construed as to carry out the legislative purpose, viz., secure information for the use of Congress, how can that best be done?

The statute itself surrounds the Commissioner with no forms, puts no legislative limits upon his methods, gives him unusual latitude as **[820]** to methods. It does not require public hearings. I am of opinion that the act contemplated that he should proceed by private hearings, because it provides in express terms that the President shall decide how much of his investigation shall become public. If the Commissioner should have public hearings, the President would have no chance to perform that portion of the work which the act assigns to him. I therefore conclude that the legislative mind intended that the Commissioner should proceed

by private hearings. The powers of the Commissioner of Corporations are defined in section 6 of the act of February 14, 1903 (32 Stat. 827, c. 552 [U. S. Comp. St. Supp. 1905, p. 68]), and are as follows:

"The said Commissioner shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company or corporate combination engaged in commerce among the several States and with foreign nations excepting common carriers subject to 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public.

"In order to accomplish the purposes declared in the foregoing part of this section, the said Commissioner shall have and exercise the same power and authority in respect to corporations, joint stock companies and combinations subject to the provisions hereof, as is conferred on the Interstate Commerce Commission in said 'Act to regulate commerce' and the amendments thereto in respect to common carriers so far as the same may be applicable, including the right to subpœna and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said 'Act to regulate commerce' and by 'An act in relation to testimony before the Interstate Commerce Commission,' and so forth, approved February eleventh, eighteen hundred and ninety-three, supplemental to said 'Act to regulate commerce,' shall also apply to all persons who may be subpœnaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section.

"It shall also be the province and duty of said bureau, under the direction of the Secretary of Commerce and Labor, to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law."

It will be observed that this section by reference gives to the Commissioner of Corporations the same powers with respect to other interstate corporations as the Cullom act and its amendments give to the Interstate Commerce Commission over common carriers so far as the same shall be applicable. These additional powers are contained in section 12 of the amended Cullom act (Act Feb. 4, 1887, c. 104, 24 Stat. 383 [U. S. Comp. St. 1901, p. 3162]), and are as follows:

"Sec. 12. (As amended March 2, 1889 [25 Stat. 858, c. 382, § 3], and February 10, 1891 [26 Stat. 743, c. 128].) That the Commission

hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right [821] to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Section 6 of the commerce and labor act also by its terms provides that persons testifying or producing evidence before the Commissioner shall be entitled to the immunities conferred by the act in relation to testimony before the Interstate Commerce Commission, of February 11, 1893, called the "Supplemental Act." This act contains the following provision:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he may testify, or produce evidence documentary or otherwise before said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding."

All of these immunity acts are relied upon by the individual defendants, and, while expressed in slightly varying lan-

guage, they all mean the same thing, and each of them is a substitute for the privilege contained in that clause of the fifth amendment to the Constitution, reading:

"Nor shall any person be compelled in any criminal case to be a witness against himself."

This fifth amendment deals with one of the most cherished rights of the American citizen, and has been construed by the courts to mean that the witness shall have the right to remain silent when questioned upon any subject where the answer would tend to incriminate him. Congress by the immunity laws in question, and by each of them, has taken away the privilege contained in the amendment, and it is [822] conceded in argument that this cannot be done without giving to the citizen by way of immunity something as broad and valuable as the privilege thus destroyed. We are not without authority on this question. By a previous act, Congress undertook to take away the constitutional privilege by giving the citizen an equivalent, and the Supreme Court held in the case of *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, that the substitute so given was not an equivalent. Then, at various times, the immunity acts in question were passed by Congress with full knowledge that in furnishing a substitute for this great right of the citizen, it must give something as broad as the privilege taken away. It might be broader, but it could not be narrower.

Now, in my judgment, the immunity law is broader than the privilege given by the fifth amendment, which the act was intended to substitute. The privilege of the amendment permits a refusal to answer. The act wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act gives immunity for evidence of or concerning the matter covered by the indictment, and the evidence need not be self-incriminating. The privilege must be personally claimed by the witness at the time. The immunity flows to the witness by action of law and without any claim on his part. *Brown* v. *Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; *Hale* v. *Henkel* (recently decided) 26 Sup. Ct. 370, 50 L. Ed. —; *State* v. *Quarles*, 13 Ark. 307, quoted in 142 U. S. 567, 12 Sup. Ct. 199 (35 L. Ed. 1110); *People* v. *Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; *Brown* v. *Walker*, approved in *Lamson* v. *Boyden*, 160 Ill. 613, 620, 621, 43 N. E. 781; *People* v. *Butler Street Foundry*, 201 Ill. 236, 248, 66 N. E. 349.

I am further of opinion that the immunity given by the act must be as broad as the liabilities imposed by the act. The act calls upon the citizen to answer any "lawful requirement" of the Commissioner. "Require" means to ask of right and by authority. Webster's Dictionary. *Tenn. Coal Co.* v. *Waller* (C. C.) 37 Fed. 545, 547. Anything is a requirement by a public officer which brings home to the person called upon that officer is there officially and desires compliance. "Demand" and "require" are synonyms. *Miller* v. *Davis*, 88 Me. 454, 34 Atl. 265. The citizen may be punished for refusal to answer such lawful requirement. I am of opinion that when the Commissioner of Corporations, who has power to compel, makes his demand, it is the duty of the witness to obey.

The contention has been made that in order to get immunity the citizen shall wait until the compulsion becomes irresistible. That is the effect of the government contention. I am not able to bring my mind to accept that doctrine. If I am right in saying that immunity flows from the law, without any claim on the part of the defendant—and at different times that has been conceded here in argument—then no act of any kind on his part which amounts to a claim of immunity, which amounts to setting up a claim of immunity, is demanded by the law. The law never puts a premium on contumacy. A person does not become a favored citizen by resistance to a lawful [823] requirement. On the contrary, the policy of the law favors the willing giving of evidence whenever an officer entitled to make a demand makes it upon a citizen who has no right to refuse. And it would be absurd and un-American to favor the citizen who resists and places obstacles in the way of the government as against the citizen who, with a full knowledge of the law, obeys without resistance the demand of an officer who has the legal right to make the demand for something which the citizen has no legal right to refuse. This, then, is the proposi-

tion to which we are led: When an officer, who has a legal right to make a demand, makes such demand upon a citizen, who has no legal right to refuse, and that citizen answers under such conditions, he answers under compulsion of the law.

Is that the situation here? Was there compulsion in this case, or were the defendants volunteers? There is so little dispute here about the facts that perhaps it is not necessary to discuss them at all. I am of opinion that the conference between Mr. Garfield, Mr. Krauthoff, Mr. McRoberts, and Mr. Dawes is the important matter, the important event, which fixes the character of condition under which this evidence was given. There is some little dispute. It may be said that Mr. Garfield is an interested witness, as a representative of the government. It may be said that Mr. McRoberts and Mr. Krauthoff, they being at the time in the employ of the Armour Company, and one of them being now a defendant, are interested witnesses. But there is little, if any, dispute, perhaps only on one subject, between Garfield and Dawes, only as to the oath, as to the fact that the oath was discussed. They agree in substance on every other proposition. Garfield says there was no discussion of the oath. Mr. Dawes agrees with Krauthoff and McRoberts that there was. I am not able to look at the evidence which was furnished in this case as being the voluntary production of these defendants. The character of such parts of it as I deemed the most important is such that it absolutely dispels any thought of that kind from my mind. Reasoning naturally, reasoning upon the natural course which men in like condition would have taken, I am led to the conclusion that the defendants would have withheld that information if they could.

It is contended that they were volunteers because they higgled with Garfield at times, debated, resisted, gave less than he first asked, withheld some. The record does show this, but the fact remains that every approach was made by the government. In no instance did the defendants go to Garfield offering anything. Garfield made his demands, made them explicit, made them definite, and it does not to my mind destroy the character of compulsion under

which they acted that the defendants, after having considered the law, and after having made up their minds that they had no legal right to resist, still debated with the Commissioner in the hope of inducing him to minimize his demands and take something less than he had originally demanded. This in some instances was done. Garfield came to them. They did not go to him. He demanded in writing, and through his accredited representatives; and I would not regard it as proper to hold him for any actions of his representatives, the result of which did not flow straight **[824]** to him, through them, from the defendants. But, so far as such results did flow straight to him in answer to his demands, they were negotiations between him and the defendants on his legal demands, which they had no right to dispute, or refuse to answer. He came to the defendants and presented them with the law. He held up before them his power as Commissioner. The defendants knew the law. They had been fully advised. They took further time after his first interview, and were advised further. They saw that the Martin resolution, under the eighth section of the law, made Garfield's duty imperative. After the passage of that resolution the defendants saw that Garfield was compelled to act, compelled to demand, and they were compelled to answer.

I regard Garfield as having been under the strictest legal compulsion by the terms of the Martin resolution. It may be said that he could have gone somewhere else and got his information. The record shows that he himself said that he could not; that he could not make the investigation imposed upon him as a legal duty by the Martin resolution and the eighth section of the law without getting it from these people. And the investigation itself disclosed that they are the authors of nearly one-half of all the business in their line in the whole country. So that I think he was compelled to demand from them, as well as they were compelled to answer, under this statute and resolution. Now, if the defendants volunteered nothing, but gave only what was demanded by an officer who had the right to make the demand, and gave it in good faith under a sense of legal

compulsion, I am of opinion that they are entitled to immunity under the act.

But it is insisted by the government that they did not give under compulsion, because they did not give under what is known in the law as testimonial compulsion; and it is argued that testimonial compulsion means compulsion furnished by the subpœna and oath. I can add nothing to what has been adduced by way of argument here on those subjects. The subpœna is not necessary where the person is present in court or within the verge of the court. *Goodpaster* v. *Voris*, 8 Iowa (8 Clarke) 334, 74 Am. Dec. 313; *Leckie* v. *Scott*, 10 La. 412. So the rule is the same as to the production of documents. *Hunton* v. *H. & H. Co.* (Mich.) 76 N. W. 1041; *Starr* v. *Mayer*, 60 Ga. 546. The only object of the subpœna is to secure the attendance. It is superfluous when he is present without subpœna. *U. S.* v. *Sanborn* (C. C.) 28 Fed. 299, at page 302, per Mr. Justice Gray; *Eastman* v. *Sherry* (C. C.) 37 Fed. 844, 845, per Jenkins, J.; *Farmer* v. *Storer*, 11 Pick. (Mass.) 241. "Lex neminem cogit ad vana seu inutilia." *Land Co.* v. *Peck*, 112 Ill. 408, 439. Under the judiciary act, providing for allowance "to the witnesses summoned in any court of the United States," it was held that the fees of a witness who attended at the request of the United States attorney without having been summoned, were taxable. *U. S.* v. *Williams*, 1 Cranch, C. C. 178, Fed. Cas. No. 16709; *Prouty* v. *Draper*, 2 Story, 199, Fed. Cas. No. 11447; *Whipple* v. *Cumberland Cotton Mfg. Co.*, 3 Story, 84, Fed. Cas. No. 17515; *Hathaway* v. *Roach*, 2 Woodb. & M. 63, 73, Fed. Cas. No. 6213, approved by Gray, Circuit Justice, in *U. S.* v. *Sanborn* (C. C.) 28 Fed. 301. So a witness who attends without subpœna attends "pursu-
[825] ant to law." *U. S.* v. *Sanborn* (C. C.) 28 Fed. 299, 302; *Hanchett* v. *Humphrey* (C. C.) 93 Fed. 895–897; *U. S.* v. *Bell* (C. C.) 81 Fed. 830; *St. Matthews Bank* v. *Fidelity Co.* (C. C.) 105 Fed. 161. I am clearly of opinion that the best judgment to be had from all of the authorities is that the subpœna is a useless and superfluous thing after the tribunal and the witnesses are together. And I am also of opinion that under any of these acts in question, these immunity laws, the production of books and papers would be legal evidence without the oath of any person, when they

are adduced as showing admissions against interest and against the party producing them.

Upon the authority in the cases of *Bram* v. *U. S.*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, and *Boyd* v. *U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, legal compulsion does not depend upon subpœna or oath, and upon reason this must be so. Books and documents prove themselves, when produced for the purpose of showing admissions against interest. They are receivable as evidence in all courts against the party producing them. The oath is not always essential to testimony. *Osborne* v. *Detroit* (C. C.) 32 Fed. 36. No oath is essential to the compulsion to produce documents in a witness' possession. A person who is required to produce documents in his possession, and produces them, need not be sworn in order to get from him the documents. *Perry* v. *Gibson*, 1 Ad. & Ell. 48; Id., 3 Nev. & M. 462 (K. C. B.); *Davis* v. *Dale*, 1 M. & M. 514; *Simpson* v. *Smith*, 1 Starkie on Ev. 161, note (n); *Summers* v. *Mosely*, 2 Cromp. & Mees. 477; Wigmore, § 1894, note 1. Further, the oath may be waived, and is waived by failing to insist on it or raise the objection. *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046; *Goldsmith* v. *State*, 32 Tex. Cr. R. 112, 22 S. W. 405; *Birch* v. *Somerville*, 2 Ir. Law R. N. S. 243; *Richards* v. *Hugh*, 51 L. J. Q. B. 361; *Cady* v. *Norton*, 14 Pick. (Mass) 236; *Slauter* v. *Whitelock*, 12 Ind. 338; *State* v. *Hope*, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608; *State* v. *Smith* (Iowa) 100 N. W. 40, 42. Books and papers produced by these defendants as the books and records of their business, and called for as such, are evidence against them, without any oath. If I am right in the proposition that the immunities given by the act are as broad as the liabilities imposed by the act, then the subpœna and the oath were not essential. Garfield could make a legal requirement without using either the subpœna or the oath. I think this is clear from the language of the act. If the Commissioner could make a legal demand without a subpœna, then immunity would follow to the witness answering without a subpœna. It is true that section 6 of the commerce and labor act of February 14, 1903 (32 Stat. 827, c. 552 [U. S. Comp. St. Supp. 1905, p. 68]) says that immunity

shall apply to all persons "who may be subpœnaed," etc. Now it would be absurd to say that a person subpœnaed would have immunity if he produced no evidence, and, as the subpœna alone cannot give immunity, so the lack of that alone cannot take it away.

The same argument will apply to the oath. The purpose of the oath was to secure the truth. That is always the purpose of the oath. That is the only purpose of the oath; and, to be certain that we get the truth, the court always starts out by putting the witness under oath. But the act under which Garfield was clothed with power did not re- [826] quire him to put anybody under oath. It required him to make investigation. He might make it according to legal forms or not. He might use any kind of evidence that he chose that was suitable to his purpose. The evidence procured from these defendants, so far as it consisted of books and papers, was, however, legal evidence—would be considered legal evidence in a court of law; and under any one of these acts the production of the books and papers is a complete compliance with the law providing for the production of evidence, documentary or otherwise. It is not strange that Garfield was satisfied not to swear the defendants, although he started out with that intention. He distinctly told them so, and his forms show that fact. He expected to put them on oath if he regarded it as necessary, if he had any doubt about the truthfulness of the evidence. He had access to the books of original entry. He was satisfied of that fact. His agents were satisfied of that fact. The record shows this over and over again by repeated answers, and there was not the slightest reason for putting anybody under oath, so far as the use of those books and documents was concerned. The oath of any one would have made that evidence no stronger or better that it is now without the oath.

If it shall be said that the act of February 14, 1903, establishing the Department of Commerce and Labor, allows immunity to the witness only upon the conditions urged by the government, viz., that he shall have resisted until regularly subpœnaed and sworn, no such contention can fairly be made as to the immunity clause of the act of February

25, 1903. The record shows, and it is not disputed, that material evidence was procured by Garfield from the defendants upon the subject of an unlawful combination. I have already held that it was given under legal compulsion. The record further shows that this evidence was demanded by the Department of Justice for the purposes of this prosecution, and that Garfield declined to give it, as he had promised the defendants it would not be so used; that later, upon repeated demands of the Department of Justice, and upon the order of the President, he turned it over to that department. It is contended that as to all such evidence the defendants are entitled to immunity under the independent and unconditional act of February 25, 1903, and I am of opinion that they are so entitled.

It is contended on behalf of the government that the construction here given to the commerce and labor law would result in the failure to convict individuals for the prosecution of whom the Commissioner of Corporations might be assisting, and thus the law would be nullified; that guilty persons would rush to the officer with their evidence and receive immunity. The answer to this contention is that the primary purpose of the act is to correct defective legislation, and, if an additional purpose be the prosecution of offenders, such additional purpose is clearly secondary. To effect the primary purpose, viz., secure information for the use of the legislative body, the construction here given would be highly efficient, as the persons required to give evidence, being personally immune, would probably testify willingly, while those coming unbidden would be volunteers and not entitled to immunity. I am also presented with the argument that the questions are of great public interest. Therefore the defendants should be held [827] to trial, to the end that upon a final judgment, if adverse to the defendants, the questions arising on the pleas might be reviewed by the Supreme Court, which would not be possible if the decision be adverse to the government. I know that courts have sometimes yielded to this argument in cases of public importance, usually where property rights only were involved; but I think it should not be the controlling motive for the decision here. The parties are entitled to the best

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judgment of the court upon the questions involved. I am of opinion that the record shows the individual defendants to have given under legal compulsion evidence of and concerning the matters contained in the indictment, and that they are therefore entitled to immunity.

Gentlemen of the jury, under the law of this case, the immunity pleas filed by the defendants will be sustained as to the individual defendants, the natural persons, and denied as to the corporations, the artificial persons, and your verdict will be in favor of the defendants as to the individuals, and in favor of the government as to the corporations

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[1010] LODER *v.* JAYNE ET AL.[a]

(Circuit Court, E. D. Pennsylvania. January 22, 1906.)

[142 Fed., 1010.]

MONOPOLIES—CONSPIRACY—RESTRAINT OF TRADE—BURDEN OF PROOF.—The burden of proving a combination and conspiracy between manufacturers and wholesale and retail dealers of proprietary medicines and drugs in restraint of trade, in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], injurious to plaintiff, and that defendants were engaged and took part in such conspiracy, was on the plaintiff.[b]

SAME—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—FIXING PRICES.—Where three voluntary associations, composed of the manufacturers, wholesalers, and retailers, respectively, of drugs, proprietary medicines, etc., were organized to arbitrarily fix a minimum retail price for such articles, which were of universal consumption and were of absolute and daily necessity, and then restricted the sale of such articles to such retailers only as conducted their retail business in accordance with the arbitrary standard of prices, such combination was in restraint of interstate commerce in the drug trade in so far as it excluded "aggressive cutters" of prices and those who dealt with them, and was in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], prohibiting monopolies in restraint of interstate trade and commerce, etc.

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[a] Judgment reversed and a new trial awarded by the Circuit Court of Appeals, Third Circuit, December 3, 1906. The opinion of the court not yet reported in the Federal Reporter. The decision of the Circuit Court, herein reprinted, was, in the main, held to be correct, the error arising from the attempt of the court, by a resolution of the verdict to eliminate items of damage, with regard to which there was admittedly no sufficient evidence.

[b] Syllabus copyrighted, 1906, by the West Publishing Co.

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TRIAL—ADMISSION OF EVIDENCE—ORDER OF PROOF.—In an action to recover damages for an alleged conspiracy in restraint of interstate commerce, it was within the discretion of the trial court [1011] to admit evidence of acts and declarations of various of the defendant associations, their officers, committees, members, and agents, made in the absence of many of the other defendants, before a prima facie case of conspiracy had been established, and before privity of some of the defendants had been proven, on condition that such connecting evidence should be thereafter given.

MONOPOLIES—EVIDENCE—FINDINGS.—In an action for damages arising on an alleged conspiracy in restraint of interstate commerce, in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], evidence *held* sufficient to establish the participation of certain of the defendants in such conspiracy.

SAME—COMBINATIONS IN RESTRAINT OF TRADE—DAMAGES—BURDEN OF PROOF.—In an action for damages for conspiracy in restraint of interstate commerce, in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], the burden was on plaintiff to show some real actual damage to his business by reason of the alleged unlawful combination.

SAME—DAMAGES—EVIDENCE.—Where, in an action for damages to plaintiff's business because of an alleged conspiracy in restraint of interstate commerce, plaintiff claimed $5,000 compensation to himself for extra work claimed to have been required by reason of such unlawful combination, but failed to prove how much additional time he was required to spend in his business after the combination went into effect, he was not entitled to recover for such alleged extra services.

SAME—ADDITIONAL CAPITAL.—Where, in a suit for damages to plaintiff's business because of an alleged unlawful combination in restraint of interstate commerce, plaintiff claimed that because of such combination it was necessary to put $10,000 extra capital into his business from rents of his building, which were collected from time to time, but he testified on cross-examination that the payments of interest and taxes on the building were in excess of the amount paid into the business, he was not entitled to recover interest on such alleged additional capital.

SAME—INCREASED COST.—Where, by reason of an unlawful combination in restraint of interstate commerce in violation of the Sherman act, plaintiff was compelled to conduct his business at a greater cost, though it was greater in volume, and by reason of the injury he received a less percentage of return, he was entitled to recover such additional cost, though by reason of his increased efforts and the natural increase of his business he was enabled to withdraw from the business for his personal services an amount equal to, or larger than, he drew from the business before the conspiracy became operative.

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At Law. On motion for a new trial.

W. Wilson Carlile and *Henry J. Scott*, for plaintiff.

Morgan & Lewis, *O. E. Shannon*, *H. C. Haines*, *F. M. Cody*, *Hopper*, *Lessig & Smith*, *W. H. Hepburn*, *Charles Biddle*, *Frank Savidge*, *Henry D. Paxson*, *J. C. Jones*, *Henry La Barre Jayne*, *Irving P. Wanger*, *N. Dubois Miller*, *Joseph C. Fraley*, and *John G. Johnson*, for defendants.

HOLLAND, District Judge.

The plaintiff, C. G. A. Loder, brought suit against the above-named defendants, in this district, to recover damages to his retail drug business, which he claims to have suffered by reason of an agreement, contract, combination, and conspiracy into **[1012]** which the defendants entered and carried into effect, in connection with other parties throughout the United States, in restraint of interstate trade and commerce, contrary to the provisions of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies." The provisions of this act of importance in this case are the following:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade, or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides, or is found, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Under sections 1 and 2 of this act every contract, combination, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, and every combination or conspiracy to monopolize any part of the trade or commerce among the several states, or with foreign nations, is declared to be illegal, and every person who makes such a contract, or engages in such combination or conspiracy, or combines or conspires to thus monopolize, is declared to be engaged in an unlawful act; and the seventh section authorizes every person injured in his business or property to bring suit against such other person or corporation, who may be engaged in any such unlawful act, in the Circuit Court of the United States in the district in which the defendants reside or are found.

The plaintiff, claiming that all these defendants were engaged in such a combination and conspiracy to monopolize and to restrain trade, forbidden by these sections, brought suit under the act, and filed his statement of claim. The case was put at issue, and tried at the October term, 1905, and a verdict rendered in favor of the plaintiff against all the defendants, excepting Jayne & Son and Campion & Co., for the sum of $20,738. Motions and reasons for a new trial were filed on behalf of all the defendants, excepting the two above mentioned, and, in addition, there were filed motions for judgments non obstante veredicto upon the whole record in favor of H. K. Mulford Company, Hance Bros. & White, and Warren H. Poley. In addition to the request for binding instructions at the trial in favor of all the defendants, H. K. Mulford Company, Hance Bros. & White, and Warren H. Poley, by their attorneys, requested binding instructions in favor of **[1013]** these particular defendants, which request was refused by the court, and under the provisions of the act of the General Assembly of the commonwealth of Pennsylvania, approved the 22d day of April, 1905 (P. L. 286), they are authorized to make this motion for judgment non obstante veredicto upon the whole record, in their favor.

There are in all 33 reasons for a new trial, which can be considered under three different heads: First, those which raise the questions as to whether or not the plaintiff charged and proved a violation of the Sherman act, and as to the cor-

rectness of the charge and rulings of the court in this connection; second, the admissibility of certain evidence; third, the sufficiency of the proof of the different items of damage claimed.

In his statement of claim Loder alleges, and offered evidence to prove, that for more than 20 years he has been engaged in the business of dealing in drugs at wholesale and retail in the city of Philadelphia, buying and selling his merchandise in various cities of the union without any hindrance to him by any one until November 1, 1900, when the injury to his business complained of began, and this he says was brought about by the defendants and others acting together in a combination and conspiracy, which he lays in his statement of claim in language following:

"The Proprietary Association of America, the National Wholesale Druggists' Association and the National Association of Retail Druggists, their officers, delegates and members unlawfully entered into an agreement, combination and conspiracy in restraint of trade or commerce among the several states and with foreign countries in this, to wit: that they unlawfully agreed, contracted, combined and conspired to enhance and arbitrarily to fix, regulate and determine the wholesale and retail prices at which various commodities of the drug trade consisting of patent medicines, drugs and proprietary articles manufactured in the several states should be sold to the retail druggists and by the said retail druggists to the consumers, residents of the several states of the United States."

The Proprietary Association of America is an unincorporated association composed of over 90 per cent. of all the manufacturers and proprietors of patent medicines within the United States; the National Wholesale Druggists' Association is an unincorporated association composed approximately of 95 per cent. of all the wholesale druggists of America who are engaged in the business of selling at wholesale drugs and proprietary articles to retailers for the manufacturers and proprietors of these drugs throughout the United States, and all the defendant wholesalers are members of this association; and the National Association of Retail Druggists is also an unincorporated association, with headquarters at Chicago, and has a membership composed of the local association of druggists, the members of these local associations comprising about 90 per cent. of the retail druggists in the cities, towns, and counties, or districts throughout the United States in which local organizations are formed, and these local associations are represented in the National Association by delegates periodically chosen for that purpose. There is also an incorporated association, one of the defendants, the Philadelphia Association of Retail Druggists, composed of nearly all the retail druggists in the city of Philadelphia, and with which association all the defendants named **[1014]** in this suit who are engaged in the retail drug trade are connected either as members or officers. This local association is a member of the National Association of Retail Druggists, and these defendants, who are members, have been acting in accordance with the rules and regulations of the National Association in the conduct of their business as retailers.

The burden of proving the existence of this agreement, contract, combination, and conspiracy, and that the defendants were engaged and took part in it, was upon the plaintiff, and for that purpose evidence, which was uncontradicted, was offered to prove that the National Association of Retail Druggists had its central office in Chicago, and received financial support from all the other associations and many of the members belonging to them; that from this central point organizers were sent out for the purpose of bringing the local retail dealers into associations, and, as a result, Philadelphia retailers were organized into an incorporated association known as the Philadelphia Association of Retail Druggists. In accordance with the plans suggested by the organizers sent from Chicago, the Philadelphia retail druggists working with the organizers secured a consensus of opinion of the retailers here from which they fixed the minimum rate at which drugs should be sold at retail by the retail druggists in Philadelphia and vicinity. All the retail dealers were then notified of this minimum rate, and in case the retailer cut below the price so fixed his name, with this information, was sent to the National Association of Retail Druggists at Chicago, and the secretary, Mr. Wooten, then placed the name of this retail druggist upon what was known as an "aggressive cutter's" list, and this aggressive cutter's list, with his name thereon, was sent to all proprietors, members of the Proprietary Association of America, and all the wholesalers, members of the National Wholesale Druggists' Association, with the request that they cease selling any drugs

whatever to such aggressive cutter; and it was further established, in case any proprietor or wholesaler, after receiving this notice from the secretary of the National Association of Retail Druggists, failed to obey and cease selling to such aggressive cutter, this information of his failure to obey also found its way to the secretary of the National Association of Retail Druggists, and such disobedient proprietor or wholesaler was disciplined by being put upon what was designated as a "pink slip," and his name was sent to all retailers throughout the United States with the information that he had been selling to aggressive cutters, and the request made to the retailers throughout the country to cease making any further purchases from such delinquent wholesaler or proprietor.

It is very plain that this arbitrary fixing of a minimum retail price for drugs which are of universal consumption and of absolute and daily necessity and then restricting their sale to such retailers only who conduct their retail business in accordance with this arbitrary standard of prices is a clear restraint of interstate commerce in the drug trade to the extent of excluding the aggressive cutters and those who deal with them, and is in violation of the act. The plaintiff was reported to Secretary Wooten, and on November 1, 1900, his name was placed upon an aggressive cutter's list, from which date down **[1015]** until the 28th day of July, when suit was brought in this case, he was unable to buy drugs direct from the proprietors or wholesalers in the United States, but was compelled to purchase them in the name of other persons and in various indirect ways, and even then was unable to keep his store stocked as extensively as a retailer usually requires. Thus embarrassed, he was compelled to secure these drugs at a much greater cost than he would have paid had he been able to purchase in the regular way.

The evidence shows that all the defendants against whom the verdict was rendered were connected with one or the other of these associations; were cognizant of the method adopted to coerce the retailers to adopt the minimum rate, and participated in the scheme of punishment visited upon all who cut below the price fixed. Of course, there was no documentary evidence which the plaintiff could produce to

show this alleged conspiracy, except copies of the kind of "aggressive cutter's" lists and "pink slips" sent out by Mr. Wooten, or, that one of the objects of these associations, and the members thereunto belonging acting together, was for this alleged purpose, but the court permitted him to show the close association of all these organizations engaged in the drug business, their acts and declarations appearing in their printed records of their joint and separate meetings, the publications and declarations made in their official organ in support of their rules and regulations jointly and separately enacted for the purpose of effecting the object of this association. It nowhere expressly appeared that one of the objects was to combine for the purpose alleged in the plaintiff's statement and to carry it out by the drastic, disciplinary methods proven at the trial. On the other hand, the evidence showed that their reports, speeches, declarations, and resolutions were usually couched in language which, upon its face, was not inconsistent with a lawful purpose, but taken in connection with what afterward occurred, and the implicit obedience with which the members, and particularly the defendants in this case, obeyed the command of the secretary of the National Association of Retail Druggists, it was for the jury to say whether or not the evidence as a whole did not justify the finding that an agreement, contract, combination, and conspiracy such as charged existed, and whether the defendants were engaged in it. The jury were instructed that if the combination and conspiracy set forth in the statement existed, it was in violation of the Sherman act, and it was for them to say whether or not the plaintiff had proven his case. The jury found in his favor.

These instructions, upon a review, we are convinced were properly given, and that the findings of the jury were based upon competent evidence. Many acts and declarations of the various associations, their officers, committees, members, and agents made in the absence of many of the other defendants in the case for the purpose of proving the conspiracy were admitted before a prima facie case of conspiracy had been established and before the privity of some of the defendants had been proven. It is true that the rule

in the admission of evidence in conspiracy cases is to require first the proof of a prima facie case of conspiracy before the acts and declarations of co-conspirators made in the absence of defendants are admitted against them, although the [1016] court may, in its discretion, permit evidence of the declarations to be introduced out of its order, upon condition that it be afterwards followed by evidence of the conspiracy, and in some peculiar instances, in which it would be difficult to establish defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. Substantially the same rule applies in criminal as in civil cases as to the admissibility of the acts or declarations of one conspirator as original evidence against each member of the conspiracy. Elliott on Evidence, vol. 4, § 2939; Id. vol. 1, § 249; Rice on Evidence, vol. 3, p. 904, § 578d. All the evidence sought to be stricken out by the motion of defendants, which raised the question of the competency of this evidence, was of this character and clearly admissible. On the whole evidence, the combination and the privity of defendants were established by proof of facts personal to each connecting him therewith. The question of damage will be considered after disposing of the motions for judgments non obstante veredicto.

It is contended that upon the whole record notwithstanding the verdict judgment should now be entered by the court in favor of Hance Bros. & White, H. K. Mulford Company, and Warren H. Poley. As we have already concluded that the combination and conspiracy alleged in the statement of claim, if proven, was in violation of the act of Congress, and the verdict of the jury in favor of the plaintiff having established its existence, the only question to be determined as to these three defendants is whether or not there is any evidence to show that they or either of them were engaged in it. Hance Bros. & White and H. K. Mulford Company were members of the National Wholesale Druggists' Association, and Warren H. Poley was a member of the Philadelphia Association of Retail Druggists.

It is not attempted to hold any of these defendants through the associations with which they are affiliated. The suit as to them is directly against the firm of Hance Bros. & White, the corporation of H. K. Mulford Company, and Warren H. Poley individually. The combination and conspiracy in which it is alleged they were engaged and which caused the injury to the plaintiff was for the purpose of arbitrarily fixing, regulating, and determining the wholesale and retail prices at which drugs should be sold to retail druggists, and by them to the consumers throughout the United States, and to carry into effect this combination or conspiracy, it is claimed that these defendants, with others in the suit, took part in the proceedings of the various organizations with which they were affiliated in bringing about and formulating rules and regulations by which delinquents could be placed upon the aggressive cutter's list, and pressure brought to bear upon them for the purpose of compelling them to conform to the demands of those engaged in the combination and conspiracy. Each of these defendants who took part in the meetings which brought about this central or-organization at Chicago, with power to carry into effect these disciplinary measures, acted upon the commands of the secretary of the National [1017] Association of Retail Druggists with regard to the punishment administered to those who were blacklisted.

The evidence shows that these three defendants were fully aware of the methods pursued by the associations to which they belonged by which their members strengthened and perfected the system of coercion emanating from Chicago, and that they, to a more or less extent, participated and acquiesced in the preliminary arrangements leading up to the consummation of the plan. The Philadelphia Association of Retail Druggists, of which Mr. Poley is a member, is a corporation, and made a defendant in this case, yet whatever part he took as an individual in the preliminary and final steps taken to carry into effect the combination and conspiracy as charged, he must answer for in his individual capacity. What part, if any, did these defendants take? The Philadelphia Association of Retail Druggists, on January 31, 1901, sent out from the office of the executive com-

mittee, No. 4154 Lancaster avenue, Philadelphia, a letter marked personal and confidential, as follows:

"Being satisfied that the policy of your firm is one of fair and considerate dealing with the retail drug trade and that you are willing to co-operate with the retail druggists along lines of mutual profit, we take the liberty of inviting your attention to the present unprofitable condition of the retail drug business in this city and of asking your co-operation with our efforts to better matters.

"The situation is this: The retail druggists of Phila. have agreed upon a schedule of prices for proprietary articles about 10 to 20% above those now generally received, the only one positively refusing to be controlled by this scale being Mr. C. G. Loder. In justice to those druggists located near Loder's store, we have deferred putting this schedule into effect until all could be protected by a common selling price, and Mr. Loder alone by his refusal, is obstructing this movement and is now preventing the druggists of this city from obtaining between prices for proprietary goods.

"We do not wish to coerce Mr. Loder or to force him into difficulties, but it does seem unfair that one man alone should deprive all the other druggists of Phila. of the fruit of many months' labor. We are willing to make reasonable terms with Loder, and have so offered, but his intention evidently is to block our plans that he may profit thereby and he refuses to agree with us.

"Under these circumstances, we think that we have the right, the right of self-protection, to ask you not to sell Mr. Loder any of your goods and proprietary articles until he agrees with us. We believe that when Mr. Loder finds that he is not greater than all the rest of Phila. druggists together nor entitled to more favor that he will listen to reason and be willing to co-operate with us along lines of mutual profits. We wish to bring him to this belief, and one of the means we are trying to use is to show him that dealers and manufacturers will not supply him with goods when by so doing they will be injuring the business of every other retail druggist in this city. We do not ask any one to refuse him goods for any other reason than this; that the interests and wellfare of all are greater than those of one alone!

"We therefore invite your careful consideration of this question, and we further ask in reply a statement from you of the position you may decide to take; for, by your action, you can either greatly help or materially retard the progress the retail druggists here have made towards the better realization of better trade conditions.

"Yours very truly,

"The Executive Committee, Phila. Association of Retail Drugg."

To which Hance Bros. & White replied:

"The policy of our house is not to sell to department stores. If the party you mention sells our goods, he does not get them from us as we don't sell him."

[1018] Subsequently, in June, 1903, a resolution C, which had been adopted by the wholesalers, as follows:

"Resolved, That in accordance with the recommendation of President Sealey, the Secretary is instructed to request all manufacturers of chemicals, pharmaceuticals, plaster, dressings and like products handled by the drug trade, to desist from selling aggressive cutters or supplies of cutters when solicited to do so by the respective local associations, and that the retail druggists shall be made acquainted with the response in such manner as the executive committee may deem best."

—was sent out to the drug trade in connection with the following query:

"Will you, when specially requested by the officers of the local association of retail druggists throughout the country that are affiliated with the N. A. R. D., refuse all sales to these price demoralizers whom the various manufacturers of proprietaries have designated as aggressive cutters?"

To which Hance Bros. & White, on June 24, 1903, responded as follows: "Our answer to the National Secretary's question is 'Yes.'" The receipt of this circular letter, the response to the inquiry accompanying resolution C, together with other statements made by Anthony M. Hance as to the connection of his firm with the alleged combination and conspiracy, show that they are equally responsible with the other defendants in the case.

From the testimony of H. K. Mulford, the vice president of the H. K. Mulford Company, we find that his company is an associate member of the National Wholesale Druggists' Association. It was shown that this, with the other associations, at various times acted together through committees appointed for that purpose, and worked in entire harmony with each other, and that he received information from the very headquarters of the combination, to wit, the secretary of the National Association of Retail Druggists at Chicago, and his company acted in strict compliance with the demands of the alleged wrongdoers for the reason that Loder was demoralizing business conditions and appeared upon the aggressive cutter's list. Mr. Mulford admitted that he received the information as to Loder cutting prices through the secretary of the National Association of Retail Druggists, and declared that his company would refuse to sell any wholesaler who was supplying Loder with goods, if his name appeared upon the aggressive cutter's list. The company's connection with the wholesalers' association, and its action in connection with the disciplinary rules administered to delinquents, was evidence to be submitted to the jury as to whether or not it was, through its officers, one of the parties

engaged in the alleged combination and conspiracy. It is not denied but that the Mulford Company, or any other defendant, would be privileged to buy from or sell to, or refuse to buy from or sell to, any other person for any reason that might suggest itself without being responsible in damages under the Sherman act, but if the defendant acted upon a policy in accord with those shown to be in a combination and conspiracy not to sell to aggressive cutters, and received its information from them, and acted upon it, and, at the same time, was an associate member of one of the associations, there is sufficient evidence to submit to the jury to say whether it was part of the combination, or acted independently, as claimed. The jury found against the company, and in this I think they were right.

[1019] Mr. Poley was an active member of the Philadelphia Association of Retail Druggists, and took part in its proceedings at a meeting where a resolution was offered "advising the National Association of Retail Druggists to exhaust every means before taking final action disciplining the firm of Smith, Kline & French Company." It is very evident he knew the nature of these disciplinary measures, as it appeared in the evidence that the Smith, Kline & French Company were subsequently blacklisted and punished for disobedience, and a "pink slip" sent out against it. Mr. Poley, prior to that time and some time before the latter part of the year 1903, offered a resolution, which was passed at a meeting of the local association, as follows:

"That our delegates to the Convention of the N. A. R. D. be instructed to use utmost endeavors to have resolutions passed at the coming convention that the druggists of America refuse to handle any new proprietaries unless protected in price."

The gist of this resolution was enacted at the Boston convention of wholesalers, and the punishment inflicted upon any one who demoralized these prices is through the very association to which his resolution appealed. Surely he cannot now be heard to say that he took no part in bringing about the creation of this system of coercion to sustain prices. The motions for judgments non obstante veredicto in favor of these three defendants, for the reasons stated, are overruled.

The plaintiff's claim for damages submitted to the jury was made up of the following items:

Compensation to the plaintiff for extra time and labor covering a period of four years	$20,000.00
Eight per cent. increased cost on $96,000 of proprietaries purchased during period from November 1, 1900, to July 25, 1904	7,680.00
Extra clerk hire $1,000 per year	4,000.00
Interest on $10,000, extra capital, for 4½ years	2,700.00
Loss of profits on sales lost from June 3, 1904, to July 25, 1904	36.72
Making a total of	$34,416.72

The jury rendered a verdict for $20,738, and the defendants contend that even if it be conceded that a combination and conspiracy prohibited by the act had been established, there was not sufficient evidence from which the jury could find damages to the extent of the verdict rendered, and it is specifically urged that there was no competent evidence submitted upon which the jury could find in favor of the plaintiff for any part of the claim for extra labor of $20,000, increased cost on proprietaries $7,680, or interest on extra capital of $2,700, and, further, that, even if the plaintiff had proven the necessity for an extra clerk, his salary was only $18 a week, and the claim could only be made for 3¾ years. The burden of proof was upon the plaintiff to show some real and actual damage to his business by reason of this unlawful combination, and it is equally well settled that unless they prove this damage by a preponderance of competent evidence, the verdict must be for the defendant. The items of damage claimed must be established by proof of facts from which they may be rationally inferred with reasonable certainty by the jury. *Coal & Coke Co.* v. *Hartman*, 111 Fed. 96, 49 C. C. A. 244; *Lowry* v. *Tile, etc., Ass'n* (C. C.) 106 Fed. 46.

[1020] The plaintiff claimed the sum of $5,000 for extra compensation for himself for extra work which he claimed he was required to bestow upon his business by reason of this unlawful combination. It was objected that this was not a proper item of claim, but the court permitted the plaintiff to offer such proofs of additional labor as he desired to submit, and the plaintiff, instead of showing facts and

circumstances from which the jury could estimate the value of the extra services; that is to say, instead of proving the amount of additional time given to his business by showing how much time he had devoted thereto prior to November 1, 1900, and then how much additional time was required of him each day, or each week, or each month, or each year, after the 1st day of November, 1900, and during the time he was on the aggressive cutter's list—he simply stated that prior to the injury complained of the business was conducted by him, giving it a supervision only, and he was able to go abroad upon two occasions, and to devote some time to recreation and pleasure, whereas, after the combination went into operation, he was compelled to devote his entire time to his business, "except in the afternoon he could take a little recreation." There was ample opportunity offered the witness to show what additional labor he was required to bestow upon the conduct of his business, but he offered no evidence whatever other than the mere, vague, indefinite assertion that he was compelled to devote his entire time to his business after he was blacklisted "except in the afternoons he could take a little recreation," and that this indefinite bestowal of additional labor was worth $5,000. There was no evidence in support of this claim to submit to a jury from which they could reasonably estimate what compensation he should have for any additional labor. From this they could only guess and speculate upon an amount as to this item of claim, and this a jury cannot be permitted to do.

It was claimed that it was necessary to put extra capital, amounting to $10,000, into the business because of the existence of the combination, necessitating his paying cash for many articles which theretofore he purchased on credit, and that this extra capital was placed in the business from rents collected, from time to time, from tenants in his building at Sixteenth and Chestnut streets; but upon cross-examination it was shown that as a matter of fact, instead of proving that $10,000 additional capital was added and used for 4½ years as claimed, the payments of interest and taxes on the building were in excess of the amounts paid in, and the plaintiff erroneously assumed that he was entitled to interest on the rents paid in. A review of the evidence

shows that in these two items the plaintiff failed to prove his claim.

In support of the other three items of claim, the plaintiff submitted the best evidence he could produce under the circumstances. While the law puts the burden of proof upon the plaintiff and requires the proof of such facts as will enable the jury to arrive at the amount of damage with reasonable certainty, it will not permit the defendants who are, through their wrongful acts, responsible for the plaintiff's injury, to carry this requirement beyond the measure of proof thus stated. He is required to prove his claim with reasonable certainty and no more. We think the plaintiff has complied with this require- **[1021]** ment as to these claims. The verdict as a whole, however, being far in excess of the total amount of these three claims, which were sustained by competent evidence, under the law it is the duty of the court to either require the plaintiff to remit this excess or grant a new trial. The claim for extra clerk hire at $16 per week to March 1, 1904, and at $18 per week thereafter during the existence of the combination would make a total of $3,164, and the damages claimed for extra cost of proprietary articles, amounting to $7,680, together with the $36.52 for loss of profits on sales lost, make a total of $10,880.52 which was proven by competent evidence with reasonable certainty.

There is one other question raised which cannot properly be classed in any of the foregoing propositions, and which, it has been contended, has some bearing upon the question of whether or not plaintiff suffered any damage. The books of the plaintiff show that beginning with the year 1899 down to the time of bringing suit he drew out of the business the following amounts:

1899	$5,663.00
1900	6,069.00
1901	7,376.00
1902	7,643.00
1903	5,464.00
Seven months in 1904	3,071.00

It was strenuously argued to the jury by counsel for the defendants that, as Loder had been able to take as much out of the business for personal service during the time the

alleged combination and conspiracy existed as before, he had suffered no injury; and, the court having failed to call the jury's attention to this fact in the general charge, defendants' counsel took an exception to that failure, and suggested to the court before the jury retired the propriety of calling their attention to this evidence for that purpose. It was shown by the books of the plaintiff that, beginning with 1897, to November 1, 1900, he had purchased merchandise to the amount of $223,645, which he sold at retail for $296,739, at a gross profit of 33 per cent. on the purchasing price, making $73,094, and during the time he was on the aggressive cutter's list he purchased merchandise at a cost of $265,821 which he sold at retail for $326,559, being a gross profit of 23 per cent. on the purchasing price, making a total of $60,738. It might be here remarked that in view of the fact that the evidence showed that retail prices were generally higher during the time Loder was on the blacklist, this loss of 10 per cent. on gross profits during that time, as shown by the books, is strongly corroborative of his claim that he was compelled to purchase his drugs at an increased cost of 8 per cent.

But as to the amount the plaintiff drew out and its bearing upon the question of damage it will be remembered that he did not claim in this case any damage for a falling off of either gross or net income, because through the extra exertion and natural increase of his business, although at extra cost by reason of the combination, the gross and net income was kept up nearly to that which he made prior to the combination on much smaller purchases and sales. Progressive business men start in a small way and through their energy and busi- **[1022]** ness ability develop a small concern, in a short time, into one much larger and bringing far greater returns. If, by reason of a combination in violation of the Sherman act, he be made to conduct what business he does at a greater cost, though it be greater in volume, but by reason of the injury done him at a less percentage of return, and he can show this, he is entitled to collect it from those who have injured him. A calculation made from the books of the plaintiff in this case shows that although Loder through his industry and perseverance, notwithstanding the injury inflicted, did a greater volume of business, but was

compelled to do it at a 10 per cent. less profit, and he offered evidence to prove this loss was the result of this combination and conspiracy. So that, it would seem to me, the fact of his drawing out an amount for personal compensation, which did not diminish after the combination went into effect, was under the circumstances no evidence whatever of a failure to establish an injury to his business in the elements claimed. The natural increase of his business, which was done at a greater cost, made his gross and net income sufficient to enable him to take these amounts out for his personal use, but these amounts did not in any way show that either the net or gross income during the time he was on the blacklist was greater in amount than it was before, nor could it in any way throw light upon the question of the extra cost and losses which he sustained by reason of the combination, and for that reason the court did not deem it its duty to call the jury's attention to the evidence for the purpose indicated by the defendants. The court being satisfied that the verdict is excessive in amount and being able clearly to establish by computation the amount of this excess, it is the duty of the court to grant a new trail to the defendants, unless the plaintiff, within the time hereinafter specified, files a remittitur for the excess. Pepper & Lewis' Digest of Decisions, 23029; *Pleasants* v. *Fant*, 89 U. S. 116, 22 L. Ed. 780; *Southern Pacific Co.* v. *Hamilton*, 54 Fed. 468, C. C. A. 441.

A decree will, therefore, be entered that the plaintiff file a remittitur in the amount of $9,857.48 on or before February 1, 1906, reducing the verdict to the sum of $10,880.52 or a new trial will be granted. In case a remittitur be filed reducing the verdict to $10,880.52, the clerk is directed to multiply the said amount, to wit, $10,880.52, by three, and enter judgment in favor of C. G. A. Loder and against Frederick Aschenbach and Adolph William Miller, trading as Aschenbach & Miller; C. F. Shoemaker and Miers Busch, trading as Shoemaker & Busch; Richard M. Shoemaker, Thomas E. Shoemaker and Benjamin H. Shoemaker, trading as Robert Shoemaker & Co.; Smith, Kline & French Company; John Wyeth & Bro. (incorporated); Valentine H. Smith & Co.; Henry K. Wampole, Albert J. Koch, S. Ross Campbell, trad-

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ing as Henry K. Wampole & Co.; Edward H. Hance, Joseph C. Hance, Anthony M. Hance, and Edward H. Hance, Jr., trading as Hance Bros. & White; H. K. Mulford Company; William R. Warner, trading as W. R. Warner & Co.; Philadelphia Association of Retail Druggists; and Thomas H. Potts, William L. Cliffe, William E. Lee, David J. Reese, George W. Fehr, Carl W. Shull, **[1023]** Nathan Cozens, Augustus T. Pollard, Henry C. Blair, William H. Gano, Alexander H. Frankeberger, Charles Leedom, Richard H. Lackey, Henry A. Nolte, Walter A. Rumsey, James C. Perry, E. C. Bottume, Warren H. Poley, Henry A. Borell and Charles A. Eckles, defendants, for the sum of $32,641.56 and an attorney's fee of $2,500 to be paid to the plaintiff's attorney.

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[242] HADLEY DEAN PLATE GLASS CO. *v.* HIGHLAND GLASS CO.

(Circuit Court of Appeals, Eighth Circuit. January 19, 1906.)

[143 Fed., 242.]

SALE—CONTRACT TO MANUFACTURE AND DELIVER GOODS—"MORE OR LESS" AS QUALIFYING STATEMENT OF QUANTITY.—Where, in a contract for the manufacture and delivery of goods, the statement of quantity is qualified by the words "more or less," these, unless supplemented by language giving them a broader scope, apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such a transaction.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 191. Contracts for sales of things to be produced or manufactured, see note to *Star Brewery Co.* v. *Horst*, 58 C. C. A. 363.]

DAMAGES—CONTRACT—BREACH BY VENDEE—MEASURE OF DAMAGES.—Where a contract for the manufacture and delivery of goods is repudiated by the vendee before the goods are manufactured, the measure of the vendor's damages is the difference between the cost of manufacture and delivery and the contract price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1106.]

MONOPOLIES—COMBINATION IN RESTRAINT OF TRADE—MISSOURI STATUTE IS WITHOUT APPLICATION TO INTETSTATE COMMERCE.—The anti-trust statute of Missouri (Rev. St. Mo. 1899, §§ 8965–8970) can have no application to a contract for the sale of goods to be manufactured by the vendor in another state and delivered to the vendee in Missouri, because such a contract directly relates to Interstate Commerce, the regulation of which is within the exclusive authority of Congress.

Opinion of the Court.

SAME—SHERMAN ANTI-TRUST ACT—CONTRACT FOR SALE OF GOODS BY MEMBER OF COMBINATION.—The Act of July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], known as the "Sherman Anti-Trust Act," does not invalidate, or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination formed for the purpose of restraining interstate trade in such goods.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Charles Cummings Collins (*W. F. Carter*, *William T. Jones*, and *A. R. Taylor*, on the brief), for plaintiff in error.

James C. Jones (*Lon O. Hocker*, *C. P. Ellerbe*, *C. P. Ellerbe, Jr.*, and *Frank A. Thompson*, on the brief), for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and LOCHREN, District Judge.

VAN DEVANTER, Circuit Judge.

The Highland Glass Company, a Pennsylvania corporation, engaged in manufacturing glass in that state, received and accepted the following order for the manufacture and delivery of glass from the Hadley-Dean Glass Company, a Missouri corporation, carrying on the business of a jobber and dealer in glass at St. Louis:

"Book us with 200,000 sq. ft. ⅛ ribbed more or less subject to sizes and delivery as required at price 5c. sq. ft. cut to size St. Louis delivery less 1% cash 10 days acct. St. L. World's Fair bldgs. Acc't Mr. Torrence. Ack."

[243] 23,056 square feet of glass was manufactured, delivered, accepted, and paid for under the contract so made. The Hadley-Dean Company then refused to furnish specifications for or to accept the remaining 176,944 feet, although the Highland Company offered and was ready and willing to manufacture and deliver the same as agreed. In an action in the Circuit Court to recover damages from the Hadley-Dean Company for its breach of the contract a verdict was directed in favor of the Highland Company for the difference

between the cost of manufacturing and delivering the remaining glass and the contract price, and judgment was rendered on the verdict returned under that direction. The purpose in prosecuting the present writ of error is to secure a reversal of that judgment.

It is assigned as error that the court held that the order was for 200,000 square feet of glass, more or less, the latter words having their usual signification, and rejected the defendant's contention that the order was for such an amount of glass as would be required by the defendant "to fulfill its contracts for glazing the St. Louis World's Fair Buildings." No reference to the existence of any such contracts or to the amount of glass required to fulfill them is made in the pleadings or in the evidence, and it is conceded that the question presented by this assignment is to be determined by an examination of the order alone. We think it was properly interpreted. The quantity of glass is expressed in the words "200,000 sq. ft., ⅓ ribbed more or less." The succeeding phrase "subject to sizes and delivery as required," merely reserved to the defendant the right to thereafter designate the sizes to which the glass should be cut and the times when it should be delivered. The still later phrase "acc't St. L. World's Fair bldgs.," while explaining the use to which the glass was to be applied, is, in point of place and grammatical arrangement, so completely separated from the expression in respect to quantity that it could not well have been intended to qualify that expression. A more reasonable view of its purpose is that it was intended to give some indication of when the glass would be required and to apprise the plaintiff of the necessity for promptly conforming to such directions as should thereafter be given for its manufacture and delivery. It was common knowledge that the time for the completion of the World's Fair buildings was limited and that a failure to complete them within that time would result in serious inconvenience and loss. True the quantity specified is qualified by the words "more or less," but it is well settled that in a contract like this these words, unless supplemented by language giving them a broader scope, apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such

a transaction. *Brawley* v. *United States*, 96 U. S. 168, 172, 24 L. Ed. 622; *Norrington* v. *Wright*, 115 U. S. 188, 204, 6 Sup. Ct. 12, 29 L. Ed. 366; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164; Id., 32 C. C. A. 406, 89 Fed. 907. There is no such broadening language in the order.

It is assigned as error that the damages were not measured by the difference between the market value of the glass and the con- **[244]** tract price, but the point may be dismissed with the statement that, under the established rule in this jurisdiction, and also in the state of Missouri where the controversy arose, where a contract for the manufacture and delivery of goods is repudiated by the vendee before the goods are manufactured, the measure of the vendor's damages is the difference between the cost of manufacture and delivery and contract price. *Kingman* v. *Western Mfg. Co.*, 34 C. C. A. 489, 92 Fed. 486; *Philadelphia, etc., Co.* v. *Howard*, 13 How. 307, 344, 14 L. Ed. 157; *United States* v. *Speed*, 8 Wall. 77, 84, 19 L. Ed. 449; *Hinckley* v. *Pittsburg Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *Roehm* v. *Horst*, 178 U. S. 1, 21, 20 Sup. Ct. 780, 44 L. Ed. 953; *Black River Lumber Co.* v. *Warner*, 93 Mo. 374, 388, 6 S. W. 210; *Crescent Mfg. Co.* v. *Nelson Mfg. Co.*, 100 Mo. 325, 336, 13 S. W. 503; *Chapman* v. *Kansas City, etc., Ry. Co.*, 146 Mo. 481, 508, 48 S. W. 646.

There was some evidence tending to show that at the time of making the contract the plaintiff and others, not including the defendant, were in an unlawful combination to stifle competition in the sale of glass and to arbitrarily increase its price, and because of this it is contended that in directing a verdict for the plaintiff the court failed to give effect to the anti-trust statute of Missouri (Rev. St. Mo. 1899, §§ 8965–8970), and to the anti-trust legislation of Congress (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]; Act August 27, 1894, c. 349, §§ 73–77, 28 Stat. 570 [U. S. Comp. St. 1901, pp. 3202, 3203]).

Of the state stautute it is sufficient to say that it can have no application to the contract under consideration without impinging upon the exclusive authority of Congress to regulate commerce among the several states. *Railroad Co.* v.

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Husen, 95 U. S. 465, 469, 24 L. Ed. 527; *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 229–233, 20 Sup. Ct. 96, 44 L. Ed. 136; *Stockard* v. *Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785. The contract was for the sale of glass to be manufactured by the vendor in Pennsylvania and delivered to the vendee in Missouri, and therefore directly related to interstate commerce. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 246, 20 Sup. Ct. 96, 44 L. Ed. 136; *Bement* v. *National Harrow Co.*, 186 U. S. 70, 92, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Montague* v. *Lowry*, 193 U. S. 38, 47, 24 Sup. Ct. 307, 48 L. Ed. 608.

The act of Congress of August 27, 1894, is also without application because it is confined to combinations "between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States."

The act of July 2, 1890, is what is popularly known as the "Sherman Anti-Trust Act," and declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." That it does not render illegal or prevent a recovery upon this contract is shown by *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, **[245]** 22 Sup. Ct. 431, 46 L. Ed. 679. In that case the plaintiff sought to recover the purchase price of sewer pipe sold by it to the defendant and the latter sought to defend on the ground that at the time of the sale the plaintiff was in an unlawful combination to restrain interstate trade in sewer pipe. The court, after holding that the principles of the common law did not justify the buyer in refusing to pay for what he had bought and received, on the ground that the seller was in an unlawful combination with others to restrain trade in the article sold, said (pages 549, 550, of 184 U. S., page 435 of 22 Sup. Ct. [46 L. Ed. 679]):

"The special defense based upon the act of Congress of July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], was also properly rejected. * * * Much of what has just been said in reference to the first special defense, based on the common law, is

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applicable to this part of the case. If the contract between the plaintiff corporation and other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

The contract for the sale of the glass being valid, it follows as a matter of course that an action lies for its breach.

No error is disclosed by the record, and the judgment is affirmed.

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[358] HARTMAN v. JOHN D. PARK & SONS CO.

(Circuit Court, E. D. Kentucky. February 14, 1906.)

[145 Fed., 358.]

PROPERTY—SECRET PROCESS—INCIDENTS OF OWNERSHIP.—The patent and copyright statutes, in conferring upon an inventor or author the exclusive right to make, use, and sell articles embodying his invention or authorship, create in him a new right and do not extend or continue a previously existing right. The owner of a secret process not patented, has no such exclusive right to make, use, and vend the article to which it relates, but he has the right to keep his knowledge to himself and to protection of the same as a property right against one who, in violation of contract or through a breach of trust or confidence, undertakes to apply the secret to his own use or to impart it to others.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Property, § 2.

Disclosure of trade secrets, see note to *S. Jarvis Adams Co.* v. *Knapp*, 58 C. C. A. 8.]

SALES—RIGHT TO RESTRICT FUTURE SALES—EFFECT OF PATENT.—The owner of a patent or copyright after an absolute sale of the article

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covered thereby may, by virtue of the exclusive right given him by statute, and his right to withhold or restrict licenses under his monopoly, retain control of future trade in the article sold, as to prices of resale, etc., irrespective of any condition in the contract of sale, but the right to reserve such future control by contract is not derived from the statute, but exists if at all, by the common law, and may as lawfully be exercised by the seller of an unpatented article.

CONTRACTS—RESTRAINT OF TRADE—SALE OF ARTICLE MADE BY SECRET PROCESS.—Provisions in a contract for the sale of a secret process restraining its use or its communication to others are not invalid as in restraint of trade, because necessary to protect the property right in the subject-matter of the contract, but such considerations do not apply to contracts for the sale of the article produced by such process which are subject to the same rules as contracts for the sale of any other article of manufacture.

SAME.—A system of contracts made by the manufacturer of a proprietary medicine between him and wholesale dealers, to whom alone he sold his medicine, by which they were bound to sell only at a certain price and to retail dealers designated by him, and between him and the retail dealers by which, in consideration of being so designated, they agreed to sell to consumers only at a certain price, is not unlawful as in restraint of trade, but [359] is a reasonable provision for the protection of the manufacturer's trade, and he is entitled to an injunction to restrain a defendant from inducing other parties to such contracts to violate the same.

In Equity. On demurrer to bill.

F. W. Hinkle, *F. F. Reed*, and *E. S. Rodgers*, for plaintiff.

W. J. Shroder, *Alton B. Parker*, *Morris & Fay*, for defendant.

COCHRAN, District Judge.

This case is before me on demurrer to the bill for want of equity. The bill alleges in substance that complainant is the manufacturer and seller amongst other medicines of one known as "Peruna"; that the formula by which it is made was discovered by him, and is known only to him and his trusted employés; that he puts it up in bottles, each of which is inclosed in a loose white wrapper bearing the words "Peruna the Great Tonic" and has pasted on it a label giving its history, the theory upon which it is based, the ailments for which it is recommended, and the directions for taking it, and is serially numbered, the number being stamped both on the wrapper and label in several places;

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that he sells the medicine to wholesale druggists only, who in turn sell to retail druggists, who in turn sell to consumers; that the wholesalers to whom he sells contract with him not to resell except to retailers designated by him and at certain prices, and the retailers whom he designates contracts with him not to resell to consumers except at certain prices; that his prices to the wholesalers are uniform and so are the prices fixed by him of wholesalers to retailers and of retailers to consumers; that he alone advertises the medicine and creates the demand for it; that with each package of medicine is furnished a card containing the serial numbers of the bottles therein and the wholesalers are required to note thereon the retailers to whom same is sold, and to return it to complainant; that the defendant, a Kentucky corporation, is a wholesale druggist; that it obtains said medicine from complainant's wholesalers and retailers by false and fraudulent representations, surreptitious, and dishonest methods and persuading them to break their contracts with him, and sells same to retailers operating "cut rate drug stores" at less than the wholesale prices fixed by him, who in turn sell to consumers at less than the retail prices so fixed; that before the medicine is so sold to consumers the wrappers are removed and the labels are defaced so as to obliterate the serial numbers stamped thereon and the information thereby given; and that defendant gives out and announces that he will continue so to obtain said medicine and so dispose of it. The relief sought is an injunction against him so doing.[a]

* * * * * * *

[373] This brings us to the other argument put forward by defendant's counsel in support of the contention that the system of contracts under which he sells his medicine outright and attempts at the same time to retain the control over the subsequent trade therein is unlawful. It is that said system of contracts in so far as it attempts to retain such control contravenes the common-law rule invalidating contracts in restraint of trade. The general principle upon which this rule is based, as stated by Pollock on Contracts, p. 309, is "that a man ought not to be allowed to restrain himself

[a] The matter omitted relates to patents rather than to unlawful restraint of trade. See first two paragraphs of syllabus.

from exercising any lawful craft or business at his own discretion and in his own way." It is thus stated in the quotation made by him from the opinion in *Hilton* v. *Eskerley*, 6 E. & B. 66, 74, 75:

[374] "Prima facie, it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it [his trade] on according to his own discretion and choice. If the law has in any manner regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion."

The restraint, then, which the rule and the general principle upon which it is based have in view is a restraint which a man puts upon himself by contract with another, and not a restraint which another puts upon him. Another is without power to put any restaint upon himself except by force. He alone can otherwise put restraint upon himself, and that by contract. Such restraint in its initiation is put upon him by his own discretion and choice. The entering into the contract is voluntary on his part, and the law in relieving him from it relieves him from the consequences of his own free act. It is a restraint, not only as to whether he shall carry on any lawful craft or business, wholly or in part, but also as to the way or mode of carrying it on. The cases which have arisen under the rule have fallen into two well-defined classes. One class is where, as a rule at least, the contract is between two, and but one party thereto agrees to restrain himself in some particular for the benefit of the other party. Such contracts are usually termed contracts in restraint of trade. The most usual instance of cases belonging to this class is where the owner of a business sells it to another and agrees with such other not to engage in the same business anywhere or only in certain territory.

Mr. Justice Holmes in *Northern Securities Co.* v. *United States*, 193 U. S. 197–404, 24 Sup. Ct. 436, 48 L. Ed. 679, defines contracts of this class as "contracts with a stranger to the contractor's business [although in some cases carrying on a similar one] which wholly or partially restrict the freedom of the contractor in carrying on the business as he otherwise would." To the same effect, he says:

"Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business and the trade restrained was the contractor's."

The objection to a contract of this class is its tendency to harm both the contractor and the public. The way in which it may harm the contractor is in depriving him of his livelihood in whole or in part. The way in which it may harm the public is in making him a public charge, in depriving it in whole or in part of the benefit of his activity, and in furthering an attempt at monopoly. Justice Holmes, in the opinion already quoted from, said that the objection to such contracts at common law was primarily on the contractor's own account. In early times the chance of such a contract doing harm was much greater than now. Under existing conditions, in view of the abundant opportunities for one to earn a living and the abundance of capital to go into any profitable business and its eagerness to do so, the chance of such a contract doing harm in either direction is much lessened. But all contracts of this class are not invalid, because of the restraint which they put upon one party thereto. Some are invalid, and some are not. Out of the cases that have arisen involving contracts of this kind a rule has been evolved by which it may be determined whether the contract is invalid or not. The rule is [375] if the restraint is reasonable the contract is valid; if not, it is invalid.

As said by Judge Simonton in *Hulse* v. *Bonsack Machine Co.*, 65 Fed. 869, 13 C. C. A. 180, the test is "as it is put in *Ammunition Co.* v. *Nordenfelt* (1893) 1 Ch. 630, and *Match Co.* v. *Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; 'Is it, in view of all the circumstances of the case, reasonable?'" In the most usual instance of such cases; that is, where the owner of a business sells it to another, and agrees with such other not to engage in the same business, what determines the reasonableness of the particular restraint involved is whether it is essential to protect the business from invasion by the contractor. If it is, it is reasonable; otherwise it is not.

Pollock on Contracts, p. 310, says:

"Public policy requires, on the one hand, that a man shall not by contract deprive himself or the state of his labor, skill, or talent; and, on the other hand, that he shall be able to preclude himself from competing with particular persons so far as necessary to obtain the best price for his business or knowledge when he chooses to sell."

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Judge Severens, in *Jarvis* v. *Knapp*, 121 Fed. 34, 58 C. C. A. 1, says:

"The underlying principle upon which the modern cases upon this subject are grounded is that, although one cannot stifle competition by a bargain having that purpose only, yet when he purchases something or acquires some right, the value of which may be affected by the subsequent conduct of the seller, the purchaser may lawfully obtain the stipulation of the seller that he will refrain from such conduct."

The principle of absolute freedom of trade which in certain instances requires that a contract imposing restraint shall give way, in such a case, enforced by the principle of absolute freedom of contract requires that it shall remain binding. But whilst this is the most usual instance of cases involving contracts where the restraint imposed is reasonable and the contract therefore valid, there are other instances of such cases which often arise

Judge Taft, in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, undertakes to specify the instances of such cases. They are as follows:

"Agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere by competition or otherwise with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant or agent not to compete with the master or employer after the expiration of his time of service."

As to what is essential to the validity of such agreements, he says:

"Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1 and 2) to the enjoyment by the buyer of the property, good will or interest in the partnership bought; or (3) to the legitimate ends of the existing partnership; or (4) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (5) to protection from danger of lass to the employer's business caused by the unjust use on the part of the employé of the confidential knowledge acquired in such business."

Then, as to whether his classification embraces all the possible instances of such cases, he said:

[376] "It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at common law; but it certainly would seem to follow from the tests laid down for determining the validity of such an agreement

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that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party."

The other class of cases which has arisen involving the restraint of trade rule is where the contract is between two or more persons engaged in the same business, sometimes including all the persons so engaged in a particular locality or everywhere; but each one engaged separately, and with no concern or interest in the business of any other one, and each one agrees to restrain himself in some particular for the mutual benefit of all. Such contracts are termed by Page, in his work on Contracts, "monopoly contracts," and in Anti-Trust Act, June 10, 1890, c. 407, 26 Stat. [U. S. Comp. St. 1901, p. 1886], "combinations or conspiracies in restraint of trade." Mr. Justice Holmes, in the opinion already quoted from, defined them as "combinations to keep strangers to the agreement out of the business." This would seem, however, not to be full enough. They include combinations to enhance prices in other ways, as by dividing territory, limiting output, fixing prices, or in any other way. Judge Taft defines them as "contracts having no purpose but to restrain competition and maintain prices." Judge Severens, in the quotation already made from his opinion in *Jarvis* v. *Knapp*, refers to them as bargains having the purpose only to stifle competition. The objection to contracts of this class, as stated by Mr. Justice Holmes, is "not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm, and their supposed consequent effect upon the public at large." Where, however, the purpose of the contract is to enhance prices otherwise than by keeping strangers out of the business the objection to it is for its direct effect upon the public at large. It is in contracts of this kind that the modern disposition to reduce competition and create monopolies has mostly manifested itself.

Page, in his work on Contracts (section 373), says that such contracts are "always illegal." And such I under-

stand to be the drift, at least, of Judge Taft's opinion in the Addyston Pipe & Steel Co. Case.

In view, then, of this difference between these two classes of cases as to the validity of the contracts belonging to them, in the one class, the contract being valid if the restraint is reasonable; in the other class, the contract probably being invalid without any reference to the question of reasonableness, it is important to determine to which class the system of contracts involved herein belongs. If it belongs to the second class, then probably we have nothing more to do than to locate it. If it belongs to the first class, then, if the restraint is reasonable, the system of contracts is certainly valid. In any event, it will add to clearness of thought to locate it. But before attempting to do this, a suggestion of complainant's counsel **[377]** should be considered and disposed of. It is that said system of contracts is not affected by the restraint of trade rule solely because complainant's medicine to which it is applied is an article made under a secret process. They would seem to contend that no contract by the purchaser of an article made under a secret process restraining himself as to what he should do with it is within the restraint of trade rule simply because it is made under such a process. That the nature of the property sold may of itself determine that a restraining contract in relation thereto is not affected by the rule, must be conceded. A patentee may assign his patent right and enter into a contract restraining himself with reference thereto.

In the case of *Central Transportation Co.* v. *Pullman Palace Car Co.*, 139 U. S. 24–43, 11 Sup. Ct. 478, 35 L. Ed. 55, Mr. Justice Gray said:

"A covenant by the assignor of letters patent for an invention that he will not himself make, use, or sell the patented article is undoubtedly valid, because the act of Congress which creates the monopoly expressly authorizes it to be assigned as a whole."

The same is true as to a grant by a patentee of his patent right, which is an assignment for a particular territory, and for the same reason. So a patentee may grant a license and enter into such a contract with reference thereto.

In the case of *Vulcan Powder Co.* v. *Hercules Powder Co.*,

96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242, Judge McFarland said:

"As a patent is a sort of monopoly the owner may manufacture under it or not as he pleases, and may make either a partial or entire assignment of it, and may protect his assignee, not only by an agreement not to use the patent (which would be unnecessary, because such use would be an infringement), but by a covenant not to interfere in any way with the profits to be derived from the assigned patent.

To the same effect are the following cases, to wit: *Morse* v. *Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Good* v. *Daland*, 121 N. Y. 1, 24 N. E. 15; *Bonsack* v. *Machine Co.* (C. C.) 70 Fed. 383.

Likewise, in relation to the patented thing, as we have seen, the purchaser thereof may be restrained as to the use of it by him. This, however, is effected without any restraining contract on the part of the purchaser, simply by the seller, the owner of the patent, limiting the license as to what the purchaser may do therewith. Again, a restraining contract in relation to a secret process is valid simply because of the nature of the property to which it relates. The existence and value of a secret process as property depends upon the fact that its secrecy can be maintained by a restraining contract. Hence one to whom it is communicated by the owner may by contract restrain himself as to the use he is to make of it.

In the case of *Harrison* v. *Glucose Sugar Refining Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915, Judge Jenkins said:

"In such a case it may well be doubted if the rule with respect to restraint of trade should apply, because these secrets of business are the property of the appellee, to which the public has no right, and may not justly insist that it shall receive the benefit of the appellant's services through breach of confidence. * * * In all such cases courts have uniformly enjoined the delin- **[378]** quent party from engaging in the business from which he has agreed to refrain and from disclosing the secrets of the business which he has thus acquired."

It was on this principle that it was held by the Supreme Court in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, that contracts of telegraph companies with the Board of Trade of Chicago. by which said companies agreed not to communicate quotations of prices for wheat, corn, and provisions offered and accepted in its exchange which they received from it, to persons who

were not in contractual relations with it and approved by it, were valid. Mr. Justice Holmes said:

"But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly and no contract in restraint of trade, either under the statutes or at common law."

So, likewise, the owner of a secret process in selling it to another may, by contract, restrain himself not thereafter to use it or to divulge it to others. In the case of *Central Transportation Co.* v. *Pullman Palace Car Co.*, *supra*, Mr. Justice Gray said:

"Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is used."

In the case of *Ammunition Co.* v. *Nordenfeldt*, 1 Ch. 630, L. J. Bowen said:

"Sales of secret processes are not within the principle or the mischief of restraint of trade at all. By the very transaction in such cases, the public gains n the one side what it lost on the other, and, unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture."

To the same effect are the cases of *Vickery* v. *Welch*, 19 Pick. (Mass.) 523; *Jarvis* v. *Peck*, 10 Paige (N. Y.) 125; *Hard* v. *Seeley*, 47 Barb. (N. Y.) 428; *Alcock* v. *Giberton*, 5 Duer. (N. Y.) 76; *Tode* v. *Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475; *Simmons Medicine Co.* v. *Simmons* (C. C.) 81 Fed. 163; *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67.

It is therefore true, as stated by Judge Scott, in *Standard Fire Proofing Co.* v. *St. Louis Co.*, 177 Mo. 559, 76 S. W. 1008, that:

"Patented inventions and secrets of art or trade not patentable are not within the purview of the rule against restraint of trade."

But what we have to do with here is not the secret process by which complainant's medicine is made. It is the medicine itself, made under the process. The secret process and the medicine made under it are separate and distinct things, and each is a subject of ownership. One person may own one and another person the other. The question has been argued whether a sale of an article made under a secret process is a publication of the process. It is and it is not. It is, if and when one can by his own ingenuity ascertain therefrom the process by which it is made. Until he so ascertains it, there has been no **[379]** publication of the process; and in the meantime the ownership of the secret and the right to its protection is as full and complete as if no sale had ever been made of the article embodying the secret process. But still, as stated, such article is not the process and the rights with reference to each are different. What is there, then, in the nature of the articles made under a secret process to occasion any difference between them and articles not so made or between them and articles which one may not have made at all, but simply owns, in the matter of the validity of restraining contracts entered into by purchasers thereof from the owner? It is hard to conceive of any. It is true that the manufacturer and owner of the articles made under the secret process may refrain from making them and selling them to purchasers, and thus putting them upon the market. Equally so, the manufacturer and owner of any other articles may refrain from so doing. So, also, the owner of articles that he has not made, but has purchased or otherwise obtained from the manufacturer may refrain from selling them to purchasers and thus putting them upon the market. Suppose that the owner of a patent should sell all the articles made under it to another with license to use or resell them, thus passing them outside of the monopoly of the patent in the hands of the purchaser, would the mere fact that they had been made under the patent lend any sanctioning force to a restraining contract entered into with reference thereto by a subpurchaser thereof? I must conclude, therefore, that the fact that complainant's medicine has been made under a secret process has no effect whatever on the validity of the system of contracts involved herein. He has no greater rights in relation thereto, as distinguished from the secret process under which it was made, than the owner of any other tangible personal property, whether made by him or not, would have in relation to such property. Nor can the fact that he sells it under a trade-mark and a certain dress, which no one else has the right to use, even if he did by his own ingenuity ascertain the secret process by which it

is made and thus became enabled to make and sell it, make any difference. No reason occurs to me why the owner of goods trade-marked and peculiarly dressed should have the right to obtaining a restraining agreement from the purchaser of his goods, and the owner of goods not so marked or dressed should not have such right. All goods have some dress, and if not trade-marked are marked with the name of the seller. If, then, such a system of contracts is valid, as applied to complainant's medicine, it would be equally valid as applied to any other article of tangible personal property owned by the one so applying it. The validity of that system depends entirely, therefore, upon the question as to which of the two classes of contracts involving the restraint of trade rule it belongs, and if it belongs to the first class, whether under all the circumstances it is reasonable.

To which class, then, does it belong? The only ground for claiming that it belongs to the second class is that its purpose is to maintain the prices of complainant's medicine to the retailers and consumers. There is nothing in them, beyond the uniformity of price **[380]** provided for, to affect competition amongst different wholesalers and amongst different retailers. The contracts are not between persons engaged in the same business. One set of them is between complainant, who is a manufacturer, and wholesale druggist; and the other set is between him and retail druggists. A separate contract is entered into between complainant and each wholesaler and between him and each retailer. In each contract between complainant and a wholesaler, there is a purchase of medicine by him and an agreement on his part to restrain himself as to the persons to whom and the price at which he resells. And in each contract between complainant and a retailer there is an agreement on his part that if he is designated as a purchaser from wholesalers to restrain himself as to price at which he resells to consumers. It is true that these contracts cover the entire trade in complainant's medicine, which fact defendant's counsel emphasize, but there is here no combination between persons engaged in the same kind of business to regulate their respective businesses for their mutual benefit to the harm of strangers or the public at large. It would seem that each of the contracts in complainant's system comes within the fourth of the five subclasses into which Judge Taft divides the first class of contracts. If complainant sold his medicine to consumers as well as manufactured it, and should make a single contract with a retailer in the market where he sold by which he sold to the retailer a lot of his medicine to resell to consumers, and the retailer agreed not to sell it at less than the price at which complainant was selling it, and thus undersell and compete with him for consumers, it would present a case clearly within said fourth subclass, and the validity of the restraint which such retailer thus put upon himself would depend upon its reasonableness, that in turn depending upon whether the restraint was reasonably necessary to the prevention of possible injury to complainant from use by the retailer of the medicine sold to him. The cases cited by Judge Taft in illustration of this fourth subclass each involved a single sale and agreement. Those cases are as follows, to wit: *American Strawboard Co.* v. *Haldeman Paper Co.*, 83 Fed. 619, 27 C. C. A. 634; *Hitchcock* v. *Anthony*, 83 Fed. 779, 28 C. C. A. 80; *Oregon Navigation Co.* v. *Winsor*, 20 Wall. (U. S.) 64, 22 L. Ed. 315; *Dunlop* v. *Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *Hodge* v. *Sloan*, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816.

In the American Strawboard Co. Case, that company owned and operated a number of strawboard mills. It conveyed one of them to the Haldeman Paper Company, which agreed not to manufacture strawboard at said mill for 20 years. In the Anthony Case, Anthony was lessee of a dock upon which he conducted the business of dealing in coal and fish and conveyed another dock near by to Hitchcock, a dealer in lumber, who agreed not to engage in the coal or fish business or do anything that would conflict with the grantor's business for seven years. In the Oregon Navigation Company Case, that company was engaged in navigating the Columbia river in Oregon and Washington. It had purchased the steamer New World from the California Navigation Company, which was engaged in navigating Cali-**[381]**fornia waters, and had agreed with it not to employ said steamer in California waters. It sold the steamer

to Winsor, who was engaged in navigating Puget's Sound. He agreed not to use it in California waters or Columbia river for 10 years. In the Gregory Case, Gregory, who was engaged in navigating Hudson river between New York, Albany, and Troy sold a two-thirds interest in steamboat Robert L. Stevens to Dunlop, who agreed not to use it at any time thereafter as a passage boat on Hudson river above the village of Saugerties. In the Hodge Case, Hodge's testator, who was engaged in the business of selling sand from land he owned, conveyed a piece of the land to Sloan who agreed he would not sell any sand from it. In each case it was held that the restraining agreement was valid. Had there been in each case any number of similar sales of similar property with similar restraining agreements, each transaction would have belonged to the fourth subclass, and the restraining agreement in each would have been dependent upon its reasonableness for its validity. Their numerousness would not affect their nature. It may be said, however, that complainant does not sell save to wholesalers to resell to retailers and that therefore neither the wholesalers nor retailers are possible competitors of complainant and the restraining agreements entered into by the wholesalers and retailers are not to prevent or affect their using the medicine in competition with him, and, hence, do not come within the letter of that fourth subclass, which covers agreements by the buyer of property not to use the same in competition with the business retained by the seller. This may be true. But the spirit of the subclass covers restraining agreements by the buyers of property to prevent their using it in any other way than by competition so as to injure the business of the seller. The principle involved in this subclass is that, if one in business sells property to another and such property may be used by the purchaser in a way to injure the business of the seller or to render it less profitable than it would otherwise be, a restraining agreement on the part of the purchaser as to the use of it may be reasonable under the circumstances of the case, and if so, valid.

Judge Taft, in Addyson Pipe & Steel Co. Case, in leading

up to the classification which he made of the cases coming within the first class, said:

"When one in business sold property with which the buyer might set up a rival business it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict."

It would be equally reasonable that the buyer should be able to restrain himself from using the property in any other way than setting up a rival business, so as to do the seller an injury which but for the sale he would be unable to inflict. But whether or not the system of contracts involved here comes within said fourth subclass, they are certainly covered by the language used by Judge Taft to take in any possible omissions from the classification he made. In each contract the restraining agreement is ancillary or collateral to the main purpose of a lawful contract, to wit, a sale of the medicine, [382] and, according to complainant's claim, it is necessary to protect him from an unjust use of the legitimate fruits of the contract by the purchaser. I therefore conclude that the system of contracts involved herein belongs to the first class, and that its validity depends solely upon its reasonableness. Is it reasonable, then, that complainant should have the right to put in force the system of contracts involved herein and obtain from his vendees and subvendees restraining agreements from the vendees, as to whom and at prices at which they shall resell, and from the subvendees as to the prices at which they shall resell? A question arises here as to the party on whom lies the burden as to the reasonableness. Is it on complainant to show that the restraint in question is reasonable, or is it on defendant to show that it is unreasonable?

Judge Simonton, in *Hulse* v. *Bonsack Machine Co.*, supra, says:

"This is not literally an agreement in restraint of trade. tI is simply a contract which by analogy can be likened to one, and the analogy should not be pushed beyond the reason for it. There is no presumption that such a contract is void. The presumption is in favor of the competency of the parties to make the contract and the burden is upon the party who alleges that it is unreasonable or against public policy."

On the other hand, Beach on Contracts, vol. 2, § 1562, says:

"Many authorities declare in substance that all restraints are presumed to be bad, but, if the circumstances are set forth, that presumption may be excluded, and the court judges of these circumstances whether the contract be void or not."

I do not find it essential in this case to locate the burden, as I hold that under the allegations of the bill, which are admitted by the demurrer, said system of contracts as applied to complainant's medicine is reasonable. The circumstances which lead me to this conclusion are these: That complainant's vendees and subvendees should be so restrained is advantageous to complainant's business. It would be an injury to it from them not to be so restrained. Exactly how it is so advantaged and how it would be injured by a removal of the restraint has not been developed in the argument; and I do not feel sufficiently advised as to such matters to say as to this. It would seem that the existence of such a system of contracts in relation to complainant's medicine would tend to prevent demoralization in the trade therein through competition amongst his vendees and subvendees, and enable him to maintain the prices for his medicine. But, however this may be, it is alleged in the bill that before complainant established and put said system in force the "cut rate" or "cut price" system had resulted in much confusion, trouble, and damage to complainant's business, and had injuriously affected the reputation and depleted the sale of his medicine, and that it was established and put in force to protect his trade, custom, and business, and the manufacture and sale of his medicine; that it prevents cutting of prices and demoralization of trade both wholesale and retail, greatly benefits him by increasing the sales of and demand for his medicine, and is of great value to him in his business; and that it has been of great benefit and advantage to him and his business, and has increased his **[383]** trade and business. It is further alleged that the prices which he and his vendees and subvendees get for his medicine are reasonable. These allegations must be accepted as true. The vendees and subvendees would not have the opportunity to sell his medicine

if he did not make and sell it. He thus brings trade to them. By fixing a uniform price on his medicine on sales by himself to the wholesalers, on sales by wholesalers to retailers, and by retailers to consumers, all purchasers, wholesalers, retailers, and consumers are treated alike, the large wholesalers have no advantage over the small ones, nor the large retailers over the small ones. All sellers and all consumers are treated alike. Complainant creates the demand for the medicine, as he alone advertises it. And, finally, complainant could accomplish the very same result by a different system, against which no legal complaint could be made. This would be by a system of agencies. Though the nature of complainant's medicine; i. e., its being an article made under a secret process, may not, without more, determine the validity of the system of contracts in question, it cannot be said that it does not add to the reasonableness of said system as applied to it. Complainant not only owns it and makes it, but no one else can make it, and if they could they could not sell it under his trade-mark and dress.

How, then, does the matter stand upon authority? The whole trend of authority is favorable to the validity of the system. The sweeping principle which has taken form in Judge Taft's five classes and in the general statement to cover any omissions therefrom upholds it. But there are a number of decisions more directly in point. They are as follows, to wit: *Elliman* v. *Carrington* (1901), 2 Ch. 275, 84 L. T. (N. S.) 853; *Garst* v. *Harris*, 177 Mass. 72, 58 N. E. 174; *Walsh* v. *Dwight* (Sup.) 58 N. Y. Supp 91; *Park & Sons Co.* v. *National Wholesale Druggists*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; *Whitwell* v. *Tobacco Co.* 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689.

In *Elliman* v. *Carrington*, the plaintiffs were manufacturers of Elliman's Royal Embrocation for horses and cattle and Elliman's Universal Embrocation for human beings. They sold it to the defendants, who bought wholesale to sell to others at retail. The latter agreed not to sell below certain prices and not to sell to others unless they agreed not to sell below certain prices. They broke the latter part of the agree-

ment which was the occasion of the suit. It was held that the agreement was valid. Mr. Justice Kekewich said:

"The [plaintiffs] are not bound to sell the embrocation at all; they are not bound to manufacture it. They are at liberty to do so as they please, and when they have manufactured it, they are at liberty to sell it at whatever price they choose to fix, it may be a prohibitive one or it may be such a small price that they cannot make any profit out of it. That is entirely for their consideration. There are no goods which the owner thereof may not lawfully retain or sell at such price as he pleases."

Again he says:

"Why should not Elliman's Sons & Co. be at liberty to fix the price in that way? Nobody has argued and it could not possibly be argued that they are not at liberty to fix the price in the first sale to Carrington & Son. Why [384] should they not be at liberty to make the further bargain with Carrington & Son that they shall not sell it below a certain price? It is said that the contract is in restraint of trade. In one sense it is, but it is just as much and no more in restraint of trade for Elliman's Sons & Co. to say that they will not sell at all. It seems to me, to say the least, that what is restraint of trade as regards Carrington & Son is really the liberty of trade as regards Elliman's Sons & Co. The cases which have been cited are well-known authorities expounding a great principle, and showing what exceptions there are to that principle. But this case seems to me not to fall within any principle or exception. I do not think that it is touched by the authorities at all. It is merely a question of whether a man is entitled when he is selling his own goods to make a bargain as to the use to be made of them by the purchaser. It is said that the contract is against public policy, but that phrase merely embodies for the present purpose the great principle of restraint of trade, and to say that it is to prevent Elliman's Sons & Co. from exercising their own discretion, seems to me to be applying a well-settled principle of law to facts to which it cannot have any possible application."

It is to be noted that though the article which was sold in this case was probably made under a secret process, no emphasis was laid upon the fact. The reasoning applies equally well to any article which one may own, whether he made it or not, and which he sells for purpose of resale.

In *Garst* v. *Harris*, the plaintiff sold Phenyo-Caffein, a proprietary medicine, to defendant, who agreed not to sell it below a stipulated price, and a certain sum was agreed on as liquidated damages. The action was brought for a breach of this agreement to recover said sum. It was held that the agreement was valid.

Holmes, C. J., said:

"It is said that the contract was unlawful as in restraint of trade. * * * When, as here, there is a secret composition, which the defendant presumably would have no chance to sell at a profit at all, but for the plaintiff's permission, a limit to the license, in the form of a restriction of the price at which he may sell, is proper enough."

It is true that the fact that the article sold was a secret composition was emphasized. But the reasoning used was equally applicable to any other article; as to any other article sold the purchaser would not have had any chance to sell that particular article, however it may have been as to other articles of the same kind, at a profit at all, but by the seller's permission.

Point is made as to these two cases that in each but a single contract was involved, and not a system of contracts as here. That is true, but no doubt there was a system of contracts in each of those cases as here. A single contract; i. e., a contract with a single purchaser, would hardly have been of any value to the seller. It was only by a system of contracts; i. e., a contract with every purchaser, that he could hope to accomplish anything. This must have been had in view by the court, as no point was made of the fact that there was but a single contract involved, and the reasoning was applicable to a system.

In *Walsh* v. *Dwight*, the defendants were manufacturers and sellers of saleratus and soda, articles in common use and capable of being manufactured by any one, which was known on the market as "Dwight's Cow Brand Saleratus and Soda." They sold these articles to job- [385] bers under contracts, whereby the latter, in consideration of a certain discount, agreed not to resell same or any other saleratus or soda at less than certain prices. The plaintiffs were rival manufacturers of saleratus and soda, and the suit was to recover damages sustained by them because of defendant's system of contracts. It was assumed that plaintiffs had a right of action if the system of contracts was invalid and the disposition of the case was made to turn on its validity. It was held to be valid. Judge Ingraham said:

"It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendants would have the right to establish agencies for the sale of their goods, or to employ others to sell them, at such prices as the defendants should designate, cannot be disputed. Nor can it be that a manufacturer of merchandise cannot agree to sell to others upon condition that the vendee, in selling at retail, should charge a specified price for the goods sold, or should sell only the manufactured product of the manufacturer. If a dealer in articles of this kind, for his own advantage, agrees to confine his business to a particular line of goods, or agrees with the manufacturer to charge a particular price for the articles which he sells in his busi-

ness, such an agreement is not illegal, as in restraint of trade or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business, or the manufacturers of other articles from selling their products to any one who is willing to buy. There is nothing to prevent any individual from selling any property that he has at any price he can get for it. Nor is there any reason why an individual should not agree that he will not sell property which he owns at the time of making the agreement, or which he thereafter acquires, at less than at a fixed price; and certainly a contract of this kind is not one which exposes the parties to it to any penalty, or subjects them to any action for damages by those whose business such a contract has interfered with."

The case of *John D. Park & Sons Co.* v. *National Wholesale Druggists Association* was a suit by the defendant herein against an association of wholesale druggists to recover damages alleged to have been occasioned by said association causing manufacturers of medicines to refuse to sell to this defendant on the same terms as it sold to members of said association unless it would enter into a contract by which it agreed not to resell same at less than certain prices, a contract similar to that which each member of said association had entered into with said manufacturers. It was held that the system of contracts was valid, and this defendant was not entitled to recover. There was a dissent by three of the judges. One dissent was based upon the ground that, though the manufacturers had a right voluntarily to put in force such a system of contracts, it was illegal for the jobbers to drive them to put in force said system by refusing to deal with them unless they did. Another dissent was based upon the ground that jobbers required the manufacturers not only to sell at the same price to each jobber, but to compel each jobber to sell to the consumers at the same price. "It is in this respect" it is said "that the agreement is vicious and operates in restraint of trade for it destroys competition among the jobbers." The force of the decision is weakened somewhat by the consideration that it is not entirely clear that the court did not think that the medicine to which the system of contracts was held lawfully applicable had been patented. The reasoning of the opinions rendered on behalf of the majority of the court, how- **[386]** ever, is not based on the fact that they had been patented. It is equally pertinent to proprietary medicines. This case suggests that

possibly complainant was driven to adopt its system of contracts by the organization of wholesale druggists.

In *Whitwell* v. *Tobacco Co.*, the defendant was a manufacturer of tobacco and the plaintiff a jobber therein. The defendant's method of doing business was to fix the prices of its goods so high to those who did not agree to refrain from dealing in the commodities of its competitors that their purchase was unprofitable, while it reduced the prices to those who did so agree so that the purchase of the goods was profitable to them. The plaintiff applied for a purchase, but refused to so agree, and, upon his so refusing, the defendant refused to sell to him. He then brought the action to recover damages for the refusal. It was held that he could not, that such an agreement on the part of a jobber was legal, and that the defendant had a right to refuse to sell to him unless he would enter into it. Judge Sanborn said:

"The tobacco company and its employé sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employé were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills."

Besides these cases there is that of *Dr. Miles Medical Co.* v. *Goldthwaite* (*C. C.*), 133 Fed. 794. The force of this decision, however, is weakened by the fact that there no argument was made on behalf of defendant. I have also been referred to certain unreported decisions upholding the

validity of complainant's system of contracts. There are decisions by Judge Lochren in the case of *Hartman* v. *Hughes*, pending in the United States Circuit Court for the district of Minnesota, rendered July 14, 1905; by Judge Kohlsaat, in the case of *Dr. Miles Medical Company* v. *Platt*, pending in the United States Circuit Court for the Northern District of Illinois, Eastern Division, rendered 19th day of January, 1906; and by Judge Tuley in the case of *Platt* v. *National Association of Retail Druggists*, pending in the circuit court of Cook County, Ill., rendered January 24, [387] 1905. But in none of these cases apparently did the judges have to reckon with the line of argument that is presented here, and though reaching the same conclusion, I have proceeded along different lines. It is to be noted that this is not a case where the manufacturer undertakes to maintain retail prices for the sale of his goods by a direct restrictive agreement with the wholesaler, and by affixing labels to the goods charging all subsequent transferees with notice of the conditions under which they were originally sold. A case of that sort presents the interesting question whether in this way the manufacturer can maintain the retail prices of his goods, i. e., whether the doctrine laid down in *Tulk* v. *Mohay*, 2 Ph. 774, by which covenants restricting the use of land are enforced against purchasers with notice should be extended to chattels.

The cases of *New York Bank Note Co.* v. *Hamilton, etc., Co.*, 28 App. Div. 411, 50 N. Y. Supp. 1093; *Murphy* v. *Christian Press, etc., Co.*, 38 App. Div. 426, 56 N. Y. Supp. 597, have been cited as holding that it should, and the cases of *Taddy & Co.* v. *Stevens & Co.*, 20 T. L. R. 102, Eng. Ch. D.; *Garst* v. *Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; as holding that it should not. In the case of *De Mattos* v. *Gibson, De Gex & Jones*, 276, the doctrine was applied to a steamboat. Lord Justice Knight Bruce said:

"Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another with knowledge of a previous contract, lawfully, and for a valuable consideration made by him with a third person, to use and employ the property for a particular purpose, and in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to his contract, and inconsistent with it, use the property in a manner not allowable to the giver or seller. The rule applicable alike in general, as I conceive, to movable and immovable property, recognized and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no reason for any exception in the instance before us."

Here, however, the retailers enter into a contract directly with the complainant upon a valuable consideration, to wit, their being designated as retailers to whom the wholesalers may sell, and the question is whether they are bound by such contract. I therefore conclude that the complainant's system of contracts is valid. The position is taken in brief on behalf of defendant that the system of contracts is invalidated by the federal anti-trust act of 1890; but I understand that this position is not insisted on. I therefore make no further reference thereto.

The general demurrer is overruled. There is a special demurrer to so much of the bill as seeks an injunction restraining defendant from removing the dress from complainant's bottle and mutilating the label. It is urged that if the system of contracts is upheld and enforced the complainant will have no occasion for such relief. This does not occur to me as sufficient reason for his not obtaining it.

The special demurrer is also overruled.

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[51] DELAWARE, L. & W. R. CO. *v.* KUTTER ET AL.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

[147 Fed. 51.]

APPEAL AND ERROR—CASE TRIED TO COURT—GENERAL FINDING—MATTERS REVIEWABLE.—When, upon a trial without a jury in a federal court, the findings of fact and of law by the court are general, exceptions to a ruling denying a motion for judgment for the defendant present for the consideration of an appellate court the question whether upon the whole evidence, with all the inferences which a jury could justifiably draw from it, the plaintiff was entitled to recover; the general finding is to be accepted as equivalent to the verdict of a jury on all matters of fact, and the appellate court cannot review the weight of the evidence.

JUDGMENT—MATTERS CONCLUDED—SECOND ACTION ON DIFFERENT DEMAND.—When a judgment is offered in evidence in a subsequent

Syllabus.

action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action, and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence; but every matter necessary to the disposition of the case as made by the pleadings is included in the conclusive effect of the judgment.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1248–1258.]

SAME.—An action to recover a sum of money alleged to be due from defendant to plaintiff under a contract, and a subsequent action for wrongful ter- **[52]** mination of the contract by defendant, although based upon the same contract, are upon different demands, and where the only defense pleaded in the first action was a breach of the contract by plaintiff, a judgment in his favor therein is conclusive only upon that question in the second action, unless it is shown that other matters were actually litigated and decided.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1248–1258.]

RAILROADS—CONTRACT TO SECURE TRAFFIC—VALIDITY—MONOPOLIES—CARRIERS—UNDUE PREFERENCE.—Defendant railroad company entered into a contract with plaintiff for a term of years to build up, develop, and conduct the business of the transportation of milk on its lines of road. Plaintiff was to have full charge of such business and was to receive as compensation a percentage of the freights earned therein. It was provided that he should charge rates not in excess of those charged by competitive roads, and should be granted the exclusive privilege of transporting milk over defendant's lines "so far as it was permitted to do so by law." In the execution of the contract all rates were made by defendant, and plaintiff was not given a monopoly of the milk traffic. *Held*, that such contract was not ultra vires nor void as contrary to public policy, especially as practically construed by the parties in its execution; nor was it in violation of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], or of section 3 of the interstate commerce act of Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155] as giving an undue and unreasonable preference to plaintiff.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 434; vol. 9, Cent. Dig. Carriers, §§ 83–85; vol. 35, Cent. Dig. Monopolies, §§ 10, 12.]

CONTRACTS—RULES OF CONSTRUCTION—LEGALITY.—The fundamental rule is that a contract will be construed, if possible, as having been made for a legal, rather than for an illegal, purpose and it should not be relaxed when a vicious construction is sought for by the party who made the contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 734.]

Opinion of the Court.

In Error to the Circuit Court of the United States for the Eastern District of New York.

W. D. Guthrie and *H. D. Hotchkiss*, for plaintiff in error.

Augustus Vaulbyck, for defendants in error.

Before WALLACE, LACOMBE and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge.

The plaintiff in error was the defendant in the court below, and by this writ of error seeks to review a judgment for the plaintiffs in an action tried by the court without a jury. The action was brought to recover damages for the breach by the railroad company of a contract dated July 9, 1886, made with Robert E. Westcott, which was to remain in force for the term of 10 years, and the duration of which was extended September 30, 1892, for the further term of 5 years.

By the terms of the contract Westcott undertook to use his best endeavors "to build up, develop, increase, facilitate, and conduct the business of transportation of milk" over the lines of the defendant's railroad; that he would be wholly responsible for the milk transported over said lines, and save the defendant harmless from all claims arising from or connected with the milk business, except those from acci- **[53]** dents and casualties to its trains or its own negligence; that he would save the defendant harmless from all liability for loss of life or injury to any person doing business over its lines on his account; that he would not charge for transportation of milk "rates in excess of those charged by competitive railroads for similar services;" and that he should monthly pay over to the defendant 80 per cent. of all charges collected by him for the transportation of milk during the preceding month, retaining 20 per cent. thereof in full compensation for his own services. The defendant on its part undertook to receive, load, and transport, at and from all stations on its lines, all the milk furnished at said stations for transportation, and to transport the same upon its trains at such times as might be best calculated to pro-

mote its business; that it would not permit any of its agents or servants to do any act to prevent or interfere with the developing, building up and conducting of the milk business of Westcott, and would grant him the exclusive privilege of transporting milk over the said lines "so far as it was permitted to do so by law;" that it would furnish sufficient depot accommodations for the conduct of the milk business, render such assistance to the messengers of Westcott accompanying the milk trains as might be necessary for the prompt loading and unloading of such milk, and promptly retransport and return to the several stations the empty milk cans used in the transportation of the milk. The contract was by its terms "subject to revision after three years, and at the end of any one year thereafter on giving three months' notice," and in case of any difference between the parties, provided for a submission to arbitration.

By its answer the defendant admitted the execution of the contract and alleged as a justification for terminating it (1) that the contract was ultra vires, and contrary to public policy; (2) that it was made in violation of the acts of Congress known as the "Anti-Trust Act" and the "Interstate Commerce Act;" and (3) that Westcott had violated the contract by entering into other contracts with competitive railroads inconsistent with his duty to the defendant and the obligation of his contract.[a]

* * * * * * *

[62] The contention that the contract was void by the act of Congress (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) to "protect trade and commerce against unlawful restraints and monopolies," may be briefly disposed of. The contract undoubtedly operated upon interstate commerce as well as upon interstate **[63]** traffic; but if the views which we have expressed are correct as to its meaning and effect, it did not have any tendency to create a monopoly, or evidence any conspiracy in restraint of trade. It could only operate in restraint of trade by permitting Westcott to charge such extortionate rates to milk shippers as would discourage shippers; and this it did not permit or contemplate.

[a] The matter omitted does not relate to anti-trust law. See the first three paragraphs of the syllabus.

The contention that the contract contravened the provisions of the interstate commerce act may likewise be briefly disposed of. The argument for the plaintiff in error is that the contract is obnoxious to section 3 of that act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) because it gave an undue and unreasonable preference to Westcott in the business of transporting milk. That act deals with the effects or results of contracts, and has no operation directly upon the contracts themselves; but assuming that the contract is void if the contention that it gave an undue and unreasonable preference is sound, the case is not one where any such preference was given. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another. *Wight* v. *United States*, 167 U. S. 516, 17 Sup. Ct. 822, 42 L. Ed. 258. The mere circumstance that there is, in a given case, a preference or advantage, does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. *Texas & Pacific R. R. Co.* v. *Interstate Commerce Com.*, 162 U. S. 219, 220, 16 Sup. Ct. 666, 40 L. Ed. 940. To come within the inhibition of the act "the positions of the respective persons or classes between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other." *Interstate Commerce Com.* v. *B. & O. R. R.*, 145 U. S. 263, 282, 12 Sup. Ct. 844, 36 L. Ed. 699. Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the interstate commerce act "leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and their own situation and relation to it, and generally to manage their impor-

tant interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." *Interstate Commerce Com.* v. *Alabama Mid. R. R. Co.*, 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453; Id., 168 U. S. 144, 173, 18 Sup. Ct. 45, 42 L. Ed. 414.

The privileges accorded to Westcott were only those which were incident to the anomalous relations existing between him and the defendant created by the contract. It is quite inconceivable that [64] there were or could have been any shippers of milk who would have been willing or able to undertake his duties and responsibilities. In consideration of his assumption of peculiar obligations and hazards, the defendant gave him exceptional privileges appertaining to his relation as a manager of the traffic; this was not an undue and unreasonable preference.

The assignments of error which have been considered are the only ones which have been argued at the bar or on the brief of counsel. The repudiation of the contract was without any justification, for even if the contracts with the New York Central Railroad Company were theoretically competitive, they had been consented to by the officers of the defendant. The repudiation, as has been said, was announced when the contract had nearly expired, and when the defendant would shortly have secured exclusively for itself all the profits of the valuable traffic built up by Westcott. It was repudiated for sordid motives, and with an arrogance born of the scorn of consequences. The appropriation of Westcott's percentage of the money, which the defendant had actually collected for him, was morally no better than larceny. Although Truesdale was primarily responsible for this conduct, and the directors of the defendant may not have been personally cognizant of it, they cannot escape their share of the moral responsibility which ensues from endeavoring to establish the defenses interposed in the earlier action and in this action. It is conduct like Truesdale's, by those who manage the affairs of great corporations, that has aroused the spirit of resentment in the public mind which is so intense to-day, and which is not unlikely to result in legislation, and in municipal interference, which will bring serious loss upon stockholders.

We find no error in the rulings of the court below, and the judgment is accordingly affirmed.

LACOMBE, Circuit Judge.

I am individually of the opinion that the contract of 1898 with the N. Y. Central Railroad was a breach of the plaintiff's contract with the defendant, because it was calculated to expose the Delaware, Lackawanna & Western R. R. to a competition which would operate to reduce the amount of its milk traffic. But that question is no longer open here. I concur in the finding that the evidence clearly shows that the defendant's officers knew of this contract and did not disapprove it, and in the conclusion that the prior judgment has conclusively established the proposition that neither such contract nor its carrying out is a breach available in defense. As to the second Delaware & Hudson contract, which I am fully convinced was a competing contract, the circumstance that both parties to it agreed that it should not go into effect until after the termination of the contract in suit, which agreement was strictly adhered to, in my opinion, eliminates it from consideration as a breach.

As to the other defenses I concur in Judge Wallace's opinion, and therefore concur in voting to affirm.

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[491] CHICAGO WALL PAPER MILLS *v.* GENERAL PAPER CO.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

[147 Fed., 491.]

MONOPOLIES—UNLAWFUL COMBINATION—EFFECT ON COLLATERAL CONTRACT.—A contract for the sale of merchandise is not rendered illegal by the fact that the selling corporation is a trust or monopoly organzied in violation of law, either federal or state; the contract of sale being collateral and having no direct relation to the unlawful scheme or combination.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 16.]

SAME—ENFORCEMENT OF SALE CONTRACT—ILLINOIS STATUTE.—Sections 1 and 2 of the Illinois anti-trust law of June 11, 1891 (Laws 1891, pp. 206, 207), prohibit any pool or combination between persons or corporations to fix the price or limit the production of any article or commodity. Section 4 (page 207) provides for the

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punishments of a violation of section 1 by fine or imprisonment. Section 5 (page 208) makes any contract in violation thereof void, and section 6 (page 208) provides that "any purchaser of any article or commodity from any individual, company, or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment." *Held*, that sections 4, 5, and 6 provide cumulative or alternative penalties for a violation of sections 1 and 2, and have no other purpose or effect; that sections 1 and 2 can have no extraterritorial effect, and hence the fact that a seller of merchandise in Illinois is a corporation formed for the prohibited purposes cannot be pleaded as a defense in an action to recover the price unless such corporation was organized in Illinois and was therefore unlawful under the statute.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 16.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The suit is in assumpsit brought by the General Paper Company, a Wisconsin corporation, against the Chicago Wall Paper Mills, a corporation organized under the laws of Illinois, to recover something over $4,000 for certain wall paper sold and delivered by the plaintiff corporation to the defendant below in the year 1905. The declaration contains the common counts.

To this declaration the defendant interposed the general issue, and also 16 pleas. These pleas set up with great elaboration a defense under the "Anti-Trust Law," so called, of Illinois. The facts set up in the pleas appear more at large in the opinion of the court. Thereafter, by leave of court, another plea was interposed, numbered 17, which substantially reproduced the averments of the 16 pleas, and also set out certain alleged "confessions" of the plaintiff company made since the suit was brought, which are certain answers made under oath in response to interrogatories which the officers of nonresident corporations were compelled to make pursuant to an act of the General Assembly of Illinois, entitled, "An act to regulate the admission of foreign corporations for profit to do business in the state of Illinois." Laws 1891, p. 206. The plea of the general issue was withdrawn, and the defense was rested solely upon the 17 special pleas.

Demurrers were interposed to each of the said 17 pleas, which demurrers were sustained by the Circuit Court, and judgment nihil dicit was rendered in favor of the plaintiff and against the defendant below for the agreed price of the paper, and thereupon the case was brought to this court by writ of error.

The sections of the statute that are material are as follows:

Statement of the Case.

[492] "Pools, Trusts and Combines Prohibited.

"Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly: If any corporation organized under the laws of this or any other state or country, for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person, or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act.

"Sec. 2. It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article."

(Section 3 imposes a fine upon the corporation, firm or association.)

"Sec. 4. Any president, manager, director or other officer or agent or receiver of any corporation, company, firm or association, or any individual found guilty of a violation of the first section of this act, may be punished by a fine of not less than two hundred dollars ($200), nor to exceed one thousand dollars ($1,000), or be punished by confinement in the county jail not to exceed one year, or both, in the discretion of the court before which such conviction may be had.

"Sec. 5. Any contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void.

"Sec. 6. Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment.

Opinion of the Court.

"Sec. 7. The fines hereinbefore provided for may be recovered in an action of debt in the name of the people of Illinois. If, upon the trial of any cause instituted under this act to recover the penalties as provided for in section 3, the jury shall find for the people, and that the defendant has been before convicted of the violations of the provisions of this act, they shall return such finding with their verdict, stating the number of times they find defendant so convicted and shall assess and return with their verdict the amount of the fine to be imposed upon the defendant in accordance with said section 3. Provided, that in all cases under this act, a preponderance of evidence in favor of the people shall be sufficient to authorize a verdict and judgment for the people.

"Sec. 8. It shall be the duty of the prosecuting attorneys in their respective jurisdictions, and the Attorney General, to enforce the foregoing provisions of this act, and any prosecuting attorney of any county, securing a conviction under the provisions of this act, shall be entitled to such fee or salary as by law he is allowed for such prosecution. When there is a conviction under this act, the former shall be entitled to one-fifth of the fine recovered, which shall be paid to him when the same is collected. All fines recovered under the provisions of this act shall be paid into the county treasury of the county [493] in which the suit is tried, by the person collecting the same, in the manner now provided by law to be used for county purposes."

Approved June 11, 1891. Laws 1891, pp. 206–208.

The rulings of the counrt below in sustaining the demurers to each of said 17 pleas, are assigned as errors.

Almon W. Bulkley, for plaintiff in error.

William Brace, for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and QUARLES, District Judge.

QUARLES, District Judge (after stating the facts).

We deem it unnecessary to consider the question of pleading with respect to the technical character of the seventeenth plea, whether it should be construed as a puis darrein continuance, and whether, therefore, it supplants all defenses theretofore interposed, because the seventeenth plea substantially embodies all the material averments of the first 16 pleas, and is sufficient to raise the vital question of law upon which this case must turn. The material facts set out in the several pleas may be put in brief concrete form as follows: The plaintiff corporation is alleged to have been organized

Opinion of the Court.

on the 26th day of May, 1900 in the state of Wisconsin, for the purpose, as stated in its charter, of acting as exclusive sales agent for the paper and paper products thereafter to be produced by 21 certain manufacturing corporations located in the states of Wisconsin and Michigan engaged in the paper industry; that its board of directors consisted of representatives of the 21 paper mills, so that for trade purposes there was a practical amalgamation of the 21 producing companies; that thereupon, on the same day, pursuant to such confederation, the plaintiff corporation became the exclusive sales agent of all such paper mills, with exclusive power to determine the extent of the output, and to fix prices arbitrarily, and that by such confederation, competition between the 21 producing corporations was stifled, and the plaintiff corporation as such sales agent, put in control of 90 per cent. of the paper and paper products manufactured west of the Alleghany Mountains; that immediately after such plaintiff corporation had been so organized and equipped, it came to the city of Chicago, complied with the requirements of the local law, secured a place of business, and has since that time continued to handle and sell such combined product of the 21 mills in Wisconsin, Michigan, Illinois, and other Western states, as contemplated by the agreement of confederation; that the alleged combination is violative of the statute of Illinois, entitled "An act to provide for the punishment of persons, copartners or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases," approved June 11, 1891, in force July 1, 1891 (Laws 1891, p. 206).

It cannot be successfully contended that the contract in suit falls within the sanction of the fifth section. The contract thereby denounced as void is plainly one which directly contravenes the earlier sections; one in which the trust takes root, or by which the illicit scheme is organized. The defendant below purchased the paper in the ordi- [494] nary course of business. It was a stranger to the alleged unlawful combination. The sale of the merchandise had no direct relation to the prohibitions of sections 1 and 2. The same distinction has been drawn under the federal anti-trust act (*Hopkins* v. *United States*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed.

290; *Anderson* v. *United States*, 171 U. S. 604, 615, 19 Sup. Ct. 50, 43 L. Ed. 300), and this court has several times held that contracts founded upon a good consideration are collateral to the unlawful scheme or combination and not tainted thereby. *Dennehy* v. *McNulta*, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609; *Star Brewery Co.* v. *United Breweries*, 121 Fed. 713, 58 C. C. A. 133; *Harrison* v. *Glucose Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915.

The real defense tendered by the several pleas is bottomed upon section 6, and it becomes material to analyze this part of the enactment. It will be noted at the outset that the structure of sections 5 and 6, is almost identical. Both hinge upon "violation of any provisions of the preceding sections of this act." Section 4 metes out punishment to officers of the offending corporation for any violation of section 1. So here there are three distinct consequences that flow from infringement of earlier sections: Under section 4, fine and imprisonment; under section 5, the avoidance of contract; and under section 6, denial of civil remedy in the courts. They partake of the same nature. They are penal inflictions of different kinds, consequent upon a single transgression. The violation contemplated in either case must be such as will sustain the penalty imposed by either section. In other words, if the combination effected in Wisconsin constituted such a violation of section 1 as to warrant the exclusion of the plaintiff company from the courts of Illinois under section 6, then a direct proceeding might have been instituted under section 4 to punish the officers of such offending corporation.

The penal character of section 6 sufficiently appears upon its face. To debar trading corporations from all redress in the courts is a drastic infliction. The same conclusion as to the nature of the section is reached by a legal inference. The title of the statute deals only with punishments and the manner of their infliction. If, therefore, section 6 were of a different character, it would contravene section 13 of article 4 of the Constitution of Illinois and be of no effect. It is fundamental and elementary that the General Assembly of Illinois has no jurisdiction to provide any punishment for an act done outside the territorial limits of the state. It can-

not project its public policy into another sovereignty. The dereliction charged against the plaintiff below by the several pleas inheres in its contract relations with the 21 producing companies whereby, as claimed, it was intended to suppress competition, restrict the output, and arbitrarily fix the price of paper. This illicit combination culminated in the organization of the plaintiff corporation and the agreement by which it was to officiate as exclusive sales agent. Thereby the combine became an accomplished fact which, for aught that appears, may not have infringed the public policy of Wisconsin. All these things happened five years before the contract in suit, and took place within the State of Wisconsin before **[495]** the plaintiff entered upon any business in Chicago. Since that time nothing has happened, certainly nothing within the state of Illinois, of which section 1 takes cognizance. It is argued that the Illinois statute is unconstitutional, and that a combination formed in one state to control prices in another states affects interstate commerce and therefore is not subject to state regulation. We are not concerned with the constitutionality of this act, if it can, in no event, be applicable to the case at bar. The Supreme Court of Illinois has had occasion to interpret this statute, and the doctrine which it lays down is decisive of the issues here.

In *People* v. *Butler Street Foundry Co.*, 201 Ill. 236, 66 N. E. 349, the court say:

"It is fundamental that the Legislature of this state is powerless to pass an enactment making an act committed in a foreign state punishable in that state, or the Legislature of a foreign state to pass an enactment to make an act committed in this state a crime punishable in this state. It is therefore evident that a violation of the statute above set forth in this state cannot be punished as an original offense in a foreign state, and that the immunity afforded by the statute is complete against a prosecution under the law of the other states of the Union. The anti-trust statute of 1891 has no extra-territorial effect. While its terms may be broad enough to include trusts, pools, combines, etc., formed with parties residing outside of this state, the courts, in construing it, must necessarily confine it to those matters upon which the General Assembly has power to act, viz, trusts, pools, combinations, etc., formed within the state of Illinois. In the construction of the statute the courts will exclude from the operation thereof subjects or classes upon which the state Legislature has no power to legislate, though comprehended within the general terms of the act, unless the different parts of the statute are so connected that they cannot be separated without destroying the evident intention of the Legislature. * *. * If the statute be confined to its legitimate constitutional scope, its proper construction

only requires the affidavit to state whether or not the corporation upon whose behalf it is made had violated the statute by performing some one or more of the acts therein prohibited within the state of Illinois, and would not include, but would exclude all acts which would connect it with any trust, pool, combination, etc., formed outside of the state, and which would violate the anti-trust statute of the United States. * * * In making the affidavit the affiant is only required to take into consideration the acts of the corporation while engaged in business wholly within the state and if, in connection with that business, it has not been connected with any trust, pool, or combination within the state, or otherwise violated the Illinois anti-trust statute, he can truthfully make the affidavit to that effect, although the corporation at the same time, in its business outside the state, has been connected with trusts, pools, combinations, etc., in violation of the United States anti-trust statute; that being a matter exclusively within the jurisdiction of the United States and over which the state has no control and to which the statute of this state does not apply. * * * We conclude, therefore, that the officer making the affidavit, and the corporation in whose behalf the same is made, are fully protected by the statutory immunity from a prosecution by any other state or by the federal authorities."

We are reminded that section 6 was not specifically involved in that case. This is immaterial. The discussion above recited was vital to the very questions before the court, so that the opinion is authoritative and applies with full force to every portion of the act.

There is nothing decided in *Coal Co.* v. *People*, 214 Ill. 421, 73 N. E. 770, which is inconsistent with the doctrine of the earlier case. **[496]** It may be conceded that if a foreign corporation enter into a combine within the state of Illinois which is forbidden by the statute, it must stand upon the same footing as a domestic corporation, and be liable to all the pains and penalties of the act, without regard to the place of its origin. It is therefore apparent that a direct proceeding could not be sustained to subject the officers of the General Paper Company to the penalties of section 4 for an alleged transgression occurring in Wisconsin. The same reasoning must be fatal to a defense based upon section 6.

We adopt and follow the conclusion of the Supreme Court of the state. It results, therefore, that the Illinois anti-trust act, so called, is not available as a defense to this action, and the judgment of the Circuit Court is affirmed.

MINES v. SCRIBNER ET AL.

(Circuit Court, S. D. New York. July 7, 1906.)

[147 Fed., 927.]

1. MONOPOLIES—AGREEMENTS IN RESTRAINT OF TRADE.—An agreement by the members of a publishers' association controlling 90 per cent of the book business of the country, under which all agreed not to sell to anyone who would cut prices on copyrighted books, nor to anyone who should be known to have sold to others who cut prices, etc., was an agreement relating to interstate trade or commerce, within the antitrust act. Act July 2, 1890, c. 647, 26 Stat., 209 [U. S. Comp. St. 1901, p. 3200].

   [Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 13.]

2. SAME—CONSPIRACY—RESTRAINT OF TRADE.—Defendants became members of an association of book publishers controlling 90 per cent of the book business of the country, which association adopted a rule that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others at cut prices. A black list was kept containing the names of such persons, and no one on the black list could buy any books of anybody in the scheme. *Held*, that such scheme constituted a conspiracy in restraint of interstate trade or commerce.

   [Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 13.]

3. COPYRIGHT—EFFECT—EXTENT OF RIGHTS ACQUIRED.—The rights acquired by publishers of copyrighted books under the copyright law did not justify them in combining and agreeing that their books should be subject to the rules laid down by the united owners, one of which was that no member of the association should sell any books to a black-listed purchaser who was known to cut prices.[a]

Theodore Baumeister, for complainant.
Stephen H. Olin, for defendants.

PLATT, district judge. This is a demurrer to a complaint brought under the United States statute of July 2, 1890 (26 Stat., 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), commonly known as the "Anti-Trust Act." It contends that upon

[a] Syllabus copyrighted, 1906, West Publishing Company.

the facts alleged the case can not be brought within the statute, for several reasons:

1. Because it does not relate to interstate trade or commerce. I think that it does.

2. Because it does not show that the defendants have entered into any contract, combination, or conspiracy in restraint of interstate trade or commerce, nor that they have attempted to monopolize, either directly or by combination, any article which is the subject of such trade or commerce. I think that it does, and let me say just a word in connection with my conclusion. A rapid glance at the case develops, among other things, the following state of affairs: Defendants, with others, became members of the American Publishers' Association, whereby 90 per cent of the book business of the country was controlled. A rule was adopted and agreed to all around that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others who cut prices. A black list was to be kept, containing the names of such persons, and no one on that black list could buy any books of anybody in the scheme. Plaintiff got on the black list, could not buy, and was thereby injured, and claims his treble damages.

It is true that this scheme does not prevent each publisher from putting such price as he sees fit upon his copyrighted book; but it compels jobber and retailer to stand by that price, whatever it may be, and if it is broken in any instance it puts such person out of business. It is not content with refusing to deliver any more copies of the particular book upon which he cuts the price, but it closes him out of all dealings on any and every book, copyrighted or not.

The copyright law can not help the defendants, because, in the first place, the restraint is not confined to copyrighted books, and, if it were, it can not be so that the right given a single publisher to do as he pleases with his copyrighted book can be extended, so that he can combine with other owners of copyrights and permit his book to be subject to the rules laid down by the united owners.

Let the demurrer be overruled.

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ABATEMENT. *See* STATUTES, 70.

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ACTIONS AND DEFENSES.

I. ACTIONS.

1. By private parties.

1. **Private Individual can not Sue in Equity under the Statute—Remedy at Law.**—The act "to protect trade and commerce against unlawful restraints and monopolies" (act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons, and the right to bring suits in equity being vested in the district attorneys of the United States. *Pidcock* v. *Harrington*, 64 F., 821. 1—377

2. **Remedy, Action for Damages—No Recourse in Equity.**—The Anti-Trust Law of July 2, 1890, does not authorize a court of equity to entertain a bill by a private party to enforce its provisions, his remedy being by an action at law for damages. *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. 1—862

3. **A municipal corporation engaged in operating water, lighting, or similar plants, from which a revenue is derived, is, in relation to such matters, a business corporation and may maintain an action under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act.** *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F., 23. 2—299

4. **Bringing in Nonresidents.**—The authority given by section 5 of the act of July 2, 1890 (26 Stat., 209), to bring in nonresidents of the district **can not be availed of in private suits,** and the court can acquire no jurisdiction over them. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. 1—620

ACTIONS AND DEFENSES—Continued.

2. By parties to the combination.

5. **Members of the Kansas City Live Stock Exchange can not enjoin the board** of directors of that exchange, under the Anti-Trust Law of 1890, **from enforcing against them certain by-laws** of the association claimed to be illegal and in violation of that act. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1—620**

6. **Where a member of a voluntary association has been suspended** by the directors for nonpayment of a fine for violation of the by-laws, **his action to be restored to the privileges of membership is founded upon the contract** between himself and the association, which he must either accept in its entirety or repudiate. He does not occupy the position of a stranger injured by the acts of co-trespassers. *Ib.*

7. **May Maintain Action to Set Aside Unlawful Transfer of Property.**—A **minority stockholder** in a corporation may maintain a suit in equity in behalf of himself and all other stockholders similarly situated to set aside an alleged unlawful transfer of the property of the corporation in pursuance of a conspiracy between its officers and the transferee in restraint of trade and commerce, where it is alleged that the corporation, on demand, has refused to bring such suit. *Metcalf* v. *Amer. School-Furniture Co.*, 108 F., 909. **2—75**

8. **Same—Multifariousness.**—**A bill for such relief which also seeks the recovery of treble damages** under the Anti-Trust Act of July 2, 1890, **is multifarious**, since such damages are only recoverable in an action at law by the plaintiff as an individual, and not as a stockholder, while the equitable relief prayed for is in behalf of the corporation, and, if granted, would inure to the benefit of all the stockholders. *Ib.*

9. **No Right of Action Against Trust to Recover Damages.**—Section 7 of the Anti-Trust Act (26 Stat., 209), giving to any person injured by any other person or corporation by reason of anything forbidden in the act the right to recover treble damages, does not authorize an action against an alleged trust corporation, by one who was a party to its organization and a stockholder therein, to recover damages resulting from the enforcement by defendant of rights given it by the alleged unlawful agreement. *Bishop* v. *Amer. Preservers Co.*, 105 F., 845. **2—51**

10. **Member of a Combination in Violation of Anti-Trust Law may Maintain Suit to Enjoin Infringement of Patent Owned by Complainant.**—That a complainant is a member of a combination in violation of the Anti-Trust Law of July 2, 1890 (26 Stat., 209), does not give third persons the right to infringe a patent of which complainant is owner, nor preclude complainant from maintaining a suit in equity to enjoin such infringement. *General Electric Co.* v. *Wise*, 119 F., 922. **2—205**

ACTIONS AND DEFENSES—Continued.

11. **Recovery on Collateral Contract.**—**The act** of July 2, 1890, section 1 (26 Stat., 209), known as the "Sherman Anti-Trust Act," does not invalidate, or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination formed for the purpose of restraining interstate trade in such goods. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. **2—995**

See also *Jayne* v. *Loder*, 149 F., 22.

3. By illegal combinations.

12. **Can not Enforce Illegal Contract.**—An illegal combination or trust can not resort to equity to enforce a contract or sale calculated to perpetuate the illegal features of the combination. *Amer. Biscuit & Mfg. Co.* v. *Klotz*, 44 F., 721. **1—2**

13. **May Recover on Collateral Contracts the Price of Goods Sold.**—A violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209), by the formation of a combination in restraint of trade, by which a penalty is incurred under the statute, does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540. **2—118**

14. **Same.—Nor does the illegality, at common law, of such a combination** formed by corporations and persons in restraint of trade, **preclude** it from recovering the purchase price of goods sold in the course of business. *Ib.*

4. By the United States.

15. **The right to bring suits in equity** for violations of the Anti-Trust Act of July 2, 1890, **is vested in the district attorneys** of the United States. *Pidcock* v. *Harrington*, 64 F., 821. **1—377**

16. **The right to bring suits for injunction** under section 4 of the act of July 2, 1890 (26 Stat., 209), **is limited to suits instituted on behalf of the Government.** *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1—620**

17. **Same.**—The only party entitled to maintain a bill of **injunction** for an alleged breach of the Anti-Trust Act of 1890 **is the** United States, by its **district attorney**, on the authority of the **Attorney-General.** *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. **1—823**

18. **The intention of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), **was to limit direct proceedings in equity** to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among

ACTIONS AND DEFENSES—Continued.

the several States and with foreign nations, **to those instituted in the name of the United States**, under section 4 of the act, by **district attorneys** of the United States, acting under the direction of the **Attorney-General**; thus securing the enforcement of the act, so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2—533**

5. By States.

19. A State can not maintain an action in equity to restrain a corporation from violating the provisions of **the act of July 2, 1890, on the ground that** such **violations** by decreasing competition **would depreciate the value of its public lands** and enhance the cost of maintaining its public institutions, the damages resulting from such violations being remote and indirect and not such direct actual injury as is provided for in section 7 of the act. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2—533**

20. Municipal Corporation may Maintain Action for Damages under Section 7, Act of 1890.—A municipal corporation engaged in operating water, lighting, or similar plants, from which a revenue is derived, is, in relation to such matters, a business corporation, and may maintain an action under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F., 23. **2—299**

6. At common law—Damages.

21. Action for Damages Must Show that Plaintiff is Engaged in Interstate Commerce.—An action to recover damages alleged to have been caused by acts done in violation of the Anti-Trust Act (26 Stat., 209) can not be maintained when the complaint fails to show that plaintiff is engaged in interstate commerce, and no such showing is made by an averment that plaintiff is engaged in "manufacturing watch cases throughout all the States of the United States and in foreign countries." *Dueber Watch Case Mfg.* v. *Howard Watch, etc., Co.*, 55 F., 851. **1—178**

Case affirmed, 66 F., 637 (1—421).

22. Same—Must Show Intention to Control Market, or a Large Portion of it.—An agreement by a number of manufacturers and dealers in watch cases to fix an arbitrary price on their goods, and not to sell the same to any persons buying watch cases of plaintiff, is not in violation of the statute; and a

ACTIONS AND DEFENSES—Continued.

complaint which, on the last analysis, avers only these facts, without averring the absorption or the intention to absorb or control the entire market, or a large part thereof, states no cause of action. *Ib.*

23. Action Alleged to be in Violation of the Statutes of a State and of the United States Held to be Founded upon Act of July 2, 1890 (26 Stat., 290).—An action brought in the United States Circuit Court for southern New York by a manufacturing company against competitors in various States, alleging the formation of a combination and an attempt to create a monopoly, "in violation of the statutes of this State and the United States," whereby plaintiff's business was injured, and alleging the formation of the combination on and prior to November 16, 1887, but that, after the passage of the act of Congress of July 2, 1890, defendants ratified, renewed, and confirmed their previous contracts, combinations, etc., and judgment being demanded for treble damages "under and by virtue of the statute." *Held*, that the action must be deemed to be founded upon the said act of July 2, 1890. *Dueber Watch Case Mfg. Co.* v. *Howard Watch, etc., Co.*, 66 F., 637. **1—421**

24. Same—A Cause of Action not Stated.—Where, in the above action, complaint alleged that previous to November 16, 1887, it sold all its goods to a great number of dealers "throughout the United States and Canada;" that prior to that date defendants had agreed with each other to maintain arbitrary and fixed prices for their watch cases; that, for the purpose of compelling plaintiff to join with them therein, defendants on said date mutually agreed that they would not thereafter sell any goods to persons who bought or sold goods manufactured by plaintiff; that they caused notice thereof to be served upon the many dealers in such goods throughout the United States and Canada, who had formerly dealt in plaintiff's goods, whereupon many of such dealers withdrew their patronage from plaintiff; that after the passage of the act of July 2, 1890, defendants ratified, renewed, and confirmed their previous agreements, and served notice of such ratification upon all said dealers in plaintiff's goods, whereby said dealers were compelled to refuse to purchase plaintiff's watch cases. *Held*, that the complaint **failed to state a cause of action** under the statutes. *Ib.*

25. Same—*Held*, that **no monopolizing or combination to monopolize interstate commerce**, contrary to the second section of the act, was **shown**, for the reason that the allegations did not preclude the inference that each defendant **may have sold his entire product in the State** where it was manufactured. *Ib.*

ACTIONS AND DEFENSES—Continued.

26. Same—*Held*, that **the contracts did not produce an unlawful restraint** of trade, under the first section, because the combination and agreement to fix arbitrary prices **did not** appear to **include all manufacturers of watch cases**, but was only a partial restraint in respect to an article not of prime necessity, and therefore came within the recognized limits of lawful contracts. *Ib.*

27. Same—*Held*, that the further **agreement not to sell** to customers of plaintiff was **a lawful means of enlarging and protecting** the **business** of the defendants. *Ib.*

Shipman, Cir. J., concurring, on the ground—

28. That the acts of the defendants, whether viewed as an attempt to create a monopoly or as a contract in restraint of trade, were **not shown to concern interstate commerce**, because there were **no allegations showing the residence of any dealers** who withdrew their patronage from complainant, and it therefore did not directly appear that any of them resided outside of the State where plaintiff's goods were manufactured. *Ib.*

Wallace, Cir., dissenting, on the ground—

29. That the **allegations** were **sufficient to show** that the **attempts** to monopolize and restrain **did operate upon interstate commerce.** *Ib.*

30. That, while the contracts might not be unlawful in themselves, yet the **purpose** for which they were alleged to be made, namely, to compel plaintiff to join in the agreement for fixing arbitrary prices, and to injure and destroy its business if it refused to do so, was **oppressive and unjust**, and rendered the acts of defendants unlawful under both sections of the statute. *Ib.*

31. The Only Remedy to Party other than the United States is a Suit for Damages.—Under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," the only remedy given to any other party than the Government of the United States, is a suit for threefold damages, costs, and attorney's fees. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. **1—823**

32. The **only remedy of a private individual** to restrain acts forbidden by the Anti-Trust Act of 1890 **is an action at law for damages.** *Pidcock* v. *Harrington*, 64 F., 821. **1—377**

33. The **remedy of a private party** under the Anti-Trust Act of 1890 **is an action** at law **for damages.** *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. **1—862**

34. By Direct Action.—A recovery of the treble damages authorized by the Sherman Anti-Trust Act of July 2, 1890, section 7 (26 Stat. L., 209, chap. 647), in case of injury sustained by violation of the act, can be had only by direct action, **and not by way of set-off** in an **action brought for the price of goods** by a company illegally formed in violation of the act—especially when the State practice does not permit the set-off of unliquidated damages. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540. **2—118**

ACTIONS AND DEFENSES—Continued.

35. Municipal Corporation may Maintin Action for Damages under Section 7, Act of 1890.—A municipal corporation engaged in operating water, lighting, or similar plants, from which a revenue is derived, is, in relation to such matters, a business corporation, and may maintain an action under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F., 23. **2—299**

36. Statutory Limitations Governed by the Laws of the State in which Action is brought.—An **action under section 7** of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States, * * * and shall recover threefold the damages by him sustained," **is not an action for a penalty** or forfeiture, **within section 1047, Revised Statutes, prescribing a limitation of five years** for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but **one for the enforcement of a civil remedy for a private injury**, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, **and** such action **is governed as to limitation by the statutes of the State** in which it is brought. *City of Atlanta* v. *Chattanooga Foundry and Pipe Co.*, 101 F., 900. **2—11**

Affirmed by Circuit Court of Appeals, 127 F., 23 (**2—299**). The judgment of the circuit court was, however, reversed, but upon other grounds—a construction of section 4470, Tennessee Code.

Affirmed by Supreme Court (203 U. S., 390).

37. Same—Every Member of the Combination Liable for Damages.—Every member of an illegal combination in restraint of interstate trade or commerce in violation of the Anti-Trust Act is liable for the damages resulting to the business or property of a plaintiff by reason of such combination, and it is immaterial that there were no direct contract relations between plaintiff and defendant. *City of Atlanta* v. *Chattanooga Foundry and Pipe Works*, 127 F., 23. **2—299**

ACTIONS AND DEFENSES—Continued.

38. Same—Measure of Recovery for Injury to Business.—If the effect of an illegal combination between manufacturers to prevent competition in the sale of a commodity which is a subject of interstate commerce be to enhance the price of such commodity to a purchaser, he is entitled to recover the **difference between the price paid and the reasonable price** under natural competitive conditions, as an injury to his business, **whether such business is interstate or not, provided the transaction** by which the purchase was made **was interstate.** *Ib.*

39. Conspiring to Injure Another in Business—Mailing Printed Circulars.—The action of an association of manufacturers in adopting a resolution denouncing a dealer in the product they manufactured, who bought and shipped such product to customers in other States and foreign countries, and in printing such resolution in circulars, and mailing the same to other manufacturers and customers of the dealer, whereby his business was injured, constituted an illegal combination or conspiracy in restraint of interstate and foreign commerce, and **gives the person injured a right of action** in a circuit court of the United States, under the Anti-Trust Law of 1890, to recover the damages sustained. *Gibbs* v. *McNeeley*, 102 F., 594. **2—25**

Verdict for defendant directed, 107 F., 210 (2—71), but Reversed by Circuit Court of Appeals, 118 F., 120 (**2—194**).

40. Complaint Fatally Defective where it Fails to Show that Plaintiff Suffered Damage.—A complaint in a civil action, based on the Anti-Trust Law of 1890, alleging an illegal combination by defendants in restraint of trade, is fatally defective where it fails to show that plaintiff has suffered damage by reason of such combination. *Ib.*

41. Treble damages are recoverable under the Anti-Trust Act of 1890 **only in an action at law** by the plaintiff as an **individual** and not as a stockholder in a corporation violating that act. *Metcalf* v. *Amer. School Furniture Co.*, 108 F., 909. **2—75**

42. Where Manufacturer Refused to Sell because Complainant was not a Member of Trust Association.—A dealer in tiles, mantels, and grates in San Francisco, to whom a manufacturer in another State refused to sell tiles on the sole ground that he was not a member of an association to which he belonged, which association sought to control the output and regulate the prices thereof in California and adjoining States, *Held*, **entitled to damages** under section 7 of the Anti-Trust Act of 1890. *Montague* v. *Lowry*, 115 F., 27. **2—112**

Affirmed, 193 U. S., 38 (**2—327**).

See also *Bishop* v. *Amer. Preservers Co.*, 105 F., 845. **2—51**

ACTIONS AND DEFENSES—Continued.

7. Equity—Injunctions, etc.

43. Private Individuals no Remedy in Equity under the Statute.—The Anti-Trust Act of July 2, 1890, confers no right upon private individuals to sue in equity for the restraint of acts forbidden by that statute. *Pidcock* v. *Harrington*, 64 F., 821. **1—377**

44. Private Party no Remedy in Equity.—The Anti-Trust Act of July 2, 1890, does not authorize a court of equity to entertain a bill by a private party to enforce its provisions. *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. **1—862**

45. The right to bring suits for injunction under section 4 of the act of July 2, 1890 (26 Stat., 209), **is limited to suits instituted on behalf of the Government.** *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1—620**

46. The only party entitled to maintain a bill of injunction for an alleged breach of the act of July 2, 1890 (26 Stat., 209), **is the United States,** by its district attorney, on the authority of the Attorney-General. *Gulf C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. **1—824**

47. Suit Enjoining Infringement Maintainable by Owner of Patent though Member of Illegal Combination.—Complainant, though a member of a combination in violation of the Anti-Trust Law of July 2, 1890, can maintain a suit in equity to enjoin an infringement of a patent owned by him. *General Electric Co.* v. *Wise*, 119 F., 922. **2—205**

8. Purchases from, or services rendered by, illegal corporations.

48. Can not Retain Goods and Recover Price Paid.—**One purchasing liquors from an illegal combination** of distillers, which controls the market and prices, though impelled thereto by business needs and policy, enters into the contract voluntarily, and can not retain the goods, and recover the price paid, or any part of it, either on the ground that the combination was illegal, or the price excessive. 77 Fed., 700, affirmed. *Dennehy* v. *McNulta*, 86 F., 825. **1—855**

49. Rebate vouchers issued by a distilling company to customers, by which it promised to refund a certain sum per gallon on their purchases at the end of six months, on condition of their purchasing exclusively from the company during that time, **can not be enforced,** either at law or in equity, **where the condition has not been performed, though such condition be illegal,** as in restraint of trade; there being no other consideration for the promise. 77 Fed., 700, affirmed. *Ib.*

ACTIONS AND DEFENSES—Continued.

50. Must Pay Reasonable Value of Services—Towage.—One who requests and accepts the services of a tug for towage purposes can not escape paying the reasonable value of the services rendered on the ground that the tug owners are members of an association which is illegal under the act of July 2, 1890, relating to trusts and monopolies. *The Charles E. Wisewall*, 74 F., 802. 1—608
Affirmed, 86 F., 671 (1—850).

9. Patents—Actions for infringement.

51. Third Party can not Enjoin Combination from Bringing Suit for Infringement of its Patents.—The fact that a corporation owning letters patent upon a particular kind of machinery has entered into a combination with other manufacturers thereof to secure a monopoly in its manufacture and sale, and to that end has acquired all the rights of other manufacturers for the exclusive sale and manufacture of such machines under patents, will not entitle a stranger to the combination to enjoin the corporation from bringing any suits for infringement against him or his customers. *Strait* v. *National Harrow Co.*, 51 F., 819. 1—52
See also *National Folding Box & Paper Co.* v. *Robertson*, 99 F., 985 (2—4); and *Otis Elevator Co.* v. *Geiger*, 107 F., 131 (2—66).

52. Owner of Patent, though Member of Illegal Combination, can Maintain Action for Infringement.—That a complainant is a member of a combination in violation of the Anti-Trust Law of July 2, 1890, does not give third persons the right to infringe a patent of which he, the complainant, is owner, nor preclude complainant from maintaining a suit in equity to enjoin such infringement. *General Electric Co.* v. *Wise*, 119 F., 922. 2—205

53. Combination Organized to Receive Assignments of Patents can not Maintain Action for Infringement against Assignor.—A combination among manufacturers of spring-tooth harrows, whereby a corporation, organized for the purpose, becomes the assignee of all patents owned by the various manufacturers, and executes licenses to them, so as to control the entire business and enhance prices, is void both as to the assignments and licenses, so that the corporation can not maintain a suit against one of its assignors who violates the agreement, for infringement. *National Harrow Co.* v. *Hench.*, 84 F., 226. 1—746
See also *National Harrow Co.* v. *Quick.*, 67 F., 130 (1—443).

ACTIONS AND DEFENSES—Continued.

10. Generally.

54. What must be Shown.—To vitiate a combination, such as the Anti-Trust Act condemns, it need not be shown that the combination, in fact, results, or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition. *Northern Securities Co.* v. *United States*, 193 U. S., 197. (Harlan, Brown, McKenna, Day.) 2—340

55. Same.—In order to maintain this suit the Government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, if such restraint is its necessary effect. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—649
See also PLEADING AND PRACTICE.

56. A suit brought by the Attorney-General of the United States to declare the Northern Securities Co. combination illegal under the act of July 2, 1890, is **not an interference with the control of the States** under which the railroad companies and the holding company were, respectively, organized. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (Brewer, concurring). 2—342

57. No Right of Action Growing out of Suits against Plaintiff which have not been Decided.—The Anti-Trust Act of July 2, 1890 (26 Stat., 209), which gives a right of action to any person injured by acts in violation of its provisions, does not authorize suit where the only cause of action is the bringing of two suits which have not been decided. *Bishop* v. *Amer. Preservers' Co.*, 51 F., 272. 1—49
See also INDICTMENTS.

II. DEFENSES.

1. Indefiniteness, duplicity.

58. Indefiniteness.—In an action by a corporation for the infringement of elevator patents, an answer alleging as a defense that the plaintiff is an unlawful combination in restraint of trade and in violation of the Sherman Anti-Trust Law (26 Stat., 209), but **which fails to state who are in the combination** in the agreement characterized as unlawful, **and does not disclose fully and in detail that the combination was entered into after the act took effect**, and all the facts necessary to show its illegality, is insufficient for indefiniteness. *Otis Elevator Co.* v. *Geiger*, 107 F., 131. 2—66

ACTIONS AND DEFENSES—Continued.

II. DEFENSES—Continued.

59. Duplicity.—A declaration in an action brought under section 7 of the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat., 210) to recover damages for a violation of section 1 of the act, **which alleges in a single count that defendant entered into a "contract, combination, and conspiracy"** in restraint of trade, **is bad for duplicity.** *Rice* v. *Standard Oil Co.*, 134 F., 464. **2—633**

60. Same.—The Anti-Trust Act of 1890 makes a **distinction between a contract and a combination or conspiracy** in restraint of trade. *Ib.*

MULTIFARIOUSNESS. *See* PLEADING AND PRACTICE.

2. Contract in violation of Anti-Trust Act, or of an act of Congress.

61. The defense that a contract is in violation of the act of Congress **of July 2, 1890** (26 Stat., 209), to protect trade and commerce against unlawful restraints and monopolies, which makes illegal every contract violative of its provisions, may be set up by a private individual when sued thereon, and, if proved, constitutes a **good defense** to the action. *Bement* v. *National Harrow Co.*, 186 U. S., 70. **2—170**

62. Same.—Anyone sued upon a contract **may set up** as a defense **that it is a violation of an act of Congress.** *Ib.* (169)

3. Illegal combination—Purchases from, services.

63. Payment for Services can not be Avoided because Performed by a Trust—Towage.—One who requests and accepts the services of a tug for towage purposes can not escape paying the reasonable value of the services rendered on the ground that the tug owners are members of an association which is illegal under the act of July 2, 1890, relating to trusts and monopolies. *The Charles E. Wisewall*, 74 F., 802. **1—608**

Affirmed, 86 F., 671 (1—850).

64. Payment of Note for Goods Purchased can not be Avoided because Bought from a Trust.—A note made for a balance due on goods bought from a corporation can not be avoided merely because the latter is a trust organized to create and carry out restrictions in trade contrary to the Anti-Trust Act of July 2, 1890, as that only covers contracts which are themselves in restraint of trade, and does not affect those which "merely indirectly, remotely, incidentally, or collaterally regulate, to a greater or less degree, interstate commerce between the States." *Union Sewer-Pipe Co.* v. *Connelly*, 99 F., 354. **2—1**

Affirmed, 184 U. S., 540 (2—118).

See also *Dennehy* v. *McNulta*, 86 F., 825 (1—885).

ACTIONS AND DEFENSES—Continued.

II. DEFENSES—Continued.

65. A contract for the sale of merchandise is not rendered illegal by the fact that the selling corporation is a trust or monopoly organized in violation of law, either Federal or State; the contract of sale being collateral and having no direct relation to the unlawful scheme or combination. *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 F., 491. **2—1027**

See also *Continental Wall Paper Co.* v. *Lewis Voight & Sons Co.*, 148 F., 940.

66. Recovery on Collateral Contract by Member of Combination in Restraint of Interstate Trade.—The act of July 2, 1890, section 1 (26 Stat., 209) does not invalidate or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination formed for the purpose of restraining interstate trade in such goods. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. **2—995**

4. Patents—Illegal combination.

67. Infringement of Patent—No Defense that the Owner is an Illegal Corporation under Anti-Trust Law.—The fact that the owner of a patent is a corporation alleged to have been formed in violation of the Anti-Trust Law, and that the patent is alleged to have been assigned to it in furtherance of the illegal purpose to create a monopoly and control the price of an article of commerce, is not available to an infringer of such patent to defeat a suit for the infringement. *National Folding-Box & Paper Co.* v. *Robertson*, 99 F., 985. **2—4**

68. Same.—In an action by a corporation for the infringement of elevator patents, a private defendant was not entitled to urge as a defense that plaintiff was a corporation organized merely for the purpose of holding the legal title to various elevator patents alleging to have been infringed, for the purpose of controlling sales and enhancing prices of elevators and apparatus, without itself engaging in the manufacture and sale of such appliances, in violation of the Sherman Anti-Trust Law (26 Stat., 209), since until the United States has acted and sought to prosecute the plaintiff for violation of such act an infringer of the plaintiff's patent will not be permitted to raise such issue as a defense thereto. *Otis Elevator Co.* v. *Geiger*, 107 F., 131. **2—66**

69. Infringement Suit can not be Maintained by Combination of Patent Owners against Assignor.—A combination among manufacturers of spring-tooth harrows, whereby a corporation, organized for the purpose, becomes the assignee of all patents owned by the various manufacturers, and executes licenses to them, so as to control the entire business and en-

ACTIONS AND DEFENSES—Continued.

II. DEFENSES—Continued.

hance prices, is void both as to the assignments and licenses, so that the corporation can not maintain a suit against one of its assignors who violates the agreement, for infringement. *National Harrow Co.* v. *Hench*, 84 F., 226. 1—746

See also *National Harrow Co.* v. *Quick*, 67 F., 130 (1—443); and ACTIONS AND DEFENSES 51–53.

5. Agreement not to engage in business.

70. **Suit to enforce.**—In a suit to enjoin a defendant from violating a contract by which for a valuable consideration he covenanted not to engage in business for himself or another in competition with that of complainant for a term of years, and to enjoin a codefendant from employing his services in a competing business, it is **no defense that his codefendant hired him in ignorance of the contract**, and will suffer damage if deprived of his services. *A. Booth & Co.* v. *Davis*, 127 F., 875. 2—319

Affirmed, 131 F., 31 (2–526).

See also *Robinson* v. *Suburban Brick Co.*, 127 F., 804 (2—312).

6. Generally.

71. **That Combination has not been Injurious to the Public.**—It is no defense to a suit to dissolve a combination as illegal, under the Anti-trust Law, that it has not been productive of injury to the public or even that it has been beneficial, by enabling the combination to compete for business in a wider field. *U. S.* v. *Chesapeake & O. Fuel Co.*, 105 F., 93. 2—34

Affirmed, 115 F., 610 (2—151).

72. **That Combination is in the Form of a Corporation or Holding Company.**—The fact that the purpose of an illegal combination between stockholders of two railroad companies operating parallel and competing interstate lines, to secure unity of interest and control of such companies, and to prevent competition, has been accomplished by the formation of a corporation which has acquired the ownership of a majority of the stock of each of the companies, **can not be urged to defeat a suit by the United States to restrain** the exercise of **the power so illegally acquired** by the corporation through such combination, as imposing a restraint upon interstate commerce in violation of the Anti-Trust Law (act July 2, 1890, 26 Stat., 209). *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

73. **Same—Questions of Benefit to the Public—Public Policy.**—Where the effect of a combination is to directly prevent competition between two parallel and naturally competing lines of railroad engaged in interstate business, it is in restraint of interstate commerce, and a violation of the Anti-Trust Act (act July 2, 1890, 26 Stat., 209), and the court, in a suit to enjoin it as such, can not consider the question whether the combination may not be of greater benefit to the public than competition would be; that being a question of public policy, to be determined by Congress. *Ib.*

Affirmed, 193 U. S., 197 (2—338).

ACTIONS AND DEFENSES—Continued.

II. DEFENSES—Continued.

74. The **pendency of a suit in a court can not be pleaded in abatement** of an action in a circuit court of the United States to recover treble damages under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), since the State court is without jurisdiction to enforce the remedy given by said section, and therefore the same case can not be depending in both courts. *Lowe* v. *Lawlor*, 130 F., 633. 2—563

AGREEMENTS NOT TO ENGAGE IN BUSINESS. *See* ACTIONS AND DEFENSES, 70; COMBINATIONS, ETC., 152–159.

AGREEMENTS NOT TO COMPETE IN BIDDING. *See* COMBINATIONS, ETC., 39–52.

ALLEGATIONS AND PROOF. *See* PLEADING AND PRACTICE, 12–15.

ANTICIPATED PROFITS. *See* DAMAGES, 3.

APPEAL. *See* COURTS, 23, 36, 38, 40, 42, 43.

APPORTIONMENT, DIVISION, OR RESTRICTION OF TERRITORY. *See* COMBINATIONS, ETC., 39, 136, 137, 166.

ATTACHMENT.

Grounds for Dissolution—Prior Attachment in State Court.—Where the State statute provides for successive attachments of the same property, a prior attachment in a State court affords no ground for the discharge of an attachment in a Federal court. *Lowe* v. *Lawlor*, 130 F., 633. 2–563

ATTORNEY-GENERAL. *See* ACTIONS AND DEFENSES, 17, 18, 55; PARTIES, 7.

ATTORNEY'S FEES. *See* COSTS.

AVOIDANCE OF PAYMENT. *See* ACTIONS AND DEFENSES, 63, 64.

BAILMENT. *See* SALE, 4.

BIDDING, AGREEMENTS NOT TO COMPETE. *See* COMBINATIONS, ETC., 39–52.

BILL. *See* EQUITY, 2, 4; PLEADING AND PRACTICE, 1, 2, 6–9, 15–17, 19, 20.

BOOKSELLERS. *See* COMBINATIONS, ETC., 28, 96.

BOYCOTT. *See* COMBINATIONS, ETC., 124, 213.

BURDEN OF PROOF. *See* EVIDENCE, 3, 4.

CARRIERS.

1. **Common Carriers Not Included Within the Statute.**—It was not the intention of Congress to include common carriers subject to the act of February 4, 1887, within the provisions of the act of July 2, 1890, which is a special statute, relating to combinations in the form of trusts and conspiracies in restraint of trade. *U. S.* v. *Trans-Mo. Ft. Assn.*, 53 F., 440. Case reversed, 166 U. S., 290 (1—648). 1—80
2. **May Demand Prepayment of Freight from One Connecting Carrier and Not from Another.**—A common carrier engaged in interstate commerce may at common law, and under the interstate commerce law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. 1—823
3. **Same—Through Transportation—Joint Rates and Billing.**—Such carrier may enter into a contract with one connecting carrier for through transportation, through joint traffic, through billing, and for the division of through rates, without being obligated to enter into a similar contract with another connecting carrier. *Ib.*
4. **Not Required to Receive Goods Without Prepayment of Charges.**—The rules of the common law do not require a carrier to receive goods for carriage, either from a consignor or a connecting carrier, without prepayment of its charges if demanded, nor to advance the charges of a connecting carrier from which it receives goods in the course of transportation; nor can it be required to extend such credit or make such advances to one connecting carrier because it does so to another. *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. 1—862
5. **Same—Express Companies.**—The interstate commerce act does not apply to independent express companies not operating railway lines. *Ib.*

See also COMBINATIONS, ETC., 100–111, 189–200.

CERTIORARI. *See* COURTS, 48.

COAL. *See* COMBINATIONS, ETC., 25–27, 59.

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC., IN RESTRAINT OF TRADE AND COMMERCE.

I. IN GENERAL.

1. Distinction.

1. **Distinction Between a Contract and a Combination or Conspiracy in Restraint of Trade.**—Section 1 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations," makes a distinction between a contract and a combination or conspiracy in restraint of trade. *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633
2. **Declaration which Made no such Distinction Bad for Duplicity.**—A declaration in a suit based on section 7 (26 Stat., 210) to recover damages resulting to plaintiff from a violation of such provision, which alleges in a single count that defendant entered into a "contract, combination, and conspiracy" in restraint of trade, is bad for duplicity. *Ib.*

2. Legality—How determinable—Test.

3. The test of the validity of contracts or combinations in restraint of trade is not the existence of restriction upon competition imposed thereby, but the reasonableness of that restriction under the facts and circumstances of each particular case. Public welfare is first considered, and, if the contract or combination appears to have been made for a just and honest purpose and the restraint upon trade is not specially injurious to the public and is not greater than the protection of the legitimate interests of the party in whose favor the restraint is imposed reasonably requires, the contract or combination is not illegal. Shiras, District Judge, dissenting, on the ground that this rule is not applicable to corporations charged with public duties. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186

Case reversed, 166 U. S., 290 (1—648).

4. **Provisions Apply to all Contracts in Restraint—Not Merely to Unreasonable Restraints.**—The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation, and are not confined to those in which the restraint is unreasonable. *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S., 290. 1—649
5. Any restraint of interstate trade or commerce, if it be accomplished by a conspiracy, is unlawful. *U. S.* v. *Debs*, 64 F., 724. 1—322
6. In a suit to restrain alleged violations of the law of July 2, 1890, against trusts and monopolies affecting interstate com-

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

I. In General—Continued.

merce, the existence of an illegal combination among the defendants is to be **determined not alone from what appears on the face of the preamble, rules, and by-laws of their association, but from the entire situation, and the practical working and results** of their methods of doing business, as disclosed by the evidence. *U. S.* v. *Hopkins*, 82 F., 529. 1—725

7. **The only question in each case** where the validity of a contract or combination under the law is involved **is whether or not its necessary effect is to restrain interstate commerce.** *Chesapeake & O. Fuel Co.* v. *U. S.*, 115 F., 610. 2—151

8. In determining whether or not a combination is in violation of the Federal Anti-Trust Law, as in restraint of interstate commerce, it is immaterial that such is not its ultimate object, which is in most cases to increase the trade and profits of the parties to such combination; nor is it material to ascertain what proportion the resulting restraint of interstate commerce bears to other results. **The true inquiry is whether it tends directly to appreciably restrain interstate trade,** and, if it does, it is within the statute, although such effect may not be so considerable as its other effects. *Ellis* v. *Inman, Poulsen & Co.*, 131 F., 182. 2—577

9. **The test** of the violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), by a contract or combination **is its effect upon competition in commerce among the States. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls** under the ban of the law, **but if it promotes or only incidentally or indirectly restricts** competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law. *Phillips* v. *Iola Portland Cement Co.*, 125 F., 593. 2—284

10. To render a combination unlawful under the Anti-Trust Act of 1890 it **need not be one which by its terms refers to interstate commerce,** but it is **sufficient if its purpose and effect** are necessarily to restrain interstate trade. *Gibbs* v. *McNeeley*, 118 F., 120. 2—194

11. **Act Includes every Combination which Directly and Substantially Restricts Interstate Commerce.**—The generality of the language used in the Anti-Trust Act of 1890 (26 Stat., 209), declaring illegal "every contract, combination, or conspiracy in restraint of trade or commerce among the several States or with foreign nations," indicates the purpose of Congress to include in the prohibition every combination which directly and substantially restricts interstate commerce, whatever its form. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

I. In General—Continued.

12. **Same—Applies to Interstate Carriers.**—The Anti-Trust Act (act July 2, 1890, 26 Stat., 209) applies to interstate carriers of freight and passengers, **and any contract or combination which directly and substantially restricts the right of such a carrier to fix its own rates** independently of its natural competitors places a direct restraint upon interstate commerce, in that it tends to prevent competition, and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable. *Ib.*

Decree affirmed, 193 U. S., 197 (2—338).

13. **Same.**—The act is **not limited to restraints** of interstate and international trade or commerce **that are unreasonable** in their nature, **but embraces all direct restraints, reasonable or unreasonable,** imposed by any combination, conspiracy, or monopoly upon such trade or commerce. *U. S.* v. *Northern Securities Co.*, 193 U. S., 197. 2—340

14. **When the direct, immediate, and intended effect of a contract or combination** among dealers in a commodity **is the enhancement of its price,** it amounts to a restraint of trade in the commodity, even though contracts to buy it at the enhanced price are being made. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211. 1—1010

15. **It does not matter that a combination embraces restraint of trade within a single State if it also embraces** and is directed against **commerce among the States.** *Swift & Co.* v. *United States*, 196 U. S., 375. 2—641

See also *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 824.

3. Contracts not enforceable.

16. **Contracts that were in unreasonable restraint of trade at common** law were not unlawful in the sense of being criminal, or as giving rise to an action for damages to one prejudicially affected thereby, but **were simply void and not enforceable.** *U. S.* v. *Addyston Pipe and Steel Co.*, 85 F., 271. 1—772

17. **A contract** made in pursuance of a combination of manufacturers seeking to restrict the production and keep up the prices of wooden dishes throughout the country, **whereby a manufacturer was guarantied a certain sum as dividends** on his stock in the central company, **in consideration of the closing of his factory** for a year, *held* to be contrary to public policy, and therefore unlawful, and **not enforceable by the courts.** *Cravens* v. *Carter-Crume Co.*, 92 F., 479. 1—983

18. **Can not Enforce Sale of a Business Which was to Constitute Part of an Illegal Combination or Trust.**—Defendant and his partner sold their bakery business to complainant corporation, receiving payment in its stock, and defendant leased to it the premises where the business was conducted and con-

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

I. In General—Continued.

tracted to carry it on as the purchaser's agent, for a salary. After operating under this arrangement for a time, he **repudiated the sale, resumed possession under the old firm name,** and refused to account to complainant. The bill was brought to enjoin him from asserting a hostile claim, for an accounting, and a receiver. Defendant, and his partner as intervenor, filed a cross-bill for rescission of the sale for fraudulent representations, and tendered back the stock. Complainant was practically a "trust," organized to monopolize the business, and had already secured control of 35 leading bakeries in 12 different States. *Held*, that, while a case was made for a receiver, pending litigation between ordinary parties, the prayer would be denied, as **equity would not encourage a combination in restraint of trade,** and probably illegal, under act of Congress, July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," and act of Louisiana, July 5, 1890, for the same purpose. *Amer. Biscuit & Mfg. Co.* v. *Klotz*, 44 F.. 721. 1—2

19. A railroad company, belonging to an illegal combination in violation of the Anti-Trust Law, can not invoke the aid of a Federal court of equity for the **protection of its rights** claimed **under contracts** which were the direct result and evidence of such unlawful combination. *Delaware, L. & W. R. Co.* v. *Frank*, 110 F., 689. 2—82

20. Illegal Condition as Consideration—Effect of Nonperformance.—Rebate vouchers issued by a distilling company to customers, by which it promised to refund a certain sum per gallon on their purchases at the end of six months, on condition of their purchasing exclusively from the company during that time, can not be enforced, either at law or in equity, where the condition has not been performed, though such condition be illegal, as in restraint of trade, there being no other consideration for the promise. 77 Fed., 700, affirmed. *Dennehy* v. *McNulta*, 86 F., 825. 1—855

4. What constitutes monopolizing, unlawful combination, etc.

21. To constitute the offense of "**monopolizing,** or attempting to monopolize," trade or commerce among the States, within the meaning of section 2 of the Anti-Trust Act of 1890, it is necessary **to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engagaing therein.** *In re Greene*, 52 F., 104. 1—55

22. Unlawful Combination.—To render a combination unlawful under the Anti-Trust Act of 1890 it need not be one which by its terms refers to interstate commerce, but it is **sufficient if its purpose and effect are necessarily to restrain interstate trade.** *Gibbs* v. *McNeeley*, 118 F., 120. 2—194

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

I. In General—Continued.

23. Combination of Lawful Elements of an Unlawful Scheme.—Even if the separate elements of a scheme are lawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize interstate commerce the plan **may make the parts unlawful.** *Swift & Co.* v. *United States*, 196 U. S., 375. 2—641

5. Liability.

24. Liability of Members of Combination.—Every member of an illegal combination in restraint of interstate trade or commerce in violation of the Anti-Trust Act is liable for the damages resulting to the business or property of a plaintiff by reason of such combination, and it is immaterial that there were no direct contract relations between plaintiff and defendant. *City of Atlanta* v. *Chattanooga Foundry & Pipe Works*, 127 F., 23. 2—299

Enforcement of Contracts and Collection of Debts. *See* Actions and Defenses.

Recovery. *See* Actions and Defenses.

Defenses. *See* Actions and Defenses, II.

II. Prohibited.

1. Agreements, contracts, or combinations to establish, maintain, raise, or control the prices, production, or output of articles or commodities.

25. Coal—Agreement Between Mining Companies and Coal Dealers to Control the Price of Coal.—An agreement *between coal-mining companies* operating chiefly *in one State and dealers in coal* in a city *in another State*, creating a coal exchange to advance the interests of the coal business, to treat all parties to the business in a fair and equitable manner, and to *establish the price of coal, and change the same from time to time*, by which it was agreed that the price of the coal at the mines should be 4½ cents, the freight being 4 cents, and the margin of the dealer should be 4½ cents, making the price to the consumer 13 cents, and that, whenever the price of the coal is advanced beyond an advance in freights, one-half the advance shall go to the mine owner and the other half to the dealer, and a penalty was provided by fine of any member selling coal at a less price than the price fixed by the exchange, and by which it was *forbidden for owners or operators* of mines *to sell coal to any person other than members* of the organization, and for dealers to purchase of miners who were not members, but *exempting coal used for manufacturing and steamboat purposes* from the prices prescribed until all the mines tributary to that market should come into the exchange, or until the exchange

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

could control the prices of coal used by manufacturers, **is within the language of act of July 2, 1890,** declaring "every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States," and also the monopolizing, or combination with another to monopolize, trade or commerce among the several States a misdemeanor. *U. S.* v. *Jellico Mtn. Coal & Coke Co.*, 46 F., 432. **1—9**

26. A combination between importers of coal from other States and foreign countries **with a local coal dealers' association, regulating** arbitrarily the **retail prices of coal** and providing against free competition, is one in restraint of interstate commerce within the meaning of the act of 1890. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. **1—749**

27. Contract Between a Fuel Company and a Combination of Coal Producers who Sought to Regulate the Production and Price of Coal.—A contract by which a corporation agrees to take the entire product of a number of independent persons, firms, and corporations engaged in mining coal and making coke in a certain district, which is intended for "western shipment" over a leading route of transportation, to sell the same at not less than a minimum price, to be fixed by an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds above a fixed sum per ton to be retained as "compensation," the stated purpose being to "enlarge the western market," and under which the shipments are made into other States, **is illegal** under the Anti-Trust Law, as in restraint of interstate commerce, and as tending to create a monopoly. *U. S.* v. *Chesapeake & Ohio Fuel Co.*, 105 F., 93. **2—34**

Affirmed, 115 F., 610 (**2—151**).

28. Copyrighted Books—Combination of Publishers and Booksellers Throughout the United States for the Purpose of Maintaining Prices on Copyrighted Books.—The organization and combination of the publishers and booksellers of the United States into two membership associations, one known as the "American Publishers' Association" and the other as the "American Booksellers' Association," whereby they together controlled the publication and sale of at least 90 per cent of all copyrighted books, the object being to compel owners and dealers of such books to purchase them of the members of the combination at an arbitrary price fixed by it, regardless of the actual value of the books as determined by a demand in an open market, or the condition of the books, **and to compel all publishers and dealers of such books to come into the combination,** be controlled by it, and sell books at prices fixed by it, regardless of the value of the books or

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

of the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books through a **system of blacklisting,** etc., the effect of which would be to cripple the business of any publisher or bookseller outside of the combination—was **in violation of the Anti-Trust Law** of July 2, 1890 (26 Stat., 209). *Bobbs-Merrill Co.* v. *Straus*, 139 F., 155. **2—755**

29. Drugs—Combination of Separate Associations of the Manufacturers, Wholesalers, and Retailers of Drugs, to fix Arbitrarily the Prices of Such Articles.—Where three voluntary associations, composed of the manufacturers, wholesalers, and retailers, respectively, of drugs, proprietary medicines, etc., were organized to arbitrarily fix a minimum retail price for such articles, which were of universal consumption and were of absolute and daily necessity, and then restricted the sale of such articles to such retailers only as conducted their retail business in accordance with the arbitrary standard of prices, such combination **was in restraint of interstate commerce in the drug trade in so far as it excluded "aggressive cutters"** of prices and those who dealt with them, **and was in violation of act of July 2, 1890** (26 Stat., 209), prohibiting monopolies in restraint of interstate trade and commerce, etc. *Loder* v. *Jayne*, 142 F., 1010. **2—976**

Judgment reversed by the Circuit Court of Appeals (149 F., 21), but upon other grounds than above.

30. Lumber—Combination of Local Lumber Dealers Seeking to Raise and Maintain Price of Lumber by Refusing to Sell to Consumers who Bought from Outside Parties, some of such Mills being Located in a Neighboring State.—A complaint alleged that plaintiff was a builder doing business in Portland, Oreg.; that in such business he purchased large quantities of rough lumber from mills located at Vancouver, Wash., which was 7 miles from Portland, but that such mills did not manufacture finished or kiln-dried lumber; that defendants, who comprised all the manufacturers and dealers in Portland, combined to fix exorbitant prices on all lumber sold by them, and to compel all consumers in Portland to pay such prices by refusing to sell any finished lumber at any price to such consumers as bought lumber of any kind from other dealers, except on condition that such consumer pays to defendants the difference between the price he paid for lumber so bought from others and the price charged therefor by defendants and promises to buy all his lumber thereafter from defendants; that the purpose and effect of such combination was to prevent plaintiff and other consumers from buying lumber at Washington mills, and to obtain a monopoly of the trade in Portland at unreasonable and

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

exorbitant prices. *Held*, that the combination charged constituted a **violation of the Federal Anti-Trust Act**, its effect being to directly restrain interstate commerce, and that the complaint stated a cause of action thereunder for the recovery of damages alleged to have resulted to plaintiffs. *Ellis* v. *Inman, Poulsen & Co.*, 131 F., 182. **2—577**

Reversing, 124 F., 956 (**2—268**).

31. **Same.—In determining whether or not a combination is in violation of the Federal Anti-Trust Law**, as in restraint of interstate commerce, it is immaterial that such is not its ultimate object, which is in most cases to increase the trade and profits of the parties to such combination; nor is it material to ascertain what proportion the resulting restraint of interstate commerce bears to other results. **The true inquiry is whether it tends directly to appreciably restrain interstate trade**, and, if it does, it is within the statute, although such effect may not be so considerable as its other effects. *Ib.*

32. **Red Cedar Shingles.—An association of manufacturers of and dealers in red cedar shingles** in the State of Washington formed for the purpose of controlling the production and the price of such shingles, which are made only in that State, but are **principally sold and used in other States**, and which, by its action in closing the mills of its members, has **reduced the production, and** has also **arbitrarily increased** the **prices** at which the product is sold, is a combination in restraint of interstate commerce, and unlawful under the Anti-Trust Law of July 2, 1890. *Gibbs* v. *McNeeley*, 118 F., 120. **2—194**

33. **Tiles—Combinations to Raise Prices of Tiles, etc., and Control Output.**—A complaint alleging that members of an association have conspired and combined to raise the prices of tiles, mantels, and grates, to control the output, and to regulate the prices thereof, with the intent to monopolize the trade and commerce **between the other States and California** in regard thereto, as well as to arbitrarily fix their prices independently of their natural market value, brings the case within the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Lowry* v. *Tile, Mantel & Grate Assn. of Cal.*, 98 F., 817. **1—995**

34. **Same—Combination of Tile Manufacturers in California and Adjoining States Agreeing not to Sell to or Purchase from Dealers not Members.**—The Tile, Mantel and Grate Association of California was organized by defendants, who were dealers in tiles and similar articles, for the declared purpose of uniting "all acceptable dealers" in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

a radius of 200 miles), and all American manufacturers of tiles and fireplace fixtures. The articles prescribed that other local dealers who had an established business and carried a stock of a stated value, and who were "acceptable," might, on motion of a member, be permitted to join, and that all manufacturers of tiles in the United States might become members by signing the constitution and paying an entrance fee. The local members were bound by the articles not to buy goods from any manufacturer who was not a member nor to sell goods to other dealers not members at less than list price, which was about double the market price, and the manufacturing members were bound not to sell to any dealer within the prescribed territory who was not a member. *Held*, That **such association was a combination in restraint of trade** among the States, **illegal under section 1** of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), **and also an attempt to monopolize** a part of the trade and commerce among the States, **within** the prohibition of **section 2**, by shutting out from such trade all local dealers who were not members, and that **defendants** were **liable in damages**, under section 7 of the act, to such a dealer to whom a manufacturer in another State refused to sell tiles, as it had previously done, on the sole ground that such dealer was not a member of the association. *Montague* v. *Lowry*, 115 F., 27. **2—112**

Affirming *Lowry* v. *Tile, Mantel and Grate Assn. of Cal.*, 106 F., 38 (**2—53**).

35. **Same—An Association of Dealers in Tiles Agreeing Not to Purchase from Nonmembers or to Sell to Them Except at an Advance of 50 per cent on Price to Members.**—An association of wholesale dealers in tiles, mantels, and grates in California and vicinity, and manufacturers in other States, of tiles and fireplace fixtures, in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tile to nonmembers for less than list prices, which are more than 50 per cent higher than prices to members, while the manufacturers agree not to sell their products or wares to nonmembers at any price, under penalty of forfeiture of membership, **is an agreement or combination in restraint of trade** within the meaning of the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Montague & Co.* v. *Lowry*, 193 U. S., 38. **2—327**

36. **Same—Where the Sales were Made within the State.**—Although the sales in question were within the State of California and although such sales constituted a very small portion of the trade involved, the **agreement of manufacturers without the State not to sell to anyone but members** was **part of**

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

a scheme which included the enhancement of the price of unset tiles by the dealers within the State, and the whole thing was so bound together that the transactions within the State were inseparable and became a part of a purpose which when carried out amounted to, and was, a combination in restraint of interstate trade and commerce. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211, followed; *Hopkins* v. *United States*, 171 U. S., 578; *Anderson* v. *United States*, 171 U. S., 604, distinguished. *Ib.*

37. **Same.—The parties aggrieved,** being a firm of dealers in tiles, mantels, and grates, in San Francisco, whose members had never been asked to join the association and who had never applied for admission therein, and which did not always carry $3,000 worth of stock, as required by the rules of the association as one of the conditions of membership, **are entitled to recovery under section 7** of the act of July 2, 1890. *Ib.*

38. **Wooden Dishes.—A contract made in pursuance of a combination** of manufacturers, seeking to **restrict the production and keep up the prices** of wooden dishes throughout the country, **whereby a manufacturer** was **guaranteed a certain sum as dividends on his stock** in the central company in consideration of the closing of his factory for a year, was contrary to public policy and therefore unlawful, and **would not be enforced by the courts.** *Cravens* v. *Carter-Crume Co.*, 92 F., 479. 1—983

WALL PAPER. *See* CONTINENTAL WALL PAPER CO. *v.* LEWIS VOIGHT & SONS CO., 148 F., 939.

LICORICE PASTE. *See* U. S. *v.* MACANDREWS & FORBES CO., 149 F., 824.

2. *Combinations, contracts, etc., eliminating competition in bidding.*

39. **Combination of Manufacturers—Dividing Territory and Allotting Contracts by Pretended Bids.**—The formation of a combination by a number of companies manufacturing iron pipe in different States, whereby the territory in which they operate (comprising a large part of the United States) is divided into "reserved" cities and "pay" territory, the reserved cities being allotted to particular members of the combination, free of competition from the others, though provision is made for pretended bids by the latter at prices previously arranged, and when all offers to purchase pipe in the pay territory are submitted to a committee, which determines the price, and then awards the contract to that member of the combination which agrees to pay the largest "bonus," to be divided among the others, is **unlawful, both at common law and under the act of 1890,** against trusts and monopolies. *U. S.* v. *Addyston Pipe and Steel Co.*, 85 F., 271. 1—772

Reversing, 78 Fed., 712 (1—631).

40. **Combinations to Enter into Public Bidding for Contracts, but Where only One of the Combination Really Bids, the Others Being Required to Bid Above Him.**—An agreement or combination between corporations engaged in the manufacture, sale, and transportation of **iron pipe,** under which they enter into public bidding for contracts, not in truth as competitors, but under an arrangement which eliminates all competition between them for the contract and permits one of their number to make his own bid, while the others are required to bid over him, **is in violation of the Anti-Trust Act** of July 2, 1890, so far as it applies to sales for delivery beyond the State in which the sale is made. *Addiston Pipe and Steel Co.* v. *U. S.*, 175 U. S., 211. 1—1009

Affirming 85 F., 271 (1—772).

41. **Same.**—A combination may illegally restrain trade by preventing competition for contracts and enhancing prices, although it does not prevent the letting of any particular contract. *Ib.*

42. **Same—Where Goods are to be Delivered in the State.**—A combination to restrain competition in proposals for contracts for the sale of certain articles which are to be delivered in the State in which some of the parties to the combination reside and carry on business **is not,** so far as those members are concerned, **in violation of the Anti-Trust Law,** although the **contract may be awarded to some party outside the State** as the lowest bidder. *Ib.*

43. **Same.**—Any agreement or **combination which directly operates,** not alone upon the manufacture, but **upon the sale, transportation, and delivery of an article of interstate commerce,** by preventing or restricting its sale, thereby regulates interstate commerce to that extent, and thus trenches upon the power of the national legislature, and **violates the statute.** *Ib.*

44. **Same.—When the direct, immediate, and intended effect** of a contract or combination among dealers in a commodity is **the enhancement of its price,** it amounts to a restraint of trade in the commodity, even though contracts to buy it at the enhanced price are being made. *Ib.*

45. **Same.—The contracts** considered **in this case,** set forth in the statement of facts and in the opinion of the court, relate to the sale and transportation to other States of specific articles, not incidentally or collaterally, but as a direct and immediate result of the combination entered into by the defendants; and they restrain the manufacturing, purchase, sale, or exchange of the manufactured articles among the several

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

States, and enhance their value, and thus **come within the provisions of the "act** to protect trade and commerce against unlawful restraints and monopolies." *Ib.*

46. Same.—The judgment of the court below, which perpetually enjoined the defendants in the court below from maintaining the combination in cast-iron pipe as described in the petition, and from doing any business under such combination, **is too broad, as it applies** equally to **commerce** which is **wholly within a State** as well as to that which is interstate or international only. *Ib.*

47. Agreement Between Live-Stock Buyers not to Bid Against Each Other, etc.—An agreement between corporations and individuals, etc., engaged in buying live stock at **divers points throughout the United States**, to refrain from bidding against each other in the purchase of cattle is combination in restraint of trade; so also their agreement **to bid up prices to stimulate shipments**, intending to cease from bidding when the shipments have arrived, and the same result follows from the combination of defendants to fix prices upon and restrict the quantities of meat shipped to their agents or their customers. Being restriction upon competition, such agreements are combination in restraint of trade. *U. S.* v. *Swift & Co.*, 122 F., 529. **2**—237

48. Same.—Restraint of trade is not dependent upon any consideration of **reasonableness or unreasonableness** in the combination averred, nor is it to be tested by the prices that result from the combination. The **statute has no concern with prices, but looks solely to competition** and to the giving of competition full play by making illegal any effort at restriction upon competition. *Ib.*

49. Same.—A combination of a dominant proportion of the **dealers in fresh meat throughout the United States not to bid against**, or only in conjunction with, **each other** in order to regulate prices in and induce shipments to the live-stock markets in other States, to restrict shipments, establish uniform rules of credit, make uniform and improper rules of cartage, and to get less than lawful rates from railroads to the exclusion of competitors with intent to monopolize commerce among the States, is an **illegal** combination within the meaning and prohibition of the act of July 2, 1890 (26 Stat., 209), **and can be restrained and enjoined** in an action by the United States. *Swift & Co.* v. *United States*, 196 U. S., 375. **2**—641

50. Same.—It does not matter that a combination of this nature embraces **restraint and monopoly** of trade **within a single State if it also embraces** and is directed against **commerce among the States.** *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

51. Same.—The effect of such a combination upon interstate commerce is direct and not accidental, secondary, or remote as in *United States* v. *E. C. Knight Co.*, 156 U. S., 1. *Ib.*

52. Same.—Even if the separate elements of such a scheme are lawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize interstate commerce the plan may make the parts unlawful. *Ib.*

53. Same.—When cattle are sent for sale from a place in one State, with the expectation they will end their transit, after purchase, **in another State, and when in effect they do so**, with only the interruption necessary to find a purchaser at the stock yards, and when this is a constantly recurring course, it constitutes interstate commerce, and the purchase of the cattle is an incident of such commerce. *Ib.*

3. Contracts, etc., in restraint of interstate trade or commerce.

54. Contracts, Combinations, etc., Against Public Policy and Void Under the Common Law.—The contracts, combinations in the form of trust or otherwise, and conspiracies in restraint of trade **declared to be illegal in the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), are the contracts, combinations, and conspiracies in restraint of trade that **had been declared** by the courts to be against public policy and **void under the common law** before the passage of that act. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. **1**—186

Case reversed, 166 U. S., 290 (**1**—648).

55. Same.—The test of the validity of such contracts or combinations is not the existence of restriction upon competition imposed thereby, but **the reasonableness of that restriction under the facts and circumstances of each particular case.** Public welfare is first considered, and, if the contract or combination appears to have been made for a just and honest purpose, and the restraint upon trade is not specially injurious to the public, and is not greater than the protection of the legitimate interests of the party in whose favor the restraint is imposed reasonably requires, the contract or combination is not illegal. Shiras, district judge, dissenting on the ground that this rule is not applicable to corporations charged with public duties. *Ib.*

56. Agreements Legal when Made which Violate Act of 1890.—The agreement of the Trans-Missouri Freight Association, in regard to establishing and maintaining railroad rates, though legal when made, became illegal on the passage of the act of July 2, 1890, and acts done under it after that statute became operative were done in violation of it. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. **1**—648

57. Contracts in Restraint of Trade—At Common Law.—Contracts that were in unreasonable restraint of trade at common law

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

were not unlawful in the sense of being criminal, or as giving rise to an action for damages to one prejudicially affected thereby, but **were simply void and not enforceable.** *U. S.* v. *Addyston Pipe and Steel Co.*, 85 F., 271. 1—772

58. Same.—The effect of the Anti-Trust Law of 1890 is to render such contracts, as applied to interstate commerce, unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and also to create a right of civil action for damages in favor of persons injured thereby, and a remedy by injunction in favor both of private persons and the public against the execution of such contracts and the maintenance of such trade restraints. *Ib.*

59. Contracts or combinations which impose any restraints whatever upon interstate commerce are unlawful under the Anti-Trust Law of July 2, 1890; and it is **immaterial whether or not** the **restraint is a fair and reasonable** one, or whether it has actually resulted in increasing the price of the commodity dealt in. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. 1—749

60. Contracts which operate as a restraint upon the soliciting of orders for, and the sale of, **goods in one State, to be delivered from another,** are contracts in restraint of interstate commerce, within the meaning of the act of July 2, 1890. *U. S.* v. *E. C. Knight Co.*, 15 Sup. Ct., 249; 156 U. S., 1, distinguished. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F., 271. 1—772

61. To render a combination unlawful under the Anti-Trust Act of 1890 it need not be one which by its terms refers to interstate commerce, but **it is sufficient if its purpose and effect are necessarily to restrain interstate trade.** *Gibbs* v. *McNeeley*, 118 F., 120. 2—194

62. Every Contract, Combination, or Conspiracy, in Whatever Form, of Whatever Nature, and Whoever May be Parties to it, which Directly or of Necessity Operates in Restraint of Interstate Trade or Commerce.—Although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it embraces and declares to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (Harlan, Brown, McKenna, Day). 2—339

63. Same.—The act is not limited to restraints of interstate and international trade or commerce **that are unreasonable** in

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

their nature, but embraces all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy, or monopoly upon such trade or commerce. *Ib.*

64. Railroad carriers engaged in interstate or international trade or commerce are **embraced** by the act. *Ib.*

65. Combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained, or commerce are **embraced** by the act. *Ib.*

66. Every combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act. *Ib.*

67. The natural effect of competition is to increase commerce, and an **agreement whose direct effect is to prevent this play of competition** restrains instead of promotes trade and commerce. *Ib.*

68. The Northern Securities Company combination **is a "trust"** within the meaning of the act of Congress of July 2, 1890, known as the Anti-Trust Act; **but if not, it is a combination in restraint of interstate and international commerce,** and that is enough to bring it under the condemnation of the act. *Ib.*

69. Every contract, combination, or conspiracy, the necessary effect of which is to stifle or to directly and substantially **restrict competition in commerce among the States,** is in restraint of interstate commerce and violates section 1 of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

70. Same.—Every attempt to monopolize a part of interstate commerce, the **necessary effect of which is to stifle or** to directly and substantially **restrict competition** in commerce among the States, violates section 2 of the act of July 2, 1890, c. 647 (26 Stat., 209). *Ib.*

For what acts and combinations do not violate the act, *see* same case, and COMBINATIONS, ETC., III.

71. Monopolies Prohibited are Those Engaged in Interstate Commerce—Not Merely Because the Commodity is a Necessity of Life.—The monopoly and restraint denounced by the act of July 2, 1890 (26 Stat., 209) "to protect trade and commerce against unlawful restraints and monopolies," are a monopoly in interstate and international trade or commerce, and not a monopoly in the manufacture of a necessary of life. *U. S.* v. *E. C. Knight*, 156 U. S., 1. 1—379

72. Any Restraint of Interstate Trade or Commerce if Accomplished by Conspiracy.—The act of July 2, 1890 (26 Stat., 209), section 1, declaring illegal "every contract, combina-

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

tion in the form of trust, or otherwise, or conspiracy" in restraint of trade or commerce among the States, or with foreign nations, **is not aimed at capital merely and combinations of a contractual nature,** which by force of the title, "An act to protect trade and commerce against unlawful restraints and monopolies," are limited to such as the courts have declared unlawful, the words "in restraint of trade" having, in connection with the words "contract," and "combination," their common-law significance, but the term "conspiracy" is used in its well-settled legal meaning, so that any restraint of trade or commerce, if to be accomplished by consipracy, is unlawful. *U. S.* v. *Debs*, 64 F., 724. **1—322**

73. Same—Construction.—The construction of the statute is not affected by the use of the phrase "**in restraint of trade,**" rather than one of the phrases "to injure trade" or "to restrain trade." *Ib.*

74. Same.—The word "commerce," in the statute, **is not synonymous with "trade,"** as used in the common-law phrase "restraint of trade." but has the meaning of the word in that clause of the Constitution which grants to Congress power to regulate interstate and foreign commerce. *Ib.*

75. Supreme Court does not Dissent from Above Conclusions.—The court enters into no examination of the act of July 2, 1890 26 Stat., 209), on which the Circuit Court mainly relied to sustain its jurisdiction; but it must not be understood that it dissents from the conclusions of that court in reference to the scope of that act, but simply that it prefers to rest its judgment on the broader ground discussed in its opinion, believing it important that the principles underlying it should be fully stated and fully affirmed. *In re Debs*, 158 U. S., 564. **1—565**

76. A contract by which a corporation agrees to take the entire product of a number of persons, firms, and corporations engaged in mining **coal and** making **coke in a certain district,** which **is intended for "western shipment,"** to sell the same at not less than a minimum price, to be fixed by an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds above a fixed sum per ton, to be retained as "compensation"—the stated purpose being "to enlarge the western market"—and under which the shipments are made into other States, **is one affecting interstate commerce,** and is subject to the provision of the Anti-Trust Law. *U. S.* v. *Chesapeake & O. Fuel Co.*, 105 F., 93. **2—34**

Affirmed, 115 F., 610 (**2—151**).

77. Effect of Illegal Provisions—Divisibility.—Stipulations in a contract which are invalid as in restraint of trade, if capable of being construed divisibly, do not affect the validity of other provisions. *U. S. Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 F., 364. **2—288**

See also CONTRACTS.

4. Live-stock associations, and exchanges, etc.

78. An Association of Commission Merchants.—An association of men engaged in receiving, buying, selling, and handling, as commission merchants, **live stock received at the Kansas City stock yards from, and sold for shipment to, various States and Territories,** which yards furnished the only available public market for that purpose for an exceedingly large area, and which by its rules **fixed a minimum rate of commissions to be charged by members** of the association, and prohibited the employment by any commission firm or corporation of more than three persons to travel and solicit business, and prohibited the sending of prepaid telegram or telephone messages quoting the markets, and **shut out all dealings and business intercourse between members and nonmembers, and boycotted and blacklisted** persons attempting to carry on business without joining the exchange, thus effectually preventing them from securing or transacting business, *held* to be **an illegal combination** to restrict, monopolize, and control that class of trade and commerce. *U. S.* v. *Hopkins*, 82 F., 529. **1—725**

Reversed, 171 U. S., 578 (**1—941**).

79. Same—Reasonableness of Restraints.—The act of Congress is aimed against all restraints of interstate commerce, and its purpose is to permit commerce between the States to flow in its natural channels, unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever. The reasonableness of the restrictions in a given case is immaterial. *Ib.*

80. Agreement Between Live-Stock Buyers Not to Bid Against Each Other, etc.—An agreement between corporations and individuals, etc., engaged in buying live stock at divers points throughout the United States, to refrain from bidding against each other in the purchase of cattle is combination in restraint of trade; so also **their agreement to bid up prices** to stimulate shipments, **intending to cease from bidding when the shipments have arrived,** and the same result follows from the **combination** of defendants **to fix prices** upon and restrict the quantities of meat shipped to their agents or their customers. Being restriction upon competition, such agreements are combination in restraint of trade. *U. S.* v. *Swift & Co.*, 122 F., 529. **2—237**

Affirmed, 196 U. S., 375 (**2—641**).

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

81. Same.—Restraint of trade is not dependent upon any consideration of **reasonableness or unreasonableness** in the combination averred, nor is it to be tested by the prices that result from the combination. The **statute has no concern with prices,** but looks solely to competition and to the giving of competition full play by making illegal any effort at restriction upon competition. *Ib.*

82. A **combination** entered into **by independent meat dealers to secure less than lawful freight rates,** with the intent to monopolize commerce in fresh meat among the several States, is forbidden by the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Swift & Co.* v. *United States,* 196 U. S., 375. 2—643

5. Conspiracy to injure in business.

83. Printing and Mailing Circulars.—The action of **an association of manufacturers in adopting a resolution denouncing a dealer** in the product they manufactured (shingles), who bought and shipped such product to customers in other States and foreign countries, **and in printing such resolution in circulars and mailing the same** to other manufacturers and customers of the dealer, whereby his business was injured, constituted an illegal combination or conspiracy in restraint of interstate and foreign commerce, and gives the person injured a right of action in a circuit court of the United States, under the Anti-Trust Law of 1890, to recover the damages sustained. *Gibbs* v. *McNeeley,* 102 F., 594. 2—25

6. Stockholding companies or corporations.

84. Holding Companies to Vote Stock in the Interests of a Railroad Combine.—Where one company (The Georgia Company of North Carolina) acquired a majority of the stock of the Central Railroad Company of Georgia, which it deposited with a trust company of New York, and transferred to the Terminal Company, a system conposed of several competing lines of railroads, which latter company and the Georgia Company relinquished to the trust company any right they might have to vote such stock. *Held,* That **the trust company** was a **mere stakeholder** and that the relinquishment did not entitle it to a vote. *Clarke* v. *Central R. R. & Banking Co. of Ga.,* 50 F., 328. 1—17

85. Same—Disqualifying Interests.—The fact that the Terminal Company has no appreciable interest in the stock of the Central Railroad Company, because of a mortgage on the railroad executed by the Terminal Company, does not remove the objection to its voting in person or by representative in the election of the directors of that railroad company, in view of the fact that it has large pecuniary interests in two directly competing lines of railroad. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

86. Same—Anti-Trust Law.—Transactions of this character are within the spirit, if not within the letter, of the "Sherman Anti-Trust Law," act of July 2, 1890 (26 Stat., 209). *Ib.*

87. Northern Securities Co.—Any contract or combination by which **a majority of the stock of two railroad companies owning** and operating **parallel and competing interstate lines of road is transferred to a corporation organized for the purpose of holding and voting the same** and receiving the dividends thereon, to be divided pro rata among the stockholders of the two companies so transferring their stock, directly and substantially restricts interstate trade and commerce, and **is in violation of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), since it **destroys any motive for competition** between the two roads; and it is immaterial that each company has its own board of directors, which nominally directs its operations and fixes its rates. *U. S.* v. *Northern Securities Co.,* 120 F., 721. 2—215

88. Northern Securities Company—Corporation Organized to Hold Majority of Stock of two Competing and Parallel Lines of Railroad for the Purpose of Preventing Competition.—Stockholders of the Great Northern and Northern Pacific Railway companies—corporations having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound—combined and conceived the scheme of organizing a corporation, under the laws of New Jersey, which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation. Pursuant to such combination the Northern Securities Company was organized as the holding corporation through which that scheme should be executed; and under that scheme such holding corporation became the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies, who delivered their stock, receiving, upon the agreed basis, shares of stock in the holding corporation. *Held,* That the arrangement was **an illegal combination in restraint of interstate commerce** and fell within the prohibitions and provisions of the act of July 2, 1890, and it was **within the power of the Circuit Court,** in an action, brought by the Attorney-General of the United States after the completion of the transfer of such stock to it, **to enjoin the holding company** from voting such stock and from exercising

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

any control whatever over the acts and doings of the railroad companies, **and also to enjoin the railroad companies from paying any dividends to the holding corporation** on any of their stock held by it. *Northern Securities Co.* v. *United States*, 193 U. S., 197. **2**—338

89. Same.—Necessarily, the **constituent companies ceased**, under this arrangement, **to be in active competition** for trade and commerce along their respective lines, and became, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. *Ib.*

90. Same.—A combination by stockholders in two competing interstate railway companies to form a stockholding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, **violates the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), which declares illegal every combination or conspiracy in restraint of interstate commerce, and forbids attempts to monopolize such commerce or any part of it. (48 L. ed., 679.) **2**—342

91. Same.—Where no individual investment is involved, but there is a combination by several individuals separately owning stock in two competing railroad companies engaged in interstate commerce, to place the control of both in a single corporation, which is organized for that purpose expressly and as a mere instrumentality by which the competing railroads can be combined, the resulting combination is a **direct restraint** of trade by destroying competition, and is illegal within the meaning of the act of July 2, 1890. (Brewer, concurring.) **2**—341

7. Patent and copyright monopolies—Illegal combinations and contracts.

92. A **corporation organized for the purpose of securing assignments of all patents relating to "spring-tooth harrows,"** to grant licenses to the assignors to use the patents upon payment of a royalty, **to fix and regulate the price** at which such harrows shall be sold, and to take charge of all litigation and prosecute all infringements of such patents, **is an illegal combination**, whose purposes are contrary to **public policy**, and which a court of equity should not aid by entertaining infringement suits brought in pursuance thereof. *National Harrow Co.* v. *Quick*, 67 F., 130. **1**—443

93. Corporation Organized to Receive Assignments of Patents.—A combination among manufacturers of spring-tooth harrows, by which each manufacturer assigns to a corporation organized for the purpose the patents under which he is operating, and **takes back an exclusive license to make and sell the same style of harrows previously made by him**, and no other, all the **parties being bound to sell at uniform prices**, *held* to be an unlawful combination for the enhancement of prices and in restraint of trade. *National Harrow Co.* v. *Hench*, 76 F., 667. **1**—610

Affirmed, 83 F., 36 (1—742).

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

94. Same.—Though the fact that several patentees are exposed to litigation justifies them in composing their differences, they can not make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage. *Ib.* **1**—743

95. A combination among manufacturers of spring-tooth harrows, whereby a **corporation organized for the purpose becomes the assignee of all patents** owned by the various manufacturers, and **executes licenses** to them, so as to **control the entire business and enhance prices, is void both as to the assignments and licenses**, so that the corporation **can not maintain a suit** against one of its assignors, who violates the agreement, **for infringement.** *National Harrow Co.* v. *Hench*, 84 F., 226. **1**—746

96. An **agreement by the members of a publishers' association** controlling 90 per cent of the book business of the country, under which all agreed **not to sell to anyone who would cut prices on copyrighted books**, nor to anyone who should be known to have sold to others who cut prices, etc., was an agreement relating to interstate trade or commerce **within the Anti-Trust Act** of July 2, 1890 (26 Stat., 209. *Mines* v. *Scribner*, 147 F., 927. **2**—1035

97. Same—Conspiracy—Restraint of Trade.—Defendants became members of an association of book publishers controlling 90 per cent of the book business of the country, which association adopted a rule that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others at cut prices. A blact list was kept containing the names of such persons, and no one on the black list could not buy any books of anybody in the scheme. *Held*, That such scheme constituted a conspiracy in restraint of interstate trade or commerce. *Ib.*

98. Same—Copyright—Effect—Extent of Rights Acquired.—The rights acquired by publishers of copyrighted books under the copyright law did not justify them in combining and agreeing that their books should be subject to the rules laid down by the united owners, one of which was that no member of the association should sell any books to a blacklisted purchaser who was known to cut prices. *Ib.*

99. License Contracts by Patentee in District where Patent De-

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

clared Illegal and in Creating a Fund to Crush Competition.—License contracts entered into by the owner of patent on a rubber tire, which patent had been adjudged invalid by the Circuit Court of Appeals for the Sixth Circuit, with all of the large manufacturers of such tires in the United States, all of whom were engaged in interstate commerce, to manufacture the same on a royalty and to sell at prices above the then market price, and providing for a system of rebates, and for the appointment of a board to receive one half of the royalties, to be used in purchasing said tires and selling them at prices deemed to be for the best interest of all. *Held*, that **such contracts went beyond the rights of complainant under its patent monopoly in raising and maintaining prices** in the States composing the sixth Federal circuit, in which the monopoly had no practical existence, **and in creating a fund to be used to crush competition** by outside manufacturers, as well in the sixth circuit as elsewhere, and were **illegal and void** as creating a combination in restraint of interstate trade and commerce, in violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 142 F., 531.

See also COMBINATIONS, ETC., 183–188. **2—855**

8. Railroads—Rates, etc.

100. Anti-Trust Act Applicable to Railroads.—The provisions respecting contracts, combinations, and conspiracies in restraint of trade or commerce among the several States or with foreign countries, contained in the act of July 2, 1890 (26 Stat., 209), "to protect trade and commerce against unlawful restraints and monopolies," apply to and cover common carriers by railroad. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. **1—648**

101. Contracts Between Railroads Affecting Rates.—A contract between railroads in restraint of interstate trade or commerce **is prohibited**, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property. *Ib.*

102. Same—No Authority Therefor Under Act to Regulate Commerce.—The act of February 4, 1887, "to regulate commerce," is not inconsistent with the of July 2, 1890, as it does not confer upon competing railroad companies power to enter into a contract in restraint of trade and commerce, like the one which forms the subject of this suit. *Ib.*

103. Right to Deviate from Rates Prescribed.—The right of a railroad company in a joint traffic association to deviate from the rates prescribed, provided it acts on a resolution of its board of directors and serves a copy thereof on the managers

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

of the association, who, upon its receipt, are required to "act promptly for the protection of the parties hereto," does not relieve the association from condemnation as an illegal restraint of competition, as the privilege of deviating from the rates would be exercised upon pain of a war of competition against it by the whole association. *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505. **1—869**

Reversing 76 F., 895 (**1—615**).

104. An agreement of railroad companies **which directly and effectually prevents competition** is, under the statute, in restraint of trade, notwithstanding the possibility that a restraint of trade might also follow unrestricted competition, which might destroy weaker roads and give the survivor power to raise rates. *Ib.*

105. The **statute applies only to contracts whose direct and immediate effect is a restraint** upon interstate commerce, and **not to contracts** made to promote **legitimate business**, though they may **indirectly or incidentally** affect such commerce. *Ib.*

106. Similar to Trans-Missouri Case.—So far as the establishment of rates and fares is concerned there is no substantial difference between the agreement in this case and the one set forth in the *Trans-Missouri case*. *Ib.*

107. Congress, with regard to the interstate commerce, and in the course of regulating it in the case of railroad corporations, **has the power to say that no contract or combination shall be legal, which shall restrain trade and commerce**, by shutting out the operation of the general law of competition. *Ib.*

108. Any contract or combination between interstate carriers which directly and substantially restrict the right of such a **carrier to fix its own rates** independently of its natural competitors places a direct restraint upon interstate commerce in that it tends to prevent competition and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable. *U. S.* v. *Northern Securities Co.*, 120 F., 721. **2—215**

109. Contract or Combination Prescribing Rates to be Maintained.—Any contract or arrangement between railroad companies for the purpose and having the effect of preventing competition by fixing rates to be maintained by the parties is in violation of the provisions of the Minnesota anti-trust act of 1899, which is substantially the same language as the Sherman Anti-Trust Act of 1890. *Minnesota* v. *Northern Securities Co.*, 123 F., 692. **2—246**

110. Agreements Between Railroads to Raise Rates upon Certain Class of Shipments.—When a number of railroads, acting

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

under articles of organization, by concert of agreement and action advance the rates upon shipments of a particular class throughout all the territory to which their organization and influence with similar organizations extend, and when they actually advance such rates and exact the same of shippers, it is of no consequence that they have a stipulation in such articles that each and all members can at will and at any time withdraw from the agreement. Such a combination is in restraint of trade. *Tift* v. *Southern Railway Co.*, 138 F., 753. 2—734, 746

See also CARRIERS.

111. **Combinations of Railroads to Prevent Competition, Pooling Passenger Receipts—No Relief in Equity Against Ticket Brokers.**—In a suit by a railroad company to enjoin the defendants, who were ticket brokers, from dealing in special tickets issued by complainant on account of the Pan-American Exposition, which were by their terms nontransferable, it appeared from the showing made on a motion for a preliminary injunction that complainant was a member of a combination known as the "Trunk Line Association," formed by a number of railroads operating in different States for the purpose of preventing competition; that the passenger receipts of all such roads were pooled and divided on an agreed basis; and that the special rates made on account of the exposition were fixed, and the terms of the tickets which were the basis of the suit were prescribed, by such association through its passenger committee. *Held*, That such combination was illegal, as in violation of the Federal Anti-Trust Law (26 Stat., 209), and that complainant could not invoke the aid of a Federal court of equity for the protection of rights claimed under contracts which were the direct result and evidence of such unlawful combination. *Delaware, L. & W. R. Co.* v. *Frank*, 110 F., 689. 2—82

112. A combination to secure less than lawful freight rates, entered into by independent meat dealers **with the intent to monopolize commerce in fresh meat among the several States**, is forbidden by the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Swift & Co.* v. *United States*, 196 U. S., 375. 2—643

9. Labor combinations.

113. **Anti-Trust Act Applies to Combinations of Laborers.**—The act declaring illegal "every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several States or with foreign nations," (26 Stat., 209) applies to combinations of laborers as well as of capitalists. *U. S.* v. *Workingmen's Amalg. Council*, 54 F., 994. Case affirmed, 57 F., 85 (1—184). 1—110

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

114. **Same—Lawful Combinations Turned to Unlawful Purposes.**—The fact that a combination of men is in its origin and general purposes innocent and lawful is no ground of defense when the combination is turned to the unlawful purpose of restraining interstate and foreign commerce. *Ib.*

115. **Same—Labor Strikes.**—A combination of men to secure or compel the employment of none but union men becomes a combination in restraint of interstate commerce, within the meaning of the statute, when, in order to gain its ends, it seeks to enforce, and does enforce, by violence and intimidation, a discontinuance of labor in all departments of business, including the transportation of goods from State to State, and to and from foreign nations. *Ib.*

116. **Same—Injunction—When Granted.**—Where an injunction is asked against the interference with interstate commerce by combinations of striking workmen, the fact that the strike is ended and labor resumed since the filing of the bill is no ground for refusing the injunction. The invasion of rights, especially where the lawfulness of the invasion is not disclaimed, authorizes the injunction. *Ib.*

117. **Railroad Employees—Agreements not to Handle Property of Railroad Against which Action is Taken.—Rule 12** of an association of locomotive engineers, styled the "Brotherhood of Locomotive Engineers," which provides "that hereafter, when an issue has been sustained by the grand chief, and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of obligations if a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad run in connection with or adjacent to said road, to handle the property belonging to said railroad or system in any way that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues or differences of any nature or kind have been amicably settled"—**is plainly** a rule or agreement in restraint of trade or commerce, and **violative of section 1 of the act** of Congress of **July 2, 1890.** *Waterhouse* v. *Comer*, 55 F., 149. 1—119

118. **Same—Conspiracy—Section 5440 R. S.**—Construing several clauses of the interstate-commerce law recited in the opinion with section 5440 of the Revised Statutes, it follows that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate-commerce law, inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade or commerce of the country, will be obnoxious to the penalties therein prescribed. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

119. Same—Receivers—Advice of Court.—In this case, the movants having avowed their purpose, in open court, to submit to the construction to be made by the court relating to rule 12 of the Brotherhood, the receiver is directed to enter into an appropriate contract with them, subject to the general operation of this decision with reference to said rule. *Ib.*

120. A combination of labor organizations **whose professed object is to arrest the operation of** the **railroads** whose lines extend from a great city into adjoining States **until such roads accede to certain demands** made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, **is an unlawful conspiracy** in restraint of trade and commerce among the States, within the act of July 2, 1890, and acts threatened in pursuance thereof **may be restrained by injunction**, under section 4 of the act. *U. S.* v. *Elliott*, 62 F., 801. 1—262

Demurrer overruled, 64 F., 27 (1—311).

121. Same—Interference with Mails and Interstate Commerce.—A combination by railroad employees to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads, **is within section 1 of the act of July 2, 1890**, and is illegal. *U. S.* v. *Elliott*, 64 F., 27. 1—311

122. Combination of Railroad Employees Interfering with Operation of Railroad in Hands of a Receiver—Instigating Strike.—Maliciously **inciting employees of a receiver**, who is operating a railroad under order of the court, **to leave his employ**, in pursuance of an unlawful combination to prevent the operation of the road, thereby inflicting injuries on its business, for which damages would be recoverable if it were operated by a private corporation, **is a contempt of the court.** *Thomas* v. *Cin., N. O. & T. P. Ry. Co.*, 62 F., 803. 1—266

123. Same—Combination to Compel Breach of Contract.—A combination to inflict pecuniary injury on the owner of cars, operated by railway companies under contracts with him, by compelling them to give up using his cars, in violation of their contracts, and, on their refusal, to inflict pecuniary injury on them by inciting their employees to quit their service, and thus paralyze their business, the existence of the contracts being known to the parties so combining, is an unlawful conspiracy. *Ib.*

124. Same—Boycott.—A combination by employees of railway companies to injure in his business the owner of cars operated by the companies by compelling them to cease using his cars by threats of quitting and by actually quitting their service, thereby inflicting on them great injury, where the relation between him and the companies is mutually profitable, and has no effect whatever on the character or reward of the services of the employees so combining, is a boycott and an unlawful conspiracy at common law. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

125. Same—A combination to incite the employees of all the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their employment, thus paralyzing utterly all railway traffic, in order to starve the railroad companies and the public into compelling an owner of cars used in operating the roads to pay his employees more wages, they having no lawful right so to compel him, is an unlawful conspiracy by reason of its purpose, whether such purpose is effected by means usually lawful or otherwise. *Ib.*

126. Same—Restraint of Interstate Commerce.—Such combination, its purpose being to paralyze the interstate commerce of the country, is an unlawful conspiracy, within the act of July 2, 1890, declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several States. *U. S.* v. *Patterson*, 55 Fed., 605, disapproved. *Ib.*

127. Same—Obstructing Mails.—Such combination, where the members intend to stop all mail trains, as well as other trains, and do delay many, in violation of Revised Statutes, section 3995, punishing any one willfully and knowingly obstructing or retarding the passage of the mails, is an unlawful conspiracy, although the obstruction is effected by merely quitting employment. *Ib.*

128. Combination or Conspiracy to Prevent Passage of Trains—Obstruction of Interstate Commerce.—Any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in interstate commerce is in violation of act July 2, 1890, declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the States. *In re Grand Jury*, 62 F., 840. 1—301

129. Mail—Obstructing Passage of Mail Trains.—It is a violation of section 995, Revised Statutes, declaring it an offense to knowingly and willfully obstruct or retard the passage of the mail, for one to prevent the running of a mail train as made up ,though he is willing that the mail car shall go on, and his purpose is other than to retard the mails. *Ib.*

130. Same.—The railway is a great public highway, and the duty of the railroad company as a common carrier is first to the public. **The road must be kept in operation for the acommodation of the public**, if it is possible to do so with the force and

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

II. PROHIBITED—Continued.

appliances within reach. Any negligence in this respect is not excused by temporary difficulties capable of being promptly removed. *Ib.*

131. Same.—Where the transportation of the mails and interstate commerce has long been interrupted by the refusal of the employees of the railway company to move trains carrying Pullman cars, it is the **duty of the railway** company to use every effort **to move the mails and interstate commerce, without regard to the make-up of regular trains**; and any willful failure to perform this duty is a violation of the statute. *Ib.*

132. Railway Employees—Strikes for the Purpose of Injuring a Third Party.—It is **unlawful** for the employees of railway companies to combine and quit work for the purpose of compelling their employer to withdraw from his relations with a third party, for the purpose of injuring that third party. They **have, however, a right to organize for mutual benefit and protection,** and for the purpose of securing the highest wages and the best conditions they can command. They may appoint officers, who shall advise them as to the course to be taken in their relations with their employer, and they may, if they choose, repose in their officers authority to order them, or any of them, on pain of expulsion from their union, peaceably to leave the employment because the terms thereof are unsatisfactory. *Thomas* v. *Railway Co.*, 62 F., 817, followed. *U. S.* v. *Cassidy*, 67 F., 698. 1—452

133. Strike—Obstruction of Mails—Restraint of Interstate Trade or Commerce.—A strike, or a preconcerted quitting of work, by a combination of railroad employees is, in itself, unlawful if the concerted action is knowingly and willfully directed by the parties to it for the purpose of obstructing and retarding the passage of the mails, or in restraint of trade and commerce among the States. *Ib.*

III. NOT PROHIBITED.

1. Agreements, combinations, etc., only incidentally affecting interstate commerce.

134. Agreements to Raise Prices of Lumber, Not Involving an Absorption of the Entire Traffic.—An agreement between a number of lumber dealers in different States to raise the price of lumber 50 cents per thousand feet in advance of the market price can not operate as a restraint upon trade within the meaning of the act of Congress "to protect trade and commerce against unlawful restraint and monopolies" (26 Stat., 209) unless such agreement involves an absorption of the entire traffic and is entered into for the purpose of monopolizing trade in that commodity with the object of extortion. *U. S.* v. *Nelson*, 52 F., 646. 1—77

But see COMBINATIONS, ETC., 8–15.

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

135. A combination between all the lumber manufacturers of a city to raise and maintain the price of lumber to local consumers, and to refuse to sell lumber to consumers who purchase any part of their supply from outside mills, **some of such mills supplying the local market being situated in another State,** is not in violation of the Sherman Anti-Trust Law, as in restraint of interstate commerce, its **effect** on such commerce **being indirect and incidental only.** *Ellis* v. *Inman, Poulsen & Co.*, 124 F., 956. 2—268

Reversed, 131 F., 182 (2—577).

136. Apportionment of Territory—Agreements Not to Compete—Iron Pipe.—The combination of several corporations engaged in the manufacture of cast-iron pipe whereby they agree not to compete with each other in regard to work done or pipe furnished in certain States and Territories, and, to make effectual the objects of the association, agree to charge a bonus upon all work done and pipe furnished within those States and Territories, which bonus was to be added to the real market price of the pipe sold by those companies, was not a violation of the Anti-Trust Act, **as it affected interstate commerce only incidentally.** *U. S.* v. *Addyston Pipe and Steel Co.*, 78 F., 712. 1—631

Reversed, 85 F., 271 (1—772); 175 U. S., 211 (1—1009). *See* COMBINATIONS, ETC., 39–46.

137. Same.—In the examination of such a contract, fraud and illegality are not to be presumed, but must be proved, as in all other cases. *Ib.*

138. Acts, contracts, and combinations which promote, or only incidentally or indirectly restrict competition in commerce among the States, while their **main purpose** and chief effect are **to foster the trade** and increase the business of those who make and operate them, are not in restraint of interstate commerce, or violative of section 1 of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

139. Same.—Attempts to monopolize a part of commerce among the States which promote, or only incidentally or indirectly restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were **not**, made illegal or **punishable by section 2 of the Anti-Trust Act** of July 2, 1890, chapter 647 (26 Stat., 209), because **such attempts** are **indispensable to the existence of any competition** in commerce among the States. *Ib.*

140. Combination to Monopolize Refining and Selling Sugar by Buying up all Competitors not a Violation of the Statute.—A combination whose object is to enable a single company to

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. Not Prohibited—Continued.

monopolize and control the business of refining and selling sugar, by buying up all competing concerns in the United States, is not in violation of Federal Anti-Trust Act of July 2, 1890, for it constitutes no restriction upon, or monopoly of, commerce between the States, but, at most, only makes it possible for the promoters of the combination to restrict or monopolize such commerce, should they so desire. *U. S.* v. *E. C. Knight Co.*, 60 F., 306. 1—250

141. Same.—The purchase of stock of sugar refineries for the purpose of acquiring control of the business of refining and selling sugar in the United States does not involve monopoly, or restraint of interstate or foreign commerce, within the meaning of the act of July 2, 1890. *U. S.* v. *E. C. Knight Co.*, 60 F., 934. 1—258

142. Purchase of Similar Establishments in other States and thus Securing a Monopoly Bears no Direct Relation to Interstate or Foreign Commerce.—Although the *American Sugar Refining Company*, a corporation existing under the laws of the State of New Jersey, obtained through the purchase of stock in four Philadelphia refineries such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business, *Held*, that the acquisition of those refineries by the New Jersey corporation, and the business of sugar refining in Pennsylvania, bear no direct relation to commerce between the States or with foreign nations; and that the result of the transaction was the creation of a monopoly in the manufacture of a necessary of life, which could not be suppressed under the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *U. S.* v. *E. C. Knight Co.*, 156 U. S., 1. 1—379

143. Corporate Rights as Regards Acquisition of Property to an Extent which Gives Control of Traffic Therein Among the States Not Prohibited.—Congress has no authority, under the commerce clause or any other provision of the Constitution, to limit the right of a corporation created by a State in the acquisition, control, and disposition of property in the several States, and it is immaterial that such property, or the products thereof, may become the subjects of interstate commerce. It is apparent that by the act of July 2, 1890, in relation to monopolies, Congress did not intend to declare that the acquisition by a State corporation of so large a part of any species of property as to enable the owners to control the traffic therein among the several States, constituted a criminal offense. *In re Greene*, 52 F., 104. 1—55

144. Contract by which Stockholders of a Corporation Agree Not to Enter Into Competition With Purchaser of the Business of the Company.—The Anti-Trust Act of July 2, 1890 (26 Stat., 209) has no application to a contract by which the stockholders of a corporation engaged in dealing in fish at different places, in consideration of the purchase of the business and good will of the company by another, agreed not to enter into competition with him in such business for the term of ten years. *A. Booth & Co.* v. *Davis*, 127 F., 85. 2—318

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. Not Prohibited—Continued.

145. Same.—Such a covenant by the stockholders rests upon a good consideration and is lawful, and the right of the purchaser to enforce it can not be affected by the question whether he has conducted the business lawfully since his purchase. *Ib.*

146. Same—Suit to Enforce—Defenses.—In a suit to enjoin a defendant from violating such a contract and to enjoin a codefendant from employing his services in a competing business, it is no defense that his codefendant hired him in ignorance of the contract, and will suffer damage if deprived of his services. *Ib.*

147. Same—Corporation Selling Out Assets and Good Will and Thereby Incidentally or Remotely Affecting Interstate Commerce.—Where a corporation engaged in the business of buying and selling fish sold out its assets and good will to plaintiff's assignor, and the seller no longer retained any interest in the property, so that the sale was not a mere combination of owners and properties under one management, the sale was not in violation of the Federal Anti-Trust Act of July 2, 1890 (26 Stat., 209), though the contract might incidentally or in some remote degree injuriously affect interstate commerce. *Davis* v. *A. Booth & Co.*, 131 F., 31. 2—566

148. Same.—An agreement ancillary to such sale of a corporation's business, by which the stockholders, who received the purchase price, agreed that, in order to protect the good will of the business so sold, they would not either directly or indirectly engage in the same business within certain distinct limits for a perod of ten years, was not void, as an unreasonable restraint of competition in trade, at common law. *Ib.*

149. Contract for Entire Product.—A contract with an independent manufacturer of wooden ware for the entire product of his plant is not in itself a contract in illegal restraint of trade. *Carter-Crume Co.* v. *Perrung*, 68 F., 439. 1—845

150. Same.—If an independent manufacturer contracts to sell his entire product, without knowledge of similar contracts made by the buyer with other manufacturers, and without any knowledge of the fact that such contract was intended by the buyer as one step in a general scheme for monopolizing the trade in that article and controlling prices, such independent manufacturer can not be held to have conspired against the freedom of commerce, or to have made a contract in illegal restraint of trade. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

151. Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, **such agreement will be upheld** as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the **effect** of its formation and enforcement upon interstate trade or commerce is in any event but **indirect and incidental,** and not its purpose or object. *Anderson* v. *United States,* 171 U. S., 604. 1—967

See also COMBINATIONS, ETC., 9, 105, 174, 176, and STATUTES, 7, 8, 14, 44, 49.

2. Agreements not to engage in business.

152. Agreements Not to Engage in Business within a Radius of 50 Miles.—A **covenant in a contract** by which the owners of brickmaking plants conveyed them to a corporation in exchange for its stock, binding the sellers not to engage in competing business within a radius of 50 miles from the place of business of the corporation for a term of ten years, is valid, and may be enforced in a court of equity by a suit to enjoin its violation. *Robinson* v. *Suburban Brick Co.,* 127 F., 804. 2—312

153. Same.—Such a covenant is personal, and is not brought within the statutes of a State other than that in which the contract was made by the fact that the property sold was situated in such State. *Ib.*

154. A contract for sale of vessels, even if they are **engaged in interstate commerce, is not** necessarily **void because the vendors agree,** as is ordinary in case of sale of a business and its good will, **to withdraw from business** for a specified period. *Cincinnati, etc., Packet Co.* v. *Bay,* 200 U. S., 179. 2—868

155. Contract by which Stockholders of a Corporation Agree Not to Enter into Competition with a Purchaser of the Business of the Company.—A **covenant** by the stockholders of a corporation which sold its property, business, and good will, that, in consideration of such sale and as an inducement thereto, they would not directly or indirectly engage in the same or like kind of business as that carried on by the company in the same territory or in the immediate vicinity of such territory for ten years after the sale, **rests upon a good consideration and is lawful,** and the right of the purchaser to enforce it can not be affected by the question whether he has conducted the business lawfully since his purchase. *A. Booth & Co.* v. *Davis,* 127 F., 875. 2—318

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

156. Same—Suit to Enforce—Defenses.—In a suit to enjoin a defendant from violating a contract by which for a valuable consideration he covenanted not to engage in business for himself or another in competition with that of complainant for a term of years, and to enjoin a codefendant from employing his services in a competing business, it is no defense that his codefendant hired him in ignorance of the contract, and will suffer damage if deprived of his services. *Ib.*

157. An **agreement by which the stockholders of a corporation, on selling its assets** to complainant's assignor, **agreed not to again engage in a similar business in specified localities** for a period of ten years, or do any act tending to impair the good will of the business sold, was not contrary to public policy. *Davis* v. *A. Booth & Co.,* 131 F., 31. 2—566

158. Same—Construction.—Where such contract ancillary to the sale provided that the stockholders of the seller would not again engage in a similar business for a period of ten years in the territory, or the immediate vicinity of the territory, dealt in by the corporation, or operated in by it or its agents, or the immediate vicinity of such territory, the **localities guarded against** were **restricted to those in which the selling company had establishments for doing business, and the immediate vicinity thereof, and did not include all parts** or every one **of the United States** in which a former customer resided, or into which the corporation's correspondence had extended, or through which an agent of the company had traveled. *Ib.*

159. Assignment of Patent—Agreements to Remain out of Business.—A contract recited that plaintiff, who was the patentee of an invention relating to brake beams, for the consideration of $10,000 to be paid him, had assigned to defendant, which was a corporation engaged in the manufacture of brake beams, a certain patent and a pending application for a second and provided that plaintiff during the life of the patent should not become connected with any company manufacturing or selling brake beams in the United States either as officer, employee, or shareholder, but reserved to him the right to terminate such part of the contract at any time by refunding the consideration paid him by defendant. *Held,* That **such agreement** to remain out of the brake-beam business **did not render the contract unlawful** as one in restraint of trade and competition or creating a monopoly and that plaintiff could maintain an action thereon to recover the stipulated consideration. *American Brake Beam Co.* v. *Pungs,* 141 F., 923. 2—826

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

3. Manufacturer's right to regulate prices and restrict sale of his own products.

160. Contracts Made by Manufacturer with Wholesale Dealers to Sell Proprietary Medicines at a Certain Price Only.—A system of contracts made by the manufacturer of a proprietary medicine between him and wholesale dealers, to whom alone he sold his medicine, by which they were bound to sell only at a certain price and to retail dealers designated by him, and between him and the retail dealers by which, in consideration of being so designated, they agreed to sell to consumers only at a certain price, is not unlawful as in restraint of trade, but is a reasonable provision for the protection of the manufacturer's trade, and he is entitled to an injunction to restrain a defendant from inducing other parties to such contracts to violate the same. *Hartman* v. *John D. Parks & Sons Co.*, 145 F., 358. **2—1000**

See also *Dr. Miles Medical Co.* v. *Jaynes Drug Co.*, 149 F., 838.

161. Agreement for Rebate if Price is Maintained, where Purchaser was not Bound in any way.—An arrangement whereby a distillery company promised persons who purchased from its distributing agents that if for the ensuing six months they would purchase their distillery products exclusively from such agents and would not resell the same at prices less than those fixed by the company, then, on being furnished with a certificate of compliance therewith, it would pay a certain **rebate** on the amount of such purchases, did not constitute a contract in restraint of trade, within the meaning of section 1 of said act, since the purchaser was not in any way bound to the performance of the conditions named; nor did such arrangement operate to "monopolize," or "as an attempt to monopolize," trade and commerce, within the meaning of section 2 of said act. *In re Greene*, 52 F., 104. **1—56**

162. Same—No Offense even after Compliance with the Conditions.—Nor was there any offense under the statute, even after the purchaser complied with the conditions of the promise, and thereby became entitled to the rebate, for such **compliance** had **no retroactive effect** to create a valid contract between the parties prior thereto. *Ib.*

163. Same.—Even if the promise could be considered as a binding contract between the parties, the **restraint thereby imposed was only partial and reasonable** in the protection of defendant's business, and was not of the general character necessary to constitute an unlawful contract in restraint of trade. *Mogul S. S. Co.* v. *McGregor* [1892], App. Cas., pt. 1, p. 25, approved. *Ib.*

164. A manufacturer, a corporation, **and its employee restricted the sales of its products to those who refrained from dealing in the commodities of its competitors** by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but refused to refrain from handling the goods of the corporation's competitors, and sued it for damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again. *Held*, The restriction of their own trade by the defendants to those purchasers who declined to deal in the goods of their competitors was **not violative of the Anti-Trust Act.** *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. **2—271**

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

165. Sales.—The owner of goods may dictate the prices at which he will sell them, and the damages which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit **constitute no legal injury**, and are **not actionable**, because they are not the result of any breach of duty or of contract by the owner. *Ib.*

166. Contracts Restricting Territory within Which Purchasers may Sell.—A contract of sale by a manufacturer to jobbers of some of its product, **to be shipped across State lines** to the latter, whereby the parties agree that the purchasers shall **not sell, ship, or allow** any of the product thus purchased **to be shipped outside of a certain State**, is not in restraint of trade or illegal under the act of July 2, 1890. *Phillips* v. *Iola Portland Cement Co.*, 125 F., 593. **2—284**

4. Live-stock associations and commission merchants.

167. A combination of commission merchants at stock yards, by which they **refuse to do business with those who are not members of** their association, even if it is illegal, **is not subject to the act** of Congress of July 2, **1890**, to protect trade and commerce, since their **business is not interstate commerce.** *Hopkins* v. *U. S.*, 171 U. S., 578. **1—941**

Reversing 82 F., 529 (1—725).

168. Same.—In order to come within the provisions of the statute, **the direct effect of an agreement or combination must be in restraint of trade or commerce** among the several States or with foreign nations. *Ib.*

169. Same.—A by-law of the Kansas City Live-Stock Exchange, **which regulates the commissions to be charged** by members of that association for selling live stock **is not** in restraint of interstate commerce or **a violation of the act** of July 2, 1890, to protect commerce from unlawful restraints. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

170. Same.—A commission agent who sells cattle at their place of destination, which are **sent from another State** to be sold, **is not engaged in interstate commerce;** nor is his agreement with others in the same business, as to the commissions to be charged for such sales, void as a contract in restraint of that commerce. *Ib.*

171. Same.—The business of agents in soliciting consignments of cattle to commission merchants in another State for sale is not interstate commerce; and a by-law of a stock exchange **restricting the number of solicitors to three** does not restrain that commerce or violate the act of Congress. *Ib.*

172. Live-Stock Exchange—Agreement not to do Business with Other Yard Traders who are not Members of the Exchange.— An agreement among persons engaged in the common business, as yard trader, of buying at a city stock yard cattle which came from different States, that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, **or buy cattle from those who also sell to yard traders who are not members** of the association, is not in violation of the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies. *Anderson* v. *U. S.*, 171 U. S., 604. 1—967

173. Same.—A rule of a live-stock exchange that its members shall not recognize any yard trader who is not also a member of the exchange is not in restraint of, or an attempt to monopolize, trade, where the exchange does not itself do any business, and there is nothing to prevent all yard traders from being members of the exchange and no one is hindered from having access to the yards or having all their facilities, except that of selling to members of the exchange. *Ib.*

174. Same.—Rules to enforce the purpose and object of such exchange, if reasonable and fair, can not, except remotely, affect interstate trade and commerce, and are not void as violations of the act of July 2, 1890. *Ib.*

175. Same.—In order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States or with foreign nations. *Ib.*

176. Same.—Where the subject-matter of the agreement **does not directly relate to and act upon and embrace interstate commerce,** and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, **such agreement will be upheld** as not within the

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the **effect** of its formation and enforcement upon interstate trade or commerce **is** in any event but **indirect and incidental,** and not its purpose or object. *Ib.*

5. Stock exchanges—Contract for distribution of quotations.

177. A contract between a board of trade, having a property right in the quotations made on its exchange, **and a telegraph company relating to the transmission and distribution of** such **quotations** by the latter **is not in violation** of the Anti-Trust Act of 1890 (26 Stat., 209), as in restraint of trade and commerce, because of a provision that the quotations shall only be furnished to persons who sign an agreement to the effect that they shall not be used in the conduct of a bucket shop. *Board of Trade* v. *Christie Grain & Stock Co.*, 121 F., 608. 2—333

178. Contracts under which the Chicago Board of Trade furnishes telegraph companies with its quotations, which it could refrain from communicating at all, **on condition that they will only be distributed to persons in contractual relations with,** and approved by, **the board,** and not to what are known as bucket shops, **are not void** and against public policy as being in restraint of trade **either at common law or under the Anti-Trust Act** of July 2, 1890. *Board of Trade* v. *Christie Grain and Stock Co.*, 198 U. S., 236. 2—717

179. Same—Property Right in Quotations—Entitled to Protection.— In a suit brought by the Chicago Board of Trade to restrain parties from using the quotations obtained and used without authority of the board, defendants contended that as the board of trade permitted, and the quotations related to, transactions for the pretended buying of grain without any intention of actually receiving, delivering, or paying for the same, that the board violated the Illinois bucket-shop statute and there were no property rights in the quotations which the court could protect, and that the giving out of the quotations to certain persons makes them free to all. *Held,* That even if such pretended buying and selling is permitted by the board of trade it **is entitled to have its collection of quotations protected** by the law and to keep the work which it has done to itself, nor does it lose its property rights in the quotations by communicating them to certain persons, even though many, in confidential and contractual relations to itself, and strangers to the trust may be restrained from obtaining and using the quotations by including a breach of the trust. *Ib.*

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

180. Same—Entitled to Protection Though it Concerns Illegal Acts.—A collection of information, otherwise entitled to protection, does not cease to be so because it concerns illegal acts, and statistics of crime are property to the same extent as other statistics, even if collected by a criminal who furnishes some of the data. *Ib.*

6. Stockholding corporations—Minnesota.

181. Anti-Trust Law of Minnesota Should Receive Same Construction as Sherman Anti-Trust Law.—The anti-trust law of Minnesota (Laws 1899, p. 487, ch. 359), making unlawful any contract or combination in restraint of trade or commerce within the State, is in substantially the same language as the Anti-Trust Act of July 2, 1890 (26 Stat., 209), and must receive a similar construction. *Minnesota* v. *Northern Securities Co.*, 123 F., 692. **2**—246

Reversed, 194 U. S., 38. Circuit Court had no jurisdiction (**2**—533).

182. Same—Stockholding Corporation.—A holding corporation organized by individual stockholders of two railroad companies owning and operating substantially parallel and competing lines of railroad within the State of Minnesota, for the sole purpose of acquiring, by the exchange of its own stock therefor, stock of the two companies, and holding and voting the same, but having no power or franchise to operate a railroad, is **not in violation of the Minnesota anti-trust law** (Laws 1899, p. 487, ch. 359), which provides that "any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust or otherwise * * * which is in restraint of trade or commerce within this State * * * is hereby prohibited and declared to be unlawful," where the purpose of its promoters was thereby to acquire and retain in the same hands a majority of the stock of one or both companies, to insure uniformity of policy and stability of management, although it in fact acquired the controlling interest in both, **in the absence of any evidence that it ever exercised its power to prevent competition** between the two roads, or to interfere in any manner with the fixing of rates by either company. *Ib.*

7. Patents—Combinations, etc., to keep up the monopolies.

183. Holding Company.—Contracts by which a number of patents covering similar inventions **are conveyed by the several owners to one of the parties, which grants licenses** under all **to the others, are not void** as against public policy or as in

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

violation of the Sherman Anti-Trust Law, **because of provisions intended to protect and keep up the patent monopoly** by requiring the licensor to prosecute all infringers, limiting the licenses to be granted to such licensees as shall be agreed on, and imposing conditions on each licensee as to the use and ownership of the patented machines, and prohibiting him from using any others. *U. S. Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 F., 364. **2**—288

184. Conditions imposed by the patentee in a license of the right to manufacture or sell the patented article, **which keep up the monopoly** or fix prices, do not violate the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints or monopolies. *Bement* v. *National Harrow Co.*, 186 U. S., 70. **2**—170

185. Reasonable and legal conditions imposed by the patentee in a license of the right to manufacture and sell the patented article, **restricting the terms** upon which the article manufactured under such license may be used **and the price** to be demanded therefor, do not constitute such a restraint on commerce as is forbidden by the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints and monopolies. *Ib.*

186. The **agreement** of the licensee of a patent for improvements relating to float spring-tooth harrows **not to manufacture or sell any other such harrows** than those which it had made under its patents before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by such licensor, **is not void** as an unlawful restraint on trade or commerce forbidden by the act of Congress of July 2, 1890 (26 Stat., 209), since the plain purpose of this provision is to prevent the licensee from infringing on the rights of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows. *Ib.*

187. An agreement by the licensor of a patent for improvements relating to harrows **not to license any other person** than the licensee to manufacture or sell any harrow of the peculiar style and construction then used or sold by such licensee does not violate the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints and monopolies. *Ib.*

188. The very **object of these laws is monopoly,** and the rule is, with few exceptions, that **any conditions which are not in their very nature illegal** with regard to this kind of property, imposed by the patentee and agreed to by the licensee for

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

the right to manufacture or use or sell the article, **will be upheld by the courts.** The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal. *Bement* v. *National Harrow Co.*, 186 U. S., 70, 91. **2—189**

See also COMBINATIONS, ETC., 92–99.

8. Railroads—Rates—Contracts, etc., favoring particular roads or individuals.

189. Combinations to Maintain Railroad Rates, but not Preventing or Illegally Limiting Competition, not a Violation of Section 1 of Statute.—An agreement between several competing railway companies and the formation of an association thereunder for the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the several lines, without preventing or illegally limiting competition, is not an agreement, combination, or conspiracy in restraint of trade in violation of the act of July 2, 1890, section 1. *U. S.* v. *Trans-Missouri Freight Assn.*, 53 F., 410. **1—80**

Reversed, 166 U. S., 290 (1—648).

190. Same—Not a Violation of Section 2 as Tending to a Monopolization, etc.—Nor is such an agreement in violation of section 2 of such act tending to the monopolization of trade and commerce. *Ib.*

191. Same—Separate Organizations, etc.—Where each company, by such agreement, maintains its own organization as before, elects its own officers, **delegates no powers to the association to govern** in any respect the operations or methods of transacting the routine business of the several competing lines, **but simply** requires that each company shall charge just and reasonable rates, and **provides for certain regulations in regard to changes in such rates,** such contract or agreement is not forbidden by public policy as amounting to a transfer of the franchises and corporate powers of such companies. *Ib.*

192. Same.—A contract between railroad companies forming a freight association that they will establish and maintain such rates, rules, and regulations on freight traffic between competitive points as a committee of their choosing shall recommend as reasonable; that these rates, rules, and regulations shall be public; that there shall be monthly meetings of the association, composed of one representative from each railroad company; that each company shall give five days' notice before some monthly meeting of every reduction of

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

rates or deviation from the rules it proposes to make; that it will advise with the representatives of the other members at the meeting relative to the proposed modification, will submit the question of its proposed action to a vote at that meeting, and, if the proposition is voted down, that it will then give ten days' notice that it will make the modification notwithstanding the vote before it puts the proposed change into effect; that no member will falsely bill any freight, or bill any at a wrong classification; and that any member may withdraw from the association on a notice of thirty days, appears to be a **contract tending to make competition fair and open,** and **to induce steadiness of rates,** and is in accord with the policy of the Interstate Commerce Act. Such agreement can not be adjudged to be a contract or conspiracy in restraint of trade under the Anti-Trust Act **when it is admitted that the rates** maintained under the same **have been reasonable and** that the **tendency has been to diminish** rather than to enhance **rates,** and there is no other evidence of its consequences or effect. Shiras, district judge, dissenting. 53 Fed. Rep., 440, affirmed. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. **1—186**

Reversed, 166 U. S., 290 (1—648).

193. Same.—No monopoly of trade or attempt to monopolize trade within the meaning of the Anti-Trust Act is proved by such a contract. *Ib.*

194. Same.—The railroad companies who are parties to such a contract do not thereby substantially disable themselves from the discharge of their public duties. *Ib.*

195. A contract by which a railroad company arranges with another, to the exclusion of still others, for the **interchange of passengers and freight by through tickets and bills of lading** is not a contract in unlawful restraint of trade, within the meaning of the act of July 2, 1890. *Prescott & A. C. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 73 F., 438. **1—604**

196. Contract Between Railroad Company and Individual Giving to Latter Exclusive Control of Shipment of Milk Over its Lines, Including the Fixing of Rates.—Defendant railroad company entered into a contract with plaintiff for a term of years to build up, develop, and conduct the business of the transportation of milk on its lines of road. Plaintiff was to have full charge of such business and was to receive as compensation a percentage of the freights earned therein. It was **provided that he should charge rates not in excess of those charged by competitive roads,** and should be granted the exclusive privilege of transporting milk over defendant's lines "so far as it was permitted to do so by law." In the execution of the contract all rates were made by defendant, and

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

plaintiff was not given a monopoly of the milk traffic. *Held*, That such contract was not ultra vires nor void as contrary to public policy, especially as practically construed by the parties in its execution; **nor was it in violation of the Anti-Trust Act of July 2, 1890** (26 Stat., 209). *Delaware, L. & W. R. Co.* v. *Kutter*, 147 F., 51. 2—1022

197. Contracts or combinations between railroad companies which do not directly and necessarily affect transportation or rates therefor are not in restraint of trade or commerce, nor within the Minnesota anti-trust law of 1899, which is in substantially the same language as the Sherman Anti-Trust Law of 1890, even though they may remotely and indirectly appear to have some probable effect in that direction. *Minnesota* v. *Northern Securities Co.*, 123 F., 692. 2—246

198. Joint Traffic Associations—Proportionate Rates and Division of Traffic.—A combination of railroad companies into joint traffic associations, under articles of agreement by which each road carries the freight it may get over its own line, at its own rates, and has the earnings to itself, though providing proportional rates or proportional division of traffic, is not a pooling of traffic on freights or division of net proceeds of earnings, within the prohibitions of the Interstate Commerce Law, nor of the act of 1890 (26 Stat., 209), against unlawful restraints and monopolies. *U. S.* v. *Joint Traffic Assn.*, 76 F., 895. 1—615

Reversed, 171 U. S., 505 (1—869).

199. Through Transportation—Prepayment of Freight.—A common carrier engaged in interstate commerce may at common law and under the Interstate Commerce Law demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. 1—823

200. Same—Joint Rates and Billing.—Such carrier may enter into a contract with one connecting carrier for through transportation, through joint traffic, through billing, and for the division of through rates, without being obligated to enter into a similar contract with another connecting carrier. *Ib.*

201. Same—Remedy not by Injunction, but by Suit for Damages.—The remedy of a party injured by such an agreement is not by bill of injunction, but by a suit for threefold damages under the act of 1890, the only party entitled to maintain a bill of injunction under that act being the Government of the United States. *Ib.*

See also CARRIERS.

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

9. Combinations, etc., operating within a State.

202. A combination or trust between the owners of tugs operating entirely within the confines of a State is not a combination in restraint of trade or commerce among the several States or with foreign nations, so as to come within the condemnation of the statutes of the United States, although most of the owners held coasting licenses. *The Charles E. Wiswall*, 86 F., 671. 1—850

203. A contract for the purchase of certain river craft to run between certain points in the same State, where the vessels necessarily pass over the soil of adjoining States, **which provides for the maintenance of existing traffic rates,** and the vendors agree to withdraw from competition for five years, is not a contract in restraint of interstate trade under the Anti-Trust Act of July 2, 1890 (26 Stat., 209), and the purchaser is not relieved from his obligation to pay the purchase price. *Cincinnati, etc., Packet Co.* v. *Bay*, 200 U. S., 179. 2—867

204. Same.—A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it. *Ib.*

205. Same.—Even if there is some interference with interstate commerce, a contract is **not necessarily void** under the Sherman Act if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law. *See U. S.* v. *Trans-Mo. Ft. Assn.*, 166, U. S., 290, 329; *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505, 568; and *Bement* v. *National Harrow Co.*, 186 U. S., 70, 92. *Ib.*

206. Same.—A contract for sale of vessels, even if they are engaged in interstate commerce, is **not necessarily void because the vendors agree,** as is ordinary in case of sale of a business and its good will, **to withdraw from business for a specified period.** *Ib.*

207. The Anti-Trust Act of July 2, 1890 (26 Stat., 209), **does not apply to a contract or combination relating to the business** of manufacturing **within a State.** *Robinson* v. *Suburban Brick Co.*, 127 F., 804. 2—312

208. Agreements not to Engage in Business—Contracts in Partial Restraint of Trade.—A covenant in a contract by which the owners of brickmaking plants conveyed them to a corporation in exchange for its stock, binding the sellers not to engage in competing business **within a radius of 50 miles** from the place of business of the corporation for a term of ten years, is valid, and may be enforced in a court of equity by a suit to enjoin its violation. *Ib.*

209. A combination to restrain competition in proposals for contracts for the sale of certain articles which are to **be de-**

COMBINATIONS, CONSPIRACIES, CONTRACTS, ETC.—Cont'd.

III. NOT PROHIBITED—Continued.

livered in the State in which some of the parties to the combination **reside** and carry on business is not, so far as those members are concerned, in violation of the Anti-Trust Law of Congress, **although the contract** may be **awarded to some party outside the State** as the lowest bidder. *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S., 211. 1—1009

210. Same—Jurisdiction of Congress.—Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce; **nor does it acquire any jurisdiction** over that part of a combination or agreement which relates to commerce wholly within a State **by reason of the fact that the combination also covers and regulates commerce which is interstate.** *Ib.*

211. An association of manufacturers of shingles within a particular State, formed for the purpose of securing concerted action between its members to prevent overproduction and establish uniform prices and grading, is not an illegal combination in restraint of interstate or foreign commerce, within the meaning of the Anti-Trust Law of 1890, or subject to Federal control; and **the fact that** through the action of the association **the mills** of its members **were closed** for a certain time, **and the price of shingles was raised,** but not to an extent alleged to be unreasonable or exorbitant, **does not give a dealer in shingles for export a right of action** against it or its members under such law. *Gibbs* v. *McNeeley*, 102 F., 594. 2—25

212. A combination controlling not only the manufacture of an article in the State, but also the sale of the manufactured article, **is not one in restraint of interstate commerce,** so as to give a right of action against it, under the Anti-Trust Law of July 2, 1890, to one injured by a resolution passed and circulated by it denouncing him for cutting prices, its sales being within the State, and any transportation and sale of the article in other States being by other agencies. *Gibbs* v. *McNeeley*, 107 F., 210. 2—71

Reversed by Circuit Court of Appeals, 118 F., 120 (2—194).

10. Labor combinations.

213. Combination Between Local Labor Union and Labor Organization Covering Many States—Boycott on Goods Sent to Other States.—The action of the members of a labor union in attempting to compel a hat manufacturer to unionize his factory by leaving his employment and preventing others from taking employment therein, and also, with the assistance of the members of affiliated organizations, by declaring a boycott upon his goods in other States into which such goods have been shipped for sale at retail, does not have such relation to interstate commerce as to constitute a combination or conspiracy in restraint of such commerce in violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Loewe* v. *Lawlor*, 148 F., 924. (Decision not in print when body of this book went to press.)

See also COMBINATIONS, ETC., 112–133.

11. Municipal contracts—State monopolies.

214. Contract Limiting Character of Material to be Used to that Controlled by a Single Corporation.—Where the contract for the paving of a street with asphalt limited the kind of asphalt to be used to **Trinidad asphalt,** such fact, and the further fact that such asphalt was controlled by a single corporation was not violative of the commerce clause of the Constitution or of the Federal anti-trust statutes, and did not affect the validity of the contract. *Field* v. *Barber Asphalt Pav. Co.*, 117 F., 925. 2—193

215. Same.—**The specification in an ordinance** by a municipal council **that Trinidad Lake asphalt shall be used for street improvement,** does not violate the commerce clause of the Federal Constitution or the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209), notwithstanding this particular kind of asphalt is the product of a foreign country and competitive bidding was thereby rendered impossible. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. 2—555

216. Same.—**The necessity for an improvement of streets is a matter of which the proper municipal authorities are the exclusive judges** and their judgment is not to be interfered with except in cases of fraud or gross abuse of power. *Ib.*

217. State Monopoly of Liquor Traffic.—The act of July 2, 1890 (26 Stat., 209) is not applicable to the case of a State which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors (act S. C., Jan. 2, 1895). A State is neither a "person" nor a "corporation," within the meaning of the act of Congress. *Lowenstein* v. *Evans*, 69 F., 908. 1—598

COMMERCE. *See* INTERSTATE COMMERCE.

COMMON CARRIERS. *See* CARRIERS.

COMMON LAW.

1. Common-Law Offenses—Definitions.—There are no common-law offenses against the United States, and the offenses cognizable in the Federal courts are only such as the Federal statutes define, provide a punishment for, and confer jurisdiction to try; but when Congress adopts or creates a common-law offense the courts may properly look to the common law for the true meaning and definition thereof, in the absence of a clear definition in the act creating it. *In re Greene*, 52 F., 104. 1—55

COMMON LAW—Continued.

2. **Common-Law Offense Adopted by Congress—Presumption—Interpretation.**—Where Congress adopts or creates a common-law offense, and in doing so uses terms which have acquired a well-understood meaning by judicial interpretation, the presumption is that the terms were used in that sense, and courts may properly look to prior decisions interpreting them for the meaning of the terms and the definition of the offense where there is no other difinition in the act. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186
Case reversed, 166 U. S., 290 (1—648).
3. **Common-Law Rule.**—The ground on which certain classes of contracts and combinations in restraint of trade were held illegal at common law was that they were against public policy. *Ib.*
4. **Public Policy—How Determined.**—The public policy of the nation must be determined from its Constitution, laws, and judicial decisions. *Ib.*
5. **Railroad Companies—Arrangements for Through Billing.**—There is no principle of common law which forbids a single railroad corporation, or two or more of such corporations, from selecting, from two or more other corporations, one which they will employ as the agency by which they will send freight beyond their own lines, on through bills of lading, or as their agent to receive freight, and transmit it on through bills to their own lines, and without breaking bulk; and the right to make such selection is not taken away by the Interstate Commerce Law. *New York & N. Ry. Co.* v. *New York & N. E. R. Co.*, 50 F., 867, explained. *Prescott & A. C. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 73 F., 438. 1—604
6. **Prepayment of Freight.**—A common carrier engaged in interstate commerce may at common law, and under the Interstate Commerce Law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. 1—823
7. **Same.**—The rules of the common law do not require a carrier to receive goods for carriage, either from a consignor or a connecting carrier, without prepayment of its charges if demanded, nor to advance the charges of a connecting carrier from which it receives goods in the course of transportation; nor can it be required to extend such credit or make such advances to one connecting carrier because it does so to another. *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. 1—862

COMMON LAW—Continued.

8. **Contracts in Restraint of Trade—At Common Law.**—Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or as giving rise to an action for damages to one prejudicially affected thereby, but were simply void, and not enforceable. *U. S.* v. *Addyston Pipe and Steel Co.*, 85 F., 271. 1—772
9. **Same.**—No contractual restraint of trade is enforceable at common law unless the covenant embodying it is merely ancillary to some lawful contract (involving some such relations as vendor and vendee, partnership, employer and employee), and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard for determining the reasonableness and validity of the restraints. But where the sole object of both parties in making the contract is merely to restrain competition, and enhance and maintain prices, the contract is void. *Ib.*
See also CONTINENTAL WALL PAPER CO. *v.* LEWIS VOIGHT & SONS CO., 148 F., 939.
10. The illegality, at common law, of a combination formed by corporations and persons in restraint of trade, does not preclude it from recovering the purchase price of goods sold in the course of business. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540. 2—118
11. **Note to Trust—Avoidance.**—A note made for a balance due on goods bought from a corporation can not be avoided merely because the latter is a trust organized to create and carry out restrictions in trade contrary to the common law. *Union Sewer Pipe Co.*, 99 F., 354. 2—1
Affirmed, 184 U. S., 540 (2—118).

COMPETITION. *See* STATUTES, 22, 23, 31.

CONGRESS.

1. **Debates in Congress** are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648
2. **Power to Prohibit Combinations to Establish and Maintain Railroad Rates.**—Congress has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad companies to establish and maintain interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the

CONGRESS—Continued.

contract or combination, **even though the rates and fares thus established are reasonable.** *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505. **1—869**

3. Same—Combinations by Means of Which Competition is Prevented.—Congress has the power to forbid any agreement or combination among or between competing railroad companies for interstate commerce, by means of which competition was prevented. *Ib.*

4. The **Anti-Trust Law is a legitimate exercise of the power of Congress** over interstate commerce, and a valid regulation thereof. *Ib.*

5. Power to Legislate Upon the Subject of Private Contracts in Respect to Interstate Commerce.—The power of Congress to regulate interstate or foreign commerce includes the power to legislate upon the subject of private contracts in respect to such commerce. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211. **1—1009**

6. Same.—Congress may enact such legislation as shall **declare void and prohibit the performance of any contract** between individuals or corporations **where the natural and direct effect of such a contract shall be,** when carried out, **to** directly and not as a mere incident to other and innocent purposes, **regulate to any substantial extent interstate or foreign commerce.** *Ib.*

7. Same.—The power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate, to a greater or less degree, commerce among the States. *Ib.*

8. Same—No Jurisdiction Over Commerce Wholly Within a State.—Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce; nor does it acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. *Ib.*

9. Congress did not exceed its power under the commerce clause of the Federal Constitution **in enacting the Anti-Trust Act of July 2, 1890** (26 Stat., 209), declaring illegal every combination or conspiracy in restraint of interstate commerce, and forbidding attempts to monopolize such commerce or any part of it, **although such statute is construed to embrace a combination of stockholders of two competing interstate**

CONGRESS—Continued.

railway companies to form a stock-holding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (48 L. ed., 279). **2—342**

10. Had Power to Enact Anti-Trust Law.—Under its powers to regulate commerce among the several States and with foreign nations Congress had authority to enact the Anti-Trust Act of July 2, 1890. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (Harlan, Brown, McKenna, Day). **2—340**

See United States v. *E. C. Knight Co.*, 156 U. S., 1; *United States* v. *Trans-Missouri Freight Association*, 166 U. S., 290; *United States* v. *Joint Traffic Association*, 171 U. S., 505; *Hopkins* v. *United States*, 171 U. S., 578; *Anderson* v. *United States*, 171 U. S., 604; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211; *Montague & Co.* v. *Lowry*, 193 U. S., 38.

11. The constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce. *Ib.*

12. Congress may protect the freedom of interstate commerce by any means that are **appropriate** and that are lawful and not prohibited by the Constitution. *Ib.*

13. If in the judgment of Congress the public convenience or the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, that **must be, for all, the end of the matter,** if this is to remain a government of laws, and not of men. *Ib.*

14. When **Congress** declared contracts, combinations, and conspiracies in restraint of trade or commerce to be illegal, it **did nothing more than apply to interstate commerce a rule that had been long applied by the several States** when dealing with combinations that were in restraint of their domestic commerce. *Ib.*

15. The power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce, subject, of course, to such restrictions as are imposed by the Constitution upon the exercise of all power. *Ib.*

16. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, so as to **prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce,** or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce; nor can any State give a cor-

CONGRESS—Continued.

poration created under its laws authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. *Ib.*

17. Whilst every instrumentality of domestic commerce is subject to State control, **every instrumentality of interstate commerce may be reached and controlled by national authority,** so far as to compel it to respect the rules for such commerce lawfully established by Congress. *Ib.*

18. **Congress has the power to establish rules by which interstate and international commerce shall be governed,** and by the Anti-Trust Act has prescribed the rule of free competition among those engaged in such commerce. *Ib.*

19. **Congress may Prohibit Private Contracts which Restrain Interstate Commerce.**—Congress may, in the exercise of the power conferred by the commerce clause of the Constitution, prohibit private contracts which operate to directly and substantially restrain interstate commerce. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—216

20. It is the **declared policy of Congress,** which accords with the principles of the common law, **to promote individual competition in relation to interstate commerce,** and to prevent combinations which restrain such competition between their members; and it is **no defense** to an action to dissolve such a combination as illegal under the Anti-Trust Law **that it has not in fact been productive of injury to the public,** or even that it has been beneficial, by enabling the combination to compete for business in a wider field. *U. S.* v. *Chesapeake & O. Fuel Co.*, 105 F., 93. 2—34

Affirmed, 115 F., 610 (2—151).

21. **Authority over State Corporation.**—Congress **has no authority,** under the commerce clause or any other provision of the Constitution, **to limit the right of a corporation created by a State in the acquisition, control, and disposition of property in the several States,** and it is **immaterial that such property, or the products thereof, may become the subjects of interstate commerce;** and it is apparent that by the act of July 2, 1890, in relation to monopolies, Congress did not intend to declare that the acquisition by a State corporation of so large a part of any species of property as to enable the owners to control the traffic therein among the several States constituted a criminal offense. *In re Greene*, 52 F., 104. 1—55

22. While Congress may not have general visitatorial power over **State corporations,** its powers **in vindication of its own laws** are the same as if the corporation had been created by an act of Congress. *Hale* v. *Henkel*, 201 U. S., 43. 2—847

CONGRESS—Continued.

23. **Franchises of a corporation chartered by a State are,** so far as they involve questions of interstate commerce, exercised **in subordination to the power of Congress to regulate such commerce.** *Ib.*

See also INJUNCTIONS, 16.

CONSENT OF PARTIES. *See* COURTS, 14.

CONSPIRACY.

1. **A conspiracy consists** in an agreement to do something; but in the sense of the law, and therefore in the sense of the act of 1890, it must be an agreement between two or more to do, by concerted action, something criminal or unlawful, or, it may be, to do something lawful by criminal or unlawful means. A conspiracy, therefore, is in itself unlawful, and, in so far as this statute is directed against conspiracies in restraint of trade among the several States, it is not necessary to look for the illegality of the offense in the kind of restraint proposed. Any proposed restraint of trade, though it be in itself innocent, if it is to be accomplished by conspiracy, is unlawful. *U. S.* v. *Debs*, 64 F., 724, 748. 1—352

See also *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 823, 831.

2. **Conspiracy to Commit Offenses Against the United States—Revised Statutes, Section 5440.**—The statute relating to conspiracies to commit offenses against the United States (Rev. Stat., sec. 5440) contains three elements, which are necessary to constitute the offense. These are: (1) The act of two or more persons conspiring together; (2) to commit any offense against the United States; (3) the overt act, or the element of one or more of such parties doing any act to effect the object of the conspiracy. *U. S.* v. *Cassidy*, 67 F., 698. 1—449

3. **Same—Conspiracy Defined.**—A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. *Pettibone* v. *U. S.*, 148 U. S., 203, cited. *Ib.*

4. **Same—Manner of Conspiring.**—The common design is the essence of the charge; but it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or the means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. *Ib.*

CONSPIRACY—Continued.

5. **Same—Parties to Conspiracy.**—Where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part any one was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. *Ib.*

6. **Same.**—Anyone who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally conconspired. *U. S.* v. *Babcock*, Fed. Cas. No. 14487, 3 Dill., cited. *Ib.*

7. **Same—Evidence—Acts of One Party.**—Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the conspiracy. *Ib.*

8. **Same—Declarations by Parties.**—Any declaration made by one of the parties during the pendency of the illegal enterprise, is not only evidence against himself, but against all the other conspirators, who, when the combination is proved, are as much responsible for such declarations, and the acts to which they relate, as if made and committed by themselves. This rule applies to the declaration of a co-conspirator, although he may not himself be under prosecution. *Ib.*

9. **Same—Conspiracy as Distinct Offense.**—The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy to commit crime requires an additional restraint to those provided for the commission of the crime itself. It therefore makes criminal the conspiracy itself, with penalties and punishments distinct from those it attaches to the crime which may be the object of the conspiracy. *Ib.*

10. **Same—Means Contemplated—Allegations and Proofs.**—It is not incumbent upon the prosecution to prove that all the means set out in the indictment were in fact agreed upon to carry out the conspiracy, or that any of them were actually used or put in operation. It is sufficient if it be shown that one or more of the means described in the indictment were to be used to execute that purpose. *Ib.*

11. **Same—Overt Acts.**—While at common law it was not necessary to aver or prove an overt act in furtherance of a conspiracy, yet, under the statute relating to conspiracies to commit an offense against the United States, the doing of some act in

CONSPIRACY—Continued.

pursuance of the conspiracy is made an ingredient of the crime, and must be established as a necessary element thereof, although the act may not be in itself criminal. *U. S.* v. *Thompson*, 31 F., 331, 12 Sawy., 155, cited. *Ib.*

12. **Same.**—It is **not necessary,** however, to a verdict of guilty, **that the jury should find that each and every one of the overt acts** charged in the indictment **was in fact committed;** but it is sufficient to show that one or more of these acts was committed, and that it was done in furtherance of the conspiracy. *Ib.*

13. **A combination** of labor organizations **whose professed object is to arrest the operation of the railroads** whose lines extend from a great city into adjoining States **until such roads accede to certain demands** made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, **is an unlawful conspiracy** in restraint of trade and commerce among the States, within the act of July 2, 1890, and acts threatened in pursuance thereof **may be restrained by injunction,** under section 4 of the act. *U. S.* v. *Elliott*, 62 F., 801. 1—262

14. **A combination to incite the employees of all the railways in the country to suddenly quit their service,** without any dissatisfaction with the terms of their employment, thus paralyzing utterly all railway traffic, **in order to starve the railroad companies and the public into compelling an owner of cars** used in operating the roads **to pay** his employees **more wages,** they having no lawful right so to compel him, **is an unlawful conspiracy** by reason of its purpose, whether such purpose is effected by means usually lawful or otherwise. *Thomas* v. *Cin., N. O. & T. P. Ry. Co.*, 62 F., 803. 1—266

15. **Same.—Such combination,** its purpose being to paralyze the interstate commerce of the country, **is an unlawful conspiracy, within the act of July 2, 1890,** declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several States. *U. S.* v. *Patterson*, 55 F., 605, disapproved. *Ib.*

16. **Same—Obstructing Mails.**—Such combination, where the members intend to stop all mail trains as well as other trains, and do delay many, in violation of Revised Statutes, section 3995, punishing anyone willfully and knowingly obstructing or retarding the passage of the mails, **is an unlawful conspiracy, although the obstruction is effected by merely quitting employment.** *Ib.*

17. **Any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains** engaged in interstate commerce **is in violation of act of July 2, 1890,** declaring illegal every contract,

CONSPIRACY—Continued.

combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the States. *In re Grand Jury*, 62 F., 840. 1—301

18. **A combination of persons**, without regard to their occupation, **which will have the effect to defeat the provisions of the interstate commerce law**, inhibiting discriminations in the transportation of freight and passengers, **and further to restrain the trade or commerce of the country, will be obnoxious to the penalties prescribed in section 5440, Revised Statutes, relating to conspiracy.** *Waterhouse* v. *Comer*, 55 F., 149. 1—120

19. The term "conspiracy," in section 1 of the act of July 2, 1890 (26 Stat., 209), is used in its well-settled legal meaning, and **any restraint of trade or commerce, if to be accomplished by conspiracy, is unlawful.** *U. S.* v. *Debs*, 64 F., 724. 1—322

20. **Conspiracy to Injure in Business.**—The action of an association of manufacturers in adopting a resolution denouncing a dealer in the product they manufactured, who bought and shipped such product to customers in other States and foreign countries, and in printing such resolution in circulars, and mailing the same to other manufacturers and customers of the dealer, whereby his business was injured, constituted an illegal combination or conspiracy in restraint of interstate and foreign commerce, and gives the person injured a right of action in a circuit court of the United States, under the Anti-Trust Law of 1890, to recover the damages sustained. *Gibbs* v. *McNeeley*, 102 F., 594. 2—25

See also STATUTES, 40.

CONSTITUTION.

1. **Constitutional Guaranty of Right of Assembly and Free Speech.**—Inciting the employees of a receiver, who is operating a railroad under the order of a court, to leave his employ, in order to carry out an unlawful conspiracy, is not protected by constitutional guaranties of the right of assembly and free speech, and is not less a contempt because effected by words only, if the obstruction to the operation of the road by the receiver is unlawful and malicious. *Thomas* v. *Cin., N. O. & T. P. Ry. Co.*, 62 F., 803. 1—266

2. **The constitutional freedom of contract** as to the use and management of property **does not include the right of railroad companies to combine** as one consolidated and powerful association **for the purpose of stifling competition** among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition, even if their rates and charges are reasonable. *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505. 1—869

CONSTITUTION—Continued.

3. **Legislation which renders unlawful contracts, the direct effect of which is to shut out from interstate commerce the operation of the general law of competition, is not an interference** with the general liberty of contract possessed by the citizen under the fifth amendment to the Constitution. *Ib.*

4. **The constitutional guaranty** of liberty of the individual to enter into private contracts **does not limit the power of Congress** so as **to prevent it from legislating upon the subject of contracts in restraint of interstate or foreign commerce.** *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S., 211. 1—1009

5. **The provision** in the Constitution regarding the liberty of the citizen **is to some extent limited by the commerce clause**; and the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate, to a greater or less degree, commerce among the States. *Ib.*

6. **Constitutional Right of Private Contract Limited by Interstate Commerce Clause.**—The constitutional guaranty of liberty to the individual to enter into private contracts is limited to some extent by the commerce clause of the Constitution, and Congress may, in the exercise of the power conferred by such clause, prohibit private contracts which operate to directly and substantially restrain interstate commerce. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

7. **The constitutional guaranty** of liberty of contract **does not prevent Congress from prescribing the rule of free competition** for those engaged in interstate and international commerce. *Northern Securities Co.* v. *United States*, 193 U. S., 197. (Harlan, Brown, McKenna, Day.) 2—340

8. **Same.**—The constitutional guaranty of liberty of contract is **not infringed by a Federal court decree enjoining the Northern Securities Co.**, a corporation formed in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, **from exercising the powers acquired** by such corporation **by virtue of its acquisition of** such **stock.** (*48 L. ed., 679.*) 2—342

9. **Only such acts as directly interfere** with the freedom of interstate commerce **are prohibited to the States** by the Constitution. *Field* v. *Barber Asphalt Co.*, 194 U. S., 618. 2—555

10. **Article IV—Has Nothing to do with the Conduct of Individuals or Corporations.**—Article IV of the Constitution of the United States only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the **faith and credit to be given** by the court to **the public acts, records, and judicial proceed-**

CONSTITUTION—Continued.

ings of a State other than that in which the court is sitting. It has nothing to do with the conduct of individuals or corporations. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2**—533

11. Fourth Amendment. *See* IMMUNITY, 14, 15; WITNESSES, 8, 20; SEARCH, 2–4; CORPORATIONS, 14, 25; and COURTS, 22.

12. Fifth Amendment. *See* IMMUNITY, 1, 3, 7, 9, 16; and WITNESSES, 1, 2, 4, 11–13, 15, 16, 20, 23.

13. Fourteenth Amendment.—It is **not the purpose** of the fourteenth amendment **to prevent the States from classifying the subjects of legislation** and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. **2**—555

14. Same.—A State statute which provides that certain improvements are not to be made if a majority of resident owners of property liable to taxation protest, is not unconstitutional because it gives the privilege of protesting to them and not to nonresident owners. *Ib.*

15. Same.—Discrimination in favor of agricultural products. *See Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540. **2**—119

CONTEMPT.

1. Interference with Receiver—Impeding Operation of Railroad.—Any willful attempt, with knowledge that a railroad is in the hands of the court, to prevent or impede the receiver thereof appointed by the court from complying with the order of the court in running the road, which is unlawful, and which, as between private individuals, would give a right of action for damages, is a contempt of the order of the court. *Thomas* v. *Cin., N. O. & T. P. R. Co.*, 62 F., 803. **1**—266

2. Same—Instigating Strike—Unlawful Combination.—Maliciously inciting employees of a receiver, who is operating a railroad under order of the court, to leave his employ, in pursuance of an unlawful combination to prevent the operation of the road, thereby inflicting injuries on its business, for which damages would be recoverable if it were operated by a private corporation, is a contempt of the court. *Ib.*

3. Same—Constitutional Guaranty of Right of Assembly and Free Speech.—Such inciting to carry out an unlawful conspiracy is not protected by constitutional guaranties of the right of assembly and free speech, and is not less a contempt because effected by words only, if the obstruction to the operation of the road by the receiver is unlawful and malicious. *Ib.*

4. Contempt—Proceeding in Equity—Conclusiveness of Answer.—In proceedings for contempt in equity, a sworn answer, however full and unequivocal, is not conclusive, even in the case

CONTEMPT—Continued.

of a stranger to the bill for the injunction which has been violated. *U. S.* v. *Debs*, 64 F., 724. **1**—322

5. Same—Justification—Irregularities.—Where a court had jurisdiction of an injunction suit, and did not exceed its powers therein, no irregularity or error in the procedure or in the order can justify disobedience of the writ. *Ib.*

6. Same.—In a proceeding for contempt in disobeying an injunction, the sufficiency of the petition for the injunction, in respect to matters of form and averment merely can not be questioned. *Ib.*

7. Contempt—Trial by Court.—Though the same act constitute a contempt and a crime, the contempt may be tried and punished by the court. *Ib.*

8. Contempt—Violation of Injunction—Conspiracy.—Where defendants, directors, and general officers of the American Railway Union, in combination with members of the union, engaged in a conspiracy to boycott Pullman cars, in use on railroads, and for that purpose entered into a conspiracy to restrain and hinder interstate commerce in general, and, in furtherance of their design, those actively engaged in the strike used threats, violence, and other unlawful means of interference with the operations of the roads, and, instead of respecting an injunction commanding them to desist, persisted in their purpose, without essential change of conduct, they were guilty of contempt. *Ib.*

9. Same—Interference with Receiver.—Any improper interference with the management of a railroad in the hands of receivers is a contempt of the court's authority in making the order appointing the receivers, and enjoining interference with their control. *Ib.*

10. The **order of the Circuit Court finding the petitioners guilty of contempt,** and sentencing them to imprisonment, was **not a final judgment** or decree. *Ir re Debs*, 158 U. S., 564. **1**—565

11. Violation of Injunction—Contempt.—An injunction having been issued and served upon the defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been disobeyed, to proceed under Revised Statutes, section 725, and to enter the order of punishment complained of. *Ib.*

12. Same—Habeas Corpus.—The Circuit Court having full jurisdiction in the premises, its findings as to the act of disobedience are not open to review on *habeas corpus* in this or any other court. *Ib.*

13. Witness—Incriminating Evidence.—Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on *habeas corpus*

CONTEMPT—Continued.

because some of the questions might be safely answered. *Foot* v. *Buchanan*, 113 F., 156. 2—104

14. **Although the subpœna duces tecum may be too broad** in its requisition, where the witness has refused to answer any question, or to produce any books or papers, this **objection would not go to the validity of the order committing him for contempt.** *Hale* v. *Henkel*, 201 U. S., 43. 2—874

CONTRACTS.

1. **Contract for Entire Product.**—A contract with an independent manufacturer for the entire product of his plant **is not in itself** a contract **in illegal restraint of trade.** *Carter-Crume Co.* v. *Perrung*, 68 F., 439. 1—845

2. **Same.**—If an independent **manufacturer** contracts to sell his entire product, **without knowledge of similar contracts** made by the buyer with other manufacturers, and without any knowledge of the fact that such contract was intended by the buyer as one step in a general scheme for monopolizing the trade in that article and controlling prices, such independent mannufacturer **can not be held to have conspired** against the freedom of commerce, or to have made a contract in illegal restraint of trade. *Ib.*

3. **Purchase of Business—Combination in Restraint of Trade.—A contract** by which a person sells his property and business good will to another **can not be repudiated** on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of interstate trade and commerce. *Camors-McConnell Co.* v. *McConnell*, 140 F., 412. 2—817

4. **Same.—In order to defeat a suit to enforce such a contract** on the ground that its enforcement is sought to aid and facilitate the carrying out of an illegal combination to monopolize interstate trade and commerce, **it must appear that the contract is directly connected with such unlawful purpose**, and not merely collateral thereto. *Ib.*

5. **Same.—Although the combination may be unlawful, an action** for the **performance** of the contract **can not be defeated** upon the ground that plaintiff is carrying on its business in an unlawful manner as a monopoly. *Ib.*

6. **Same.—An agreement**, as incidental to the sale of property as a business, that the seller will **not enter into a competing business, is valid and enforceable**, notwithstanding it is in partial restraint of trade. *Ib.*

7. **Same—Specific Performance—Sale of Business—Enjoining Violation.**—A court of equity will enjoin a defendant from violating a contract, clearly shown, by which he deliberately obligated himself for a valuable consideration not to engage in a certain business. *Ib.*

CONTRACTS—Continued.

8. **Purchaser of River Craft not Relieved from Obligation to Pay Purchase Price Because of His Agreement to Maintain Present Traffic Rates.**—A purchaser of river craft can not invoke the Anti-Trust Act of July 2, 1890 (26 Stat., 209), to relieve him from his obligation to pay the purchase price, because of his covenant to maintain the present traffic rates, which is not declared by the contract to enter into the consideration of the sale—especially **where the rates referred to primarily, if not exclusively, relate to domestic, and not to interstate, business.** *Cincinnati, etc., Packet Co.* v. *Bay*, 200 U. S., 179. 2—867

9. **Same.—A contract is not to be assumed to contemplate unlawful results** unless a fair construction requires it. *Ib.*

10. **Same.—Where a contract relates to commerce between points within a State**, both on a boundary river, it will **not** be construed as falling **within** the prohibitions of the Sherman **act because the vessels** affected by the contract **sail over soil belonging to the other State** while passing between the intrastate points. *Ib.*

11. **Same.—Even if there is some interference with interstate commerce, a contract is not necessarily void under the Sherman Act** if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law. *Ib.*

12. **Same.**—A contract for sale of vessels, even if they are engaged in interstate commerce, is **not necessarily void because the vendors agree**, as is ordinary in case of sale of a business and its good will, **to withdraw from business for a specified period.** *Ib.*

13. **Any contract or combination which directly and substantially restricts the right of an interstate carrier to fix its own rates**, independently of its natural competitors, places a direct restraint upon interstate commerce, in that it tends to prevent competition, and **is in violation of the act**, whether the rates actually fixed be reasonable or unreasonable. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

14. **Contracts—Proprietary Medicines.**—A system of contracts made by the manufacturer of a proprietary medicine between him and wholesale dealers, to whom alone he sold his medicine, by which they were bound **to sell only at a certain price** and to retail dealers designated by him, and between him and the retail dealers by which, in consideration of being so designated, they agreed to sell to consumers only at a certain price, is **not unlawful as in restraint of trade**, but is a reasonable provision for the protection of the manufacturer's trade, and he is entitled to an injunction to restrain a defend-

CONTRACTS—Continued.

ant from inducing other parties to such contracts to violate the same. *Hartman* v. *John D. Parks & Sons Co.*, 145 F., 358. **2**—1000

See also *Dr. Miles Medical Co.* v. *Jaynes Drug Co.*, 149 F., 838.

15. **A contract for the sale of merchandise is not rendered illegal by the fact that the selling corporation is a trust** or monopoly organized **in violation of law**, either Federal or State, the contract of sale being collateral and having no direct relation to the unlawful scheme or combination. *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 F., 491. **2**—1027

16. **Contracts Limiting Character of Material to be Used to that Controlled by a Single Corporation.**—Where the contract for the paving of a street with asphalt limited the kind of asphalt to be use to **Trinidad asphalt**, such fact, and the further fact that such asphalt was controlled by a single corporation, was not violative of the commerce clause of the Constitution or of the Federal Anti-Trust Statutes, and did not affect the validity of the contract. *Field* v. *Barber Asphalt Pav. Co.*, 117 F., 925. **2**—193

Affirmed, 194 U. S., 618 (**2**—555).

17. **Illegal.—Parties to a transaction adjudged to violate the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), are **not exempt from the doctrine** *in pari delicto* on the theory that they acted in good faith and without intent to violate the law, where, with knowledge of the facts and of the statute, they acted under the mistaken supposition that the statute would not be held applicable to the facts. *Harriman* v. *Northern Securities Co.*, 197 U. S., 244. **2**—669

Affirming, 134 F., 331 (**2**—618).

Reversing, 132 F., 464 (**2**—587).

18. **Same.—Property delivered under an executed illegal contract can not be recovered back** by any party *in pari delicto*, and the courts can not relax the rigor of this rule where the record discloses no special considerations of equity, justice, or public policy. *Ib.*

19. **Same.—Where a vendor after transferring shares** of railway stock to a corporation in exchange for its shares **becomes a director of the purchasing corporation** and participates in acts consistent only with absolute ownership by it of the railway stocks, and **does so after an action has been brought to declare the transaction illegal, his right to rescind the contract** and compel restitution of his original railway shares, if it ever existed, **is lost** by acquiescence and laches. *Ib.*

CONTRACTS—Continued.

20. **Effect of Illegal Provisions—Divisibility.**—Stipulations in a contract which are invalid as in restraint of trade, if capable of being construed divisibly, do not affect the validity of other provisions. *U. S. Consolidated Seeded Rasin Co.* v. *Griffin & Skelley Co.*, 126 F., 364. **2**—288

21. **Same—Validity—When Question for Jury.**—Conceding that a contract legal in its terms and in its consideration may be rendered illegal as against public policy by reason of the intention of the parties to so use it as to commit civil injury to third persons, where the evidence as to such intention is conflicting, the contract can not be declared illegal by the court as matter of law. *Ib.*

22. **Effect of Anti-Trust Law upon Contracts in Restraint of Trade which at Common Law were Not Unlawful.**—The effect of the Anti-Trust Law of 1890 is to render contracts in restraint of trade, as applied to interstate commerce, unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and also to create a right of civil action for damages in favor of persons injured thereby, and a remedy by injunction in favor both of private persons and the public against the execution of such contracts and the maintenance of such trade restraints. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F., 271. **1**—772

See also *Continental Wall Paper Co.* v. *Lewis Voight & Sons Co.*, 148 F., 939.

23. **The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity,** but **seeks to reach those which directly restrain** or impair **the freedom of interstate trade.** The law reaches contracts and combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity. *Chesapeake & O. Fuel Co.* v. *United States*, 115 F., 610, 624. **2**—168

24. **Applies to Common Carriers by Railroads—Contracts Affecting Rates.**—The provisions respecting contracts, combinations, and conspiracies in restraint of trade or commerce among the several States or with foreign countries, contained in the act of July 2, 1890, apply to and cover common carriers by railroad; and a contract between them in restraint of such trade or commerce is prohibited, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. **1**—648

CONTRACTS—Continued.

25. Act Applies to All Contracts in Restraint of Interstate or Foreign Commerce—Not Confined to Unreasonable Restraints.—The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

26. Test of Legality of a Contract or Combination.—The Anti-Trust Act of July 2, 1890 (26 Stat., 209), does not leave to the courts the consideration of the question whether the restraint is or is not unreasonable and such as would have rendered the contract invalid at common law. **The only question in each case** where the validity of a contract or combination under the law is involved is **whether or not its necessary effect is to restrain interstate commerce.** *Chesapeake & Ohio Fuel Co.* v. *U. S.*, 115 F., 610. 2—151

27. Same.—The test of the violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), by a contract or combination, is its effect upon competition in commerce among the States. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law, but if it promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law. *Phillips* v. *Iola Portland Cement Co.*, 125 F., 593. 2—284

28. The Sherman Act of July 2, 1890, **is not intended to affect contracts which have only a remote and indirect bearing** on commerce between the States. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. 2—555

29. The Anti-Trust Act of July 2, 1890 (26 Stat., 209), **does not apply to a contract or combination relating to the business of manufacturing within a State.** *Robinson* v. *Suburban Brick Co.*, 127 F., 804. 2—312

30. The act of July 2, 1890, commonly known as the "Anti-Trust Act," **does not,** and could not constitutionally, **affect any monopoly or contract** in restraint of trade, **unless it interferes directly and substantially with interstate commerce,** or commerce with foreign nations. *U. S.* v. *Addyston Pipe & Steel Co.*, 78 F., 712. 1—630

31. What Contracts, Combinations, or Conspiracies Violate Anti-Trust Act.—Every contract, combination, or conspiracy **the necessary effect of which is to stifle or to directly and substantially** restrict competition in commerce among the States is in restraint of interstate commerce, and violates section 1 of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

CONTRACTS—Continued.

32. What Acts, Contracts, and Combinations Do Not Violate Anti-Trust Act.—Acts, contracts, and combinations which **promote, or only incidentally or indirectly restrict,** competition in commerce among the States, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce or violative of section 1 of the act of July 2, 1890 (26 Stat., 209). *Ib.*

33. Section 1 of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209), **makes a distinction between a contract and a combination or conspiracy** in restraint of trade. *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633

34. Contract for Sale of Goods by Member of Combination.—The act of July 2, 1890, section 1 (26 Stat., 209), known as the "Sherman Anti-Trust Act," **does not invalidate or prevent a recovery for the breach of a collateral contract** for the manufacture and sale of goods **by a member of a combination** formed for the purpose of restraining interstate trade in such goods. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. 2—995

In Restraint of Trade. *See* Combinations, etc., 54–77.

Not Enforceable. *See* Combinations, etc., 16–20.

Freedom of Contract—Right of Private Contract. *See* Constitution, 2–8; and Congress, 5–7, 11, 19.

Contracts for Entire Product. *See* Combinations, etc., 149, 150.

Agreements not to Engage in Business or Compete. *See* Combinations, etc., 144–146, 148, 159, 208.

Contracts in Violation of Anti-Trust Act. *See* Actions and Defenses, 61, 62.

Defenses. *See* Actions and Defenses.

COPYRIGHT.

The rights acquired by publishers of copyrighted books under the copyright law did not justify them in combining and agreeing that their books should be subject to the rules laid down by the united owners, one of which was that no member of the association should sell any books to a **blacklisted purchaser** who was **known to cut prices.** *Mines* v. *Scribner*, 147 F., 927. 2—1035

See also Combinations, etc., 28, 96–98.

COVENANTS. *See* Combinations, etc., 152, 153, 155.

CORPORATIONS.

1. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, **is not endowed with the inalienable rights of a natural**

CORPORATIONS—Continued.

person, but it is an artificial person, created and existing only for the convenient transaction of business. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (Brewer concurring). 2—341

2. **Stockholding—Corporations to Acquire Stock of Competing Railroads—Legality.**—The real control of a corporation is in its stockholders, who have the power to determine all important corporate acts and policies, and any contract or combination by which a majority of the stock of two railroad companies owning and operating parallel and competing interstate lines of road is transferred to a corporation organized for the purpose of holding and voting the same, and receiving the dividends thereon, to be divided pro rata among the stockholders of the two companies so transferring their stock, directly and substantially, restricts interstate trade and commerce, and is in violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), since it destroys any motive for competition between the two roads; and it is immaterial that each company has its own board of directors, which nominally directs its operations and fixes its rates. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

3. **Same.—The fact that** the purpose of **an illegal combination between stockholders of two railroad companies** operating parallel and competing interstate lines, to secure unity of interest and control of such companies, and to prevent competition, **has been accomplished by the formation of a corporation** which has acquired the ownership of a majority of the stock of each of the companies, **can not be urged to defeat a suit by the United States to restrain** the exercise of **the power so illegally acquired** by the corporation through such combination, as imposing a restraint upon interstate commerce in violation of the Anti-Trust Law (act July 2, 1890, 26 Stat., 209). *Ib.*

Affirmed, 193 U. S., 197 (2—338).

4. **Powers of Corporations—New Jersey Statutes.**—The language of the New Jersey enabling act (Laws 1899, p. 473), authorizing the organization of corporations "for any lawful purpose," imposes a limitation upon the powers of any corporation organized thereunder, however broad may be the terms of its articles of incorporation. *Ib.*

5. **Northern Securities Company—Distribution of Stock—Purchase and Sale.**—A contract by which defendant, the Northern Securities Company, acquired from complainants certain shares of stock of the Northern Pacific Railway Company (193 U. S. 197), *Held*, under the evidence, to have been one of purchase and sale, by which **defendant**, on payment of the agreed price, became the absolute owner of the shares, free from

CORPORATIONS—Continued.

any trust in favor of the complainants, and **free to distribute the same pro rata among all its stockholders** upon the entry of a decree declaring it to be an illegal combination, and prohibiting it from voting or receiving dividends on such stock. *Northern Securities Co.* v. *Harriman*, 134 F., 331. 2—618

Affirmed, 197 U. S., 244 (2—669).

6. **Same—Should not be Enjoined from Distributing Stock.**—Defendant corporation having been adjudged an illegal combination in restraint of interstate commerce, and enjoined from voting or receiving dividends on certain railroad stock which it owned, but permitted to transfer the same to its stockholders, a plan adopted by its directors and stockholders to distribute the same pro rata among all its stockholders was equitable, and its execution should not be enjoined. *Ib.*

7. **Same.—The decree of the Circuit Court** in the Northern Securities case, affirmed by this court (193 U. S., 197), **did not determine the quality of the transfer** as between the defendants, **and the provisions therein as to return of shares of stock** transferred to it by the railway stockholders **were permissive only**, and not an adjudication that any of the vendors were entitled to a restitution of their original railway shares. *Harriman* v. *Northern Securities Co.*, 197 U. S., 244. 2—669

8. **Same.—The judgment of the Supreme Court in the Northern Securities case went no further than the decree of the Circuit Court** itself, and while it leaves that court at liberty to proceed in the execution of its decree as circumstances may require, it **does not operate to change the decree or import a power to do so** not otherwise possessed. *Ib.*

9. **Same.—The judgment or opinion of the Supreme Court in this case did not enlarge the scope of the decree of the Circuit Court so as to make it an adjudication that** any of the **vendors** of railway stocks **were entitled to judicial restitution of the stocks transferred** by them to the Securities Company, or that the Securities Company could not distribute the shares of railway stock held by it *pro rata* between its own shareholders. *Ib.*

10. **Same.—The transaction** between complainants and the Northern Securities Company **was one of purchase and sale** of Northern Pacific Railway Company stock for shares of stock of the Securities Company and cash and **not a bailment or trust.** *Ib.*

11. **Same—Duty of Securities Company to Distribute Stock.**—It was the duty of the Securities Company under the decree in the Government suit to end a situation which had been adjudged unlawful, and as this could be effected by sale and distribution in cash, or by distribution in kind, the company was

CORPORATIONS—Continued.

justified in adopting the latter method and avoiding the forced sale of several hundred million dollars of stock which would have involved disastrous results. *Ib.*

12. **Unreasonable Search and Seizure of Contracts and Correspondence—Immunity—Grand Jury.**—A corporation charged with a violation of the Anti-Trust Act of July 2, 1890, is entitled to immunity under the fourth amendment of the Constitution from such an unreasonable search and seizure as the compulsory production before a grand jury, under a *subpœna duces tecum*, of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different States. *Hale* v. *Henkel*, 201 U. S., 43. **2**—874

13. **Same.**—A corporation is but an association of individuals with a distinct name and legal entity, and in organizing itself as a collective body it waives no appropriate constitutional immunities, and although it can not refuse to produce its books and papers it is **entitled to immunity** under the fourth amendment **against unreasonable searches** and seizures, and **where an examination of its books is not authorized by an act of Congress a subpœna duces tecum requiring the production of practically all of its books and papers is as indefensible** as a search warrant would be if couched in similar terms. *Ib.*

14. **Same.**—The protection against unreasonable searches and seizures afforded by **the Fourth Amendment can not ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers** in obedience to a *subpœna duces tecum*, issued in aid of an investigation by a grand jury of an alleged violation of the Anti-Trust Act of July 2, 1890, by such corporation. *Ib.*

15. **Same—Contempt.**—**Although the subpœna duces tecum may be too broad** in its requisition, where the witness has refused to answer any question, or to produce any books or papers, **this objection would not go to the validity of the order committing him for contempt.** *Ib.*

16. **Same—Reserve Right to Investigate Contracts of a Corporation.**—A corporation is a creature of the State, and there is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. *Ib.*

17. **Same.**—There is a **clear distinction between an individual and a corporation, and the latter**, being a creature of the State, **has not the constitutional right to refuse to submit its books and papers** for an examination at the suit of the State. *Ib.*

CORPORATIONS—Continued.

18. **Same.—An officer of a corporation** which is charged with criminal violation of a statute **can not plead the criminality of the corporation as a refusal to produce its books.** *Ib.*

19. **Franchises of a corporation chartered by a State are, so far as they involve questions of interstate commerce, exercised in subordination to the power of Congress** to regulate such commerce; and while Congress may not have general visitatorial power over State corporations, its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress. *Ib.*

20. **In an action against corporations** for violations of the Anti-Trust Law, the books of the various defendants both before and after the alleged combination, and **the contracts between them, as well as other papers, referred to in the opinion, are all matters of material proof,** but whether material or not the testimony must be taken and exceptions can be noted by the examiner and the materiality of the evidence passed on by the court. *Nelson* v. *United States*, 201 U. S., 92. **2**—920

21. **Corporate Officers—Production of Documentary Evidence.**—**The refusal** of corporate officers to obey orders of a Federal circuit court requiring them to produce certain documentary evidence, on their examination before a special examiner, **can not be justified on the theory that such evidence was not in their possession** or under their control, because their possession was not personal, but was that of the corporations. *Ib.*

22. **Same.**—Documentary evidence in the shape of **books and papers** of corporations **are in the possession of the officers thereof.** *Ib.*

23. **Same—Officers and Employees Can Not Refuse to Testify or Produce Books, etc.**—*Hale* v. *Henkel* (vol. 2, p. 874) followed, to the effect that officers and employees of corporations can not, under the fourth and fifth amendments, refuse to testify or produce books of corporations in suits against the corporations for violations of the Anti-Trust Law of July 2, 1890, in view of the immunity given by the act of February 25, 1903. *Ib.*

24. **Corporation can not Claim Immunity Because of Testimony or Evidence Furnished by its Officers.**—A corporation, whether State or Federal, can not claim immunity from prosecution for violation of the interstate commerce or anti-trust laws of the United States because of testimony given or evidence produced by its officers or agents before the Interstate Commerce Commission or the Commissioner of Corporations, or in any proceeding, suit, or prosecution under such laws; **the right to immunity** on account of evidence so **given** in the several cases granted **by act February 11, 1893** (27 Stat., 443), **and acts February 14 and February 25, 1903** (32 Stat., 827, 904),

CORPORATIONS—Continued.

being **limited to individuals** who as witnesses give testimony or produce evidence. *United States* v. *Armour & Co.*, 142 F., 808. 2—951

25. Article IV of the Constitution of the United States **has nothing to do with the conduct of** individuals or **corporations.** It only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State, other than that in which the court is sitting. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. 2—533

26. Indictment—Criminal Responsibility—Joinder of Defendants—Corporation and its Officers. *See U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 823, 836.

COSTS.

The discretion of the trial court under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), **to allow a reasonable attorney's fee** to the successful plaintiff in an action brought under that section to recover damages for a violation of the provisions of that act against combinations in restraint of trade, **is not abused by an allowance of $750,** although the verdict was but for $500, where the trial took five days, and from the proof offered it appeared that from $750 to $1,000 would be a reasonable sum. *Montague* v. *Lowry*, 193 U. S., 38. 2—329

COURTS.

I. Federal Courts in General—Jurisdiction and Power.

1. Jurisdiction over Nonresident Defendants in Private Suits.—The authority given by section 5 of the act of July 2, 1890 (26 Stat., 209), to bring in nonresidents of the district can not be availed of in private suits, and the court can not acquire jurisdiction over them. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. 1—620

2. Jurisdiction in Private Suits Against a State for Violation of Anti-Trust Law—Necessary Parties.—Where a person brings an action under section 7 of the Anti-Trust Law of July 2, 1890, against the officials of a State, to recover damages for acts done under authority of a State statute, which gives the State an entire monopoly of the traffic in intoxicating liquors (act S. C., Jan. 2, 1895), the State itself is a necessary party thereto, and consequently the Federal courts would have no jurisdiction of the action. *Lowenstein* v. *Evans*, 69 F., 908. 1—598

COURTS—Continued.

I. Federal Courts in General—Continued.

3. Court of Equity can not Entertain Bill of Private Party to Enforce Anti-Trust Law.—The Anti-Trust Law of July 2, 1890, does not authorize a court of equity to entertain a bill by a private party to enforce its provisions, **his remedy being by an action at law for damages.** *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. 1—862

4. The United States can not maintain a bill in equity to restrain an association of railroads from carrying into effect an agreement alleged to be illegal under the Interstate Commerce Law, **when it appears that it did not grant the charter of,** and has no proprietary interest in, any of the roads. Its right is to prosecute for breaches of the law, not to provide remedies. *U. S.* v. *Joint Traffic Assn.*, 76 F., 895. 1—615
Case reversed, 171 U. S., 505 (1—869).

5. Jurisdiction After Admission of Territory as State.—In 1895 the plaintiff in error was indicted, with others, in a district court of the Territory of Utah, under section 3 of the act of July 2, 1890 (26 Stat., 209), which declares illegal "every * * * combination * * * in restraint of trade or commerce in any Territory." In January, 1896, Utah was admitted as a State, and thereafter the case was transferred to the Federal court for the district of Utah, where, after hearing on demurrer to the indictment, the plaintiff in error was tried and convicted. *Held*, on writ of error, that neither under the act of Congress authorizing Utah to form a State government (28 Stat., 111, 112), nor the constitution of Utah (art. 24, sec. 7), nor by other legislation, was jurisdiction conferred upon the Federal court to proceed with the case. *Moore* v. *U. S.*, 85 F., 465. 1—815

6. Same.—*Held*, further, that the case did not come within the provisions of Revised Statutes, section 13, regulating the effect of the repeal of statutes, for the admission of Utah as a State did not operate to repeal the act of July 2, 1890, which still applies to the Territories of the United States. *Ib.*

7. Court of Equity—Adjustment of Difficulties Between Receiver of Railroad and Employees.—Where the property of a railway or other corporation is being administered by a receiver under the superintending power of a court of equity, it is competent for the court to adjust difficulties between the receiver and his employees, which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership. *Waterhouse* v. *Comer*, 55 F., 149. 1—119

8. Same.—It follows, then, that it is **in the power of the court,** in the interest of public order and for the protection of the property under its control, to direct a suitable arrangement with its employees or officers, **to provide compensation and**

COURTS—Continued.

I. Federal Courts in General—Continued.

conditions of their employment, and to avoid, if possible, an interruption of their labor and duty, which will be disastrous to the trust and injurious to the public. *Ib.*

9. **A Court of Equity Should Not Aid by Entertaining Infringement Suits Brought by an Illegal Corporation.**—A corporation organized for the purpose of securing assignments of all patents relating to "spring-tooth harrows," to grant licenses to the assignors to use the patents upon payment of a royalty, to fix and regulate the price at which such harrows shall be sold, and to take charge of all litigation, and prosecute all infringements of such patents as an illegal combination, whose purposes are contrary to public policy, and which a court of equity should not aid by entertaining infringement suits brought in pursuance thereof. *National Harrow Co.* v. *Quick*, 67 F., 130. 1—443

10. **Jurisdiction of a Court of Equity can not be Invoked to Enforce a Contract Arising out of an Unlawful Combination of Railroads—Ticket Brokers.**—In a suit by a railroad company to enjoin the defendants, who were ticket brokers, from dealing in special tickets issued by complainant on account of the Pan-American Exposition, which were by their terms nontransferable, it appeared from the showing made on a motion for a preliminary injunction that complainant was a member of a combination known as the "Trunk Line Association," formed by a number of railroads operating in different States for the purpose of preventing competition; that the passenger receipts of all such roads were pooled and divided on an agreed basis: and that the special rates made on account of the exposition were fixed, and the terms of the tickets which were the basis of the suit were prescribed by such association through its passenger committee. *Held*, That such combination was illegal, as in violation of the Federal Anti-Trust Law (26 Stat., 209), and that complainant could not invoke the aid of a Federal court of equity for the protection of rights claimed under contracts which were the direct result and evidence of such unlawful combination. *Delaware, L. & W. R. Co.* v. *Frank*, 110 F., 689. 2—82

11. **A railroad company, belonging to an illegal combination** in violation of the Anti-Trust Act of 1890, **can not invoke the aid of a Federal court of equity** for the protection of its rights claimed under contracts which were the direct result and evidence of such unlawful combination. *Ib.*

12. **Will Enjoin a Combination Between Two Parallel and Competing Lines of Railroad—Question of Public Policy.**—Where the effect of a combination is to directly prevent competition between two parallel and naturally competing lines of railroad engaged in interstate business, it is in restraint of interstate commerce and a **violation of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), and the court, in a suit to enjoin it as such, can not consider the question whether the combination may not be of greater benefit to the public than competition would be; that being a question of public policy to be determined by Congress. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—216

COURTS—Continued.

I. Federal Courts in General—Continued.

13. **May Restrain Violations of Anti-Trust Act and Frame its Decree to Accomplish Practical Results.**—Although cases should not be brought within a statute containing criminal provisions that are not clearly embraced by it, the court should not by narrow, technical, or forced construction of words exclude cases from it that are obviously within its provisions, and while the act of July 2, 1890, contains criminal provisions, the Federal court has power under section 4 of the act in a suit in equity to prevent and restrain violations of the act, and may mold its decree so as to accomplish practical results such as law and justice demand. *Northern Securities Co.* v. *United States*, 193 U. S., 197. 2—339

14. **Consent of Parties can Never Confer Jurisdiction upon a Federal Court.** If the record does not affirmatively show jurisdiction in the circuit court, this court must, upon its own motion, so declare, and make such order as will prevent the circuit court from exercising an authority not conferred upon it by statute. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. 2—533

15. **A State is not a citizen** within the meaning of the provisions of the Constitution or acts of Congress regulating the jurisdiction of the Federal courts. *Ib.*

16. **A case can not,** under existing statutes regulating the jurisdiction of the courts of the United States, **be removed from a State court, as one arising under the Constitution or laws of** the United States **unless the plaintiff's complaint, bill, or declaration shows it to be a case of that character.** *Ib.*

17. **While an allegation in a complaint** filed in a circuit court of the United States **may confer jurisdiction to determine whether the case is of the class** of which the court may properly take cognizance for purposes of a final decree on the merits, **if notwithstanding** such allegation, the court finds, at any time, that **the case does not really** and substantially **involve a dispute or controversy within its jurisdiction then,** by the express command of the act of 1875, **its duty is to proceed no further.** And if the suit, as discussed by the complaint could not have been brought by plaintiff originally in the circuit court, then, under the act of 1887–88 it

COURTS—Continued.

I. Federal Courts in General—Continued.

should not have been removed from the State court and should be remanded. *Ib.*

18. **A State can not, by a suit in its own name, invoke the original jurisdiction of a Federal circuit court to restrain and prevent violations** by competing interstate railway companies, **of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), because, alone, of the alleged remote and indirect injury to its proprietary interests arising from the mere absence of free competition in trade and commerce as carried on by such carriers within its limits. *Ib.*

19. **Article IV of the Constitution** of the United States **only prescribes a rule by which courts, Federal and State, are to be guided when a question arises** in the progress of a pending suit **as to the faith and credit** to be given by the court to the public acts, records, and judicial proceedings of a State, other than that in which the court is sitting. It has nothing to do with the conduct of individuals or corporations. *Ib.*

20. **Allegation of Amount in Controversy.**—It is not essential that a bill in a Federal court should state the amount or value in controversy, if it appears to be within the jurisdictional limit, from the allegations of the bill, or otherwise from the record, or from evidence taken in the case before the hearing of objections to the jurisdiction. *Robinson* v. *Suburban Brick Co.*, 127 F., 804. **2—312**

21. **Abatement—Pendency of Action in State Court.**—The pendency of a suit in a State court is not a bar to one on the same cause of action in a Federal court. *Ib.*

22. **Production of Documents.—The search and seizure clause of the fourth amendment** was **not intended to interfere** with the power of courts to compel the production upon a trial of documentary evidence through a *subpœna duces tecum*. *Hale v. Henkel*, 201 U. S., 43. **2—874**

See also Search, and Witnesses.

23. **Orders of a Federal circuit court directing witnesses** to answer the questions put to them and produce written evidence in their possession on their examination before a special examiner appointed in a suit brought by the United States to enjoin an alleged violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), **is interlocutory in the principal suit, and therefore not appealable** to the Supreme Court. An appeal does lie, however, from a judgment of contempt, attempting to enforce the order. *Alexander* v. *United States*, 201 U. S., 117. **2—945**

See also *Nelson* v. *United States*, 201 U. S., 92 (**2**—920).

24. **Admission of Evidence—Order of Proof.**—In an action to recover damages for an alleged conspiracy in restraint of interstate commerce, it was **within the discretion of the trial court to** admit evidence of acts and declarations of various of the defendant associations, their officers, committees, members, and agents, made in the absence of many of the other defendants, **before a prima facie case of conspiracy had been established**, and before privity of some of the defendants had been proven, on condition that such connecting evidence should be thereafter given. *Loder* v. *Jayne*, 142 F., 1010. **2—977**

COURTS—Continued.

I. Federal Courts in General—Continued.

II. Circuit Courts.

25. **Jurisdiction to Restrain and Punish Violations of Anti-Trust Act.**—The circuit court have jurisdiction under the Anti-Trust Act of July 2, 1890, to issue injunctions to restrain and punish violations of that act. *U. S.* v. *Agler*, 62 F., 824. **1—294**

26. **Jurisdiction—Habeas Corpus—Removal of Prisoner.**—Where a prisoner, arrested under warrant based upon an indictment in a distant State and district, is held pending an application to the district court for a warrant of removal for trial, the circuit court of the district in which he is held has authority on *habeas corpus* to examine such indictment and to release the prisoner, if in its judgment the indictment should be quashed on demurrer. *In re Terrell*, 51 F., 213. **1—46**

27. **Habeas Corpus—Removal of Prisoner—Examination of Indictment.**—It is the right and duty of the circuit court on an application for *habeas corpus* for the purpose of releasing a person held under a warrant of a United States commissioner to await an order of the district judge for his removal to another district to answer an indictment, to examine the indictment to ascertain whether it charges any offense against the United States, or whether the offense comes within the jurisdiction of the court in which the indictment is pending. *In re Greene*, 52 F., 104. **1—54**

28. **Jurisdiction—Obstruction of the Mails.**—The circuit court had power to issue its process of injunction upon complaint which clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mails, not only temporarily existing, but threatening to continue. *In re Debs*, 158 U. S., 565. **1—565**

29. **Same—Violation of Injunction—Contempt.**—Such an injunction having been issued and served upon the defendants, the circuit court had authority to inquire whether its orders had been disobeyed, and when it found that they had been disobeyed, to proceed under Revised Statutes, section 725, and to enter the order of punishment complained of. *Ib.*

30. **Same—Habeas Corpus.**—The circuit court having full jurisdiction in the premises, its findings as to the act of disobedi-

COURTS—Continued.

II. Circuit Courts—Continued.

ence are not open to review on *habeas corpus* in this or any other court. *Ib.*

31. The circuit court **has power, in an action brought by the Attorney-General, to enjoin the Northern Securities Company,** a corporation organized to hold the majority of the stock of two competing and parallel lines of railroad for the purpose of preventing competition, from voting such stock, and from exercising any control whatever over the acts and doings of the railroad companies in question, and also to enjoin them from paying any dividends to the holding corporation on any of the stock so held by it. *Northern Securities Co.* v. *United States*, 193 U. S., 197. **2**—338

32. The circuit court **can have no jurisdiction of a suit instituted by a State, because of an allegation** in the complaint **that full faith and credit will not be given to its public acts if a New Jersey corporation** organized for the purpose of acquiring the control of two competing interstate railway companies engaged in business within its limits **is allowed to carry out the object of its incorporation.** *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2**—533

33. The **jurisdiction** of the circuit court **to entertain a suit to enjoin a combination of persons from interfering with and preventing shipowners from shipping a crew may be maintained** on the ground of preventing a multiplicity of suits at law, and for the reason that damages at law for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural and not susceptible of proof. 54 Fed. Rep., 40, affirmed. *Blindell* v. *Hagan*, 56 F., 696. **1**—182

34. **The jurisdiction of the circuit court** over a bill in equity **to enjoin a railroad company from granting rebates** to favored shippers can not be maintained upon the ground that such act of the railroad company is a monopoly within the meaning of the second section of said Anti-Trust Act (act July 2, 1890, 26 Stat., 209). *United States* v. *Atchison, T. & S. F. Ry. Co.*, 142 F., 176. **2**—831

35. **The pendency of a suit in a State court can not be pleaded in abatement of an action in a circuit court** of the United States **to recover treble damages** under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), since the State court is without jurisdiction to enforce the remedy given by said section, and therefore the same case can not be depending in both courts. *Loewe* v. *Lawlor*, 130 F., 633. **2**—563

36. **Appeal to Supreme Court.—Where there are allegations of diverse citizenship** in the bill, **but the jurisdiction** of the circuit court **is also invoked on constitutional grounds,** the case is appealable directly to the Supreme Court under section 5 of the act of March 3, 1891, as one involving the construction or application of the Constitution of the United States, and where both parties have appealed the entire case comes to this court, and the respondent's appeal does not have to go to the Circuit Court of Appeals. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. **2**—555

COURTS—Continued.

II. Circuit Courts—Continued.

III. Circuit Court of Appeals.

37. The Circuit Court of Appeals **will not reverse an interlocutory order granting or continuing a temporary injunction unless** it is clearly shown that the same was improvidently granted and is hurtful to the appellant. *Workingmen's Amalg. Council* v. *U. S.*, 57 F., 85. **1**—184

IV. Supreme Court.

38. **Jurisdiction—Appeal—Dissolution of Illegal Association.**—The dissolution of the freight association **does not prevent this court from taking cognizance** of the appeal and deciding the case on its merits; as, where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law, and the jurisdiction of the court has attached by the filing of a bill to restrain such or like action under a similar agreement, and a trial has been had and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association effected subsequently to the entry of judgment in the suit. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. **1**—648

39. **Same.**—While the **statutory amount** must as a matter of fact be in controversy, yet the fact that it is so need not appear in the bill, but may be shown to the satisfaction of the court. *Ib.*

40. **Jurisdiction—Appeal—Refusal of Witness to Answer Questions in Anti-Trust Investigation—Fifth Amendment.**—In a suit in the Circuit Court of the United States brought by the United States against corporations for violations of the Anti-Trust Law of July 2, 1890, a witness refused to answer questions or submit books to inspection before an examiner appointed by the court on the ground of immateriality, also pleading the Fifth Amendment; after the court had overruled the objections and directed him to answer he again refused and judgment in contempt was entered against him. On appeal to the Supreme Court, *Held*, That questions under the Constitution of the United States were involved and the court has jurisdiction of an appeal direct from the circuit court. *Nelson* v. *United States*, 201 U. S., 92. **2**—920

41. **Same.**—In such an action **the books of the various defendants,** both before and after the alleged combination, **and the contracts between them, as well as other papers referred to in** the opinion, **are all matters of material proof,** but whether

COURTS—Continued.

IV. SUPREME COURT—Continued.

material or not the testimony must be taken and exceptions can be noted by the examiner and the materiality of the evidence passed on by the court. *Ib.*

42. **Jurisdiction—The Order of a Judge of the Circuit Court to a Witness to Answer or be Punished for Contempt is Interlocutory and Not Appealable to Supreme Court.**—In a suit in a circuit court of the United States brought by the United States against corporations for violations of the Anti-Trust Law of July 2, 1890, a witness refused to answer questions or produce books before the examiner on the ground of immaterially, also pleading the privileges of the Fifth Amendment; the court overruled the objections and ordered the witness to answer the questions and produce the books; an appeal was taken to this court. *Held*, That while such an order might leave the witness no alternative except to obey or be punished for contempt it is interlocutory in the principal suit and not a final order, nor does it constitute a practically independent proceeding amounting to a final judgment, and an appeal will not lie therefrom to this court. *Alexander* v. *United States*, 201 U. S., 117. 2—945

43. **Same—But an Appeal from a Judgment of Contempt is Reviewable.**—If the witness refuses to obey and the court goes further and punishes him for contempt there is a right of review, and this is adequate for his protection without unduly impeding the process of the case. [*See* also *Nelson* v. *United States*, 201 U. S., 92 (2—920).] *Ib.*

44. **The jurisdiction of the Supreme Court** of the United States on writ of error to a circuit court, under the Circuit Court of Appeals act, **when the constitutionality of a State statute is in question, extends to all cases in which such a question is decided against the claim of either party**, and therefore includes a case in which the writ of error is taken by a defendant who set up in defense of the action a statute which the court held unconstitutional. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 54. 2—118

45. **Same.**—If a claim is made in the circuit court that a State enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, the Supreme Court may review the judgment at the instance of the unsuccessful party. *Ib.*

46. **Consent of Parties can Never Confer Jurisdiction upon a Federal Court.**—If the record does not affirmatively show jurisdiction in the circuit court, the Supreme Court must, upon its own motion, so declare, and make such order as will prevent the circuit court from exercising an authority not conferred upon it by statute. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. 2—533

COURTS—Continued.

IV. SUPREME COURT—Continued.

47. **The findings of fact made in a State court** in a suit in equity **are conclusive upon the Supreme Court** of the United States on writ of error to that court. *Bement* v. *National Harrow Co.*, 186 U. S., 70, 83. 2—169, 181

48. **Certiorari.—Where the decree of the Circuit Court of Appeals** in an action in equity **only reverses an order of the Circuit Court** granting an injunction, **but** the court, the record presenting the whole case, **practically disposes of the entire controversy** on the merits, **certiorari may issue** from the Supreme Court and that court may finally dispose of it by its direction to the Circuit Court. *Harriman* v. *Northern Securities Co.*, 197 U. S., 244. 2—669

CREDIBILITY OF WITNESSES. *See* JURY, 2.

DAMAGES.

1. **Damages Recoverable.—Only actual damages**, established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable under the Sherman Anti-Trust Law (26 Stat., 209). Speculative, remote, or contingent damages can not form the basis of a lawful judgment. *Central Coal & Coke Co.* v. *Hartman*, 111 F., 96. 2—94

2. **Same—Speculative Damages—Evidence—Sufficiency.**—The estimates, speculations, or conjectures of witnesses unfounded in the knowledge of actual facts from which the amount of the damages could have been inferred with reasonable certainty will no more sustain a judgment than the conjectures of a jury. *Ib.*

3. **Same—Anticipated Profits—When Recoverable.**—The general rule is that the anticipated profits of a commercial business are too remote, speculative, and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to this rule that the loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was. *Ib.*

4. **Same—Profits of Established Business—Evidence—Indispensable to Recovery.**—Proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business. *Ib.*

5. **Same—Loss of Profits.**—The plaintiff testified that the acts of the defendants had greatly diminished his business, prevented him from making contracts for future delivery of coal, and diminished his sales from 15 to 20 carloads per month, on which he would have made a profit of from $12 to $20 per car; that he could not tell what the volume of his

DAMAGES—Continued.

business was before or after the acts complained of, and that he had no books or papers which would show this fact. He produced no evidence of the expenses or income of his business before or after the acts complained of. *Held*, That the evidence was insufficient to sustain a verdict for damages for the loss of anticipated profits. *Ib.*

6. **Burden of Proof.**—In an action for damages for conspiracy in restraint of interstate commerce in violation of act of Congress of July 2, 1890 (26 Stat., 209), the burden was **on plaintiff** to show some real actual damage to his business by reason of the alleged unlawful combination. *Loder* v. *Jayne*, 142 F., 1010. **2—977**

7. **Same—Compensation for Extra Work—Evidence.**—Where, in an action for damages to plaintiff's business because of an alleged conspiracy in restraint of interstate commerce, plaintiff claimed $5,000 compensation to himself for extra work claimed to have been required by reason of such unlawful combination, but **failed to prove how much additional time he was required to spend in his business** after the combination went into effect, he was **not entitled to recover** for such alleged extra services. *Ib.*

8. **Same—Additional Capital.**—Where, in a suit for damages to plaintiff's business because of an alleged unlawful combination in restraint of interstate commerce, plaintiff claimed that because of such combination it was necessary to put $10,000 extra capital into his business from rents of his building, which were collected from time to time, but he testified on cross-examination that the payments of interest and taxes on the building were in excess of the amount paid into the business, he was not entitled to recover interest on such alleged additional capital. *Ib.*

9. **Same—Increased Cost.**—Where, by reason of an unlawful combination in restraint of interstate commerce in violation of the Sherman Act, plaintiff was compelled to conduct his business at a greater cost, though it was greater in volume, and by reason of the injury he received a less percentage of return, he was entitled to recover such additional cost, though by reason of his increased efforts and the natural increase of his business he was enabled to withdraw from the business for his personal services an amount equal to, or larger than, he drew from the business before the conspiracy became operative. *Ib.*

10. The **owner of goods may dictate the prices at which he will sell them**, and **the damages** which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit **constitute no legal injury**, and are not actionable, because they are not the result of any breach of duty or of contract by

DAMAGES—Continued.

the owner. *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. **2—271**

ACTIONS FOR RECOVERY. *See* ACTIONS AND DEFENSES, 21–42; Statutes 62–71.

DECLARATIONS.

1. **Averments.**—**A declaration** in an action for damages under the Anti-Trust Act of 1890, **which does not aver** that the goods manufactured by plaintiff, and in respect of which he claims to be injured, are a subject of **interstate commerce**, or that the acts complained of have anything to do with any contract in **restraint of trade**, or that the parties are citizens of different States, is demurrable. *Bishop* v. *American Preservers Co.*, 51 F., 272. **1—49**

2. **Duplicity.**—**A declaration in a suit** based on section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), **to recover damages** resulting to plaintiff from a violation of such provision, **which alleges in a single count that defendant entered into a "contract, combination, and conspiracy"** in restraint of trade, **is bad for duplicity.** *Rice* v. *Standard Oil Co.*, 134 F., 464. **2—633**

See also PARTIES, 3.

DEFENSES. *See* ACTIONS AND DEFENSES.

DEFINITIONS. *See* WORDS AND PHRASES.

DEMURRER.

A bill in equity, and the demurrer thereto, are neither of them to be read and construed strictly as an indictment, but are to be taken to mean what they fairly convey to a dispassionate reader by a fairly exact use of English speech. *Swift & Co.* v. *United States*, 196 U. S., 375. **2—642**

See DECLARATIONS, 1; HABEAS CORPUS, 1.

DIRECT AND IMMEDIATE EFFECT.

DIRECT. *See* COMBINATIONS, ETC., 14, 19, 30, 43, 51, 63, 67, 91, 168, 175; CONSTITUTION, 9; INTERSTATE COMMERCE, 32, 37; STATUTES, 11, 19, 23.

DIRECT AND IMMEDIATE. *See* COMBINATIONS, ETC., 14, 44, 45, 105.

DIRECTLY AND APPRECIABLY. *See* COMBINATIONS, ETC., 8, 31; STATUTES, 26.

DIRECTLY AND EFFECTUALLY. *See* COMBINATIONS, ETC., 104.

DIRECTLY AND NECESSARILY. *See* COMBINATIONS, ETC., 9, 197; STATUTES, 17.

DIRECTLY AND SUBSTANTIALLY. *See* COMBINATIONS, ETC., 9, 11, 12, 69, 70, 87, 108; CONGRESS, 7; STATUTES, 10, 11, 14, 15, 16, 43, 48.

DIVISION OF TERRITORY. *See* COMBINATIONS, ETC., 39, 136, 137.

DOCUMENTARY EVIDENCE. *See* EVIDENCE, 8, 9; *and* PRODUCTION OF DOCUMENTS.

DRUGS. *See* COMBINATIONS, ETC., 29, 160.

ENFORCEMENT. *See* INJUNCTIONS, 5, 8, 9, 13, 20, 21; COMBINATIONS, ETC., 16–20.

EQUITY.

1. **Equity will not encourage a combination in restraint of trade** and probably illegal under the Federal Anti-Trust Act of July 2, 1890. *Amer. Biscuit Mfg. Co.* v. *Klotz*, 44 F., 721. 1—3
2. **Jurisdiction.—Equity has jurisdiction to restrain public nuisances** on bill or information filed by the proper officer on behalf of the people. *U. S.* v. *Debs*, 64 F., 724. 1—322
3. **Same—Right to Jury.**—The power given by act of July 2, 1890, to circuit courts "to prevent and restrain violations" of the act is not an invasion of the right of trial by jury, as the jurisdiction so given to equity will be deemed to be limited to such cases only as are of equitable cognizance. *Ib.*
4. **A bill in equity and the demurrer thereto are neither of them to be read and construed strictly as an indictment,** but are to be taken to mean what they fairly convey to a dispassionate reader by a fairly exact use of English speech. *Swift & Co.* v. *United States*, 196 U. S., 375. 2—642

See also PARTIES; COURTS; PLEADING AND PRACTICE.

EVIDENCE.

1. **Admissibility—Proclamations of Various Government Officers—Newspaper Reports.**—In order to sustain the allegations of a bill praying an injunction against a combination in restraint of interstate commerce, the complainant may offer in evidence, as matter of history, the official proclamation of the various Government officers and also newspaper reports supported by affidavits containing manifestoes and declarations of the respondents. *U. S.* v. *Workingmen's Amalg. Council*, 54 F., 994. 1—110

Case affirmed, 57 F., 85 (1—184).

2. **Admission of Evidence—Order of Proof.**—In an action to recover damages for an alleged conspiracy in restraint of interstate commerce it was **within the discretion of the trial court** to admit evidence of acts and declarations of various of the defendant associations, their officers, committees, members, and agents, made in the absence of many of the other defendants, **before a prima facie case of conspiracy had been established,** and before privity of some of the defendants had been proven, on condition that such connecting evidence should be thereafter given. *Loder* v. *Jayne*, 142 F., 1010. 2—977
3. **Same—Burden of Proof.**—The burden of proving a combination and conspiracy between manufacturers and wholesale and retail dealers of proprietary medicines and drugs in restraint of trade, in violation of act of Congress of July 2, 1890 (26 Stat., 209), injurious to plaintiff, and that defendants were engaged and took part in such conspiracy, **was on the plaintiff.** *Ib.*
4. **Same—Damages—Burden of Proof.**—In an action for damages for conspiracy in restraint of interstate commerce, in violation of act of Congress of July 2, 1890 (26 Stat., 209), the **burden was on plaintiff to show some real actual damage** to his business by reason of the alleged unlawful combination. *Ib.*
5. **Same—Compensation for Extra Work—Evidence.**—Where, in an action for damages to plaintiff's business because of an alleged conspiracy in restraint of interstate commerce, plaintiff claimed $5,000 compensation to himself for extra work claimed to have been required by reason of such unlawful combination, but **failed to prove how much additional time he was required to spend in his business** after the combination went into effect, he was **not entitled to recover** for such alleged extra services. *Ib.*
6. **Sufficiency—Injunction Pendente Lite.**—Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorize the court to enjoin interference with the business of the complainants by such combination pendente lite. *Blindell* v. *Hagan*, 56 F., 696. 1—182

Affirming 54 F., 40 (1—106).

7. **Acts of One Party.**—Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be **evidence against any of the others** who were engaged in the conspiracy. *U. S.* v. *Cassidy*, 67 F., 698. 1—449
8. **Documentary or Oral—Materiality.**—Evidence, whether documentary or oral, sought to be elicited from witnesses **summoned** in an action brought by the United States to enjoin an alleged conspiracy by manufacturers of paper to suppress competition, in violation of the act of July 2, 1890 (26 Stat., 209), by creating a general selling and distributing agent, is material, **where it would tend to establish the manner in which such agent executed its functions.** *Nelson* v. *United States*, 201 U. S., 92. 2—920

EVIDENCE—Continued.

9. **Same.—Documentary evidence in the shape of books and papers of corporations are in the possession of the officers thereof,** who can not refuse to produce them on the ground that they are not in their possession or under their control. *Ib.*

10. **Same.—The immateriality of the evidence** sought to be elicited **can not justify the refusal of witnesses to obey** the orders of the Federal circuit court, requiring them to answer the questions put to them and to produce written evidence in their possession, on their examination before a special examiner. *Ib.*

11. **Same.—Objections to the materiality of the testimony** are **not open to consideration on a writ of error sued out by witnesses** to review a judgment for **contempt,** entered against them for disobeying an order to testify. *Ib.*

OVERT ACTS—CUMULATIVE EVIDENCE. *See U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 836.

See also WITNESSES.

EXPRESS COMPANIES. *See* STATUTES, 83.

FAIR AND REASONABLE RESTRAINTS. *See* COMBINATIONS, ETC., 59, 174, 191.

FISH. *See* COMBINATIONS, 144, 147.

FORFEITURE OF GOODS. *See* SEIZURE; STATUTES, 59.

FRANCHISES. *See* CORPORATIONS, 19.

GRAND JURY.

Powers—Witnesses—Refusal to Testify—Contempt.—Where, after a witness had refused to testify before a grand jury considering supposed infractions of the Anti-Trust Law, the grand jury made a presentment to the court charging the witness with contempt, and the court, after hearing, ordered the witness to answer the questions and to forthwith produce the papers required, the court's action was equivalent to an express instruction to the grand jury to investigate the matter referred to in the presentment, and hence the fact that the grand jury had been previously acting beyond its power was harmless. *In re Hale*, 139 F., 496. **2—804**

Order affirmed. *Hale* v. *Henkel*, 201 U. S., 43 **(2—874).**

See also IMMUNITY.

HABEAS CORPUS.

1. **Removal of Prisoner—Jurisdiction of Circuit Courts.**—Where a prisoner, arrested under warrant based upon an indictment in a distant State and district, is held pending an application to the district court for a warrant of removal for trial, the circuit court of the district in which he is held has **authority** on *habeas corpus* **to examine** such **indictment and**

HABEAS CORPUS—Continued.

to release the prisoner, if in its judgment the indictment should be quashed on demurrer. *In re Terrell*, 51 F., 213. **1—46**

2. **Same.**—On *habeas corpus* to release a person held under a warrant of a United States commissioner to await an order of the district judge for his removal to another district to answer an indictment, it is the **right and duty** of the circuit court **to examine the indictment to ascertain whether** it charges any offense against the United States, or whether **the offense comes within the jurisdiction of the court** in which the indictment is pending. *In re Greene*, 52 F., 104. **1—54**

3. **Witness—Contempt—Incriminating Evidence.**—Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on *habeas corpus* because some of the questions might be safely answered. *Foot* v. *Buchanan*, 113 F., 156. **2—104**

4. **Witness Committed for Contempt by One Judge Would Not be Discharged by Habeas Corpus by Another Judge of Same Court.**—Where a *subpœna duces tecum* was directed to be issued by a circuit judge, and the witness was committed for contempt for failure to obey the same, he would not be discharge on *habeas corpus* by another judge of the same court, though the latter was of the opinion that the subpœna authorized an unconstitutional search and seizure of private papers. *In re Hale*, 139 F., 496. **2—804**

Order affirmed in *Hale* v. *Henkel*, 201 U .S., 43 **(2—874).**

5. **Jurisdiction of Circuit Courts in Contempt Proceedings.**—Where the circuit court has full jurisdiction, its findings as to the act of disobedience of its orders are not open to review on *habeas corpus* in the Supreme Court or any other court. *In re Debs*, 158 U. S., 564. **1—566**

HOLDING COMPANIES.

TO VOTE STOCK. *See* COMBINATIONS, ETC., 84–91, 181, 182.

TO RECEIVE ASSIGNMENTS OF PATENTS. *See* COMBINATIONS, ETC., 92–95, 183.

IMMUNITY.

1. **Of Witnesses Before the Grand Jury.—Act of Congress, February 11, 1893** (27 Stat., 443), providing that no person shall be excused from testifying in a proceeding growing out of an alleged violation of an act to regulate interstate commerce, approved February 4, 1887, on the ground that his testimony will tend to incriminate him, and that no person shall be prosecuted, etc., on account of anything concerning which he may testify in such proceeding, **applies only to proceedings connected with the act of February 4, 1887,** and **does**

IMMUNITY—Continued.

not apply to a prosecution for violation of the Anti-Trust Act (26 Stat., 209), so as to abrogate in relation thereto the Fifth Amendment to the Constitution, providing that no person shall be compelled in a criminal case to be a witness against himself. *Foot* v. *Buchanan*, 113 F., 156. 2—104

2. **Same—Question of Incrimination one for Judge.**—Where a witness claims that the answer to a question will tend to incriminate him, it is not for the witness, but for the judge, to decide whether, under all the circumstances, such might be the effect, and the witness entitled to the privilege of silence. *Ib.*

3. **Same.—Where a person has already been indicted for an offense about which he is to be examined as a witness,** and the questions asked him tend to connect him with such offense, the **testimony sought is within the inhibition of the Fifth Amendment to the Constitution** providing that no person shall be compelled in any criminal case to be a witness against himself. *Ib.*

4. **Same—Witness not Compelled to act Upon an Assurance of Judge.**—Where a witness before a grand jury declines to answer certain questions, and is taken before the judge, who assures him that he can safely answer, as his testimony can not be used against him, he is not compelled by such assurance to relinquish his constitutional privilege, where the answer may tend to criminate him. *Ib.*

5. **Same.—An inquisition before a grand jury to determine the existence of supposed violations of the Anti-Trust Act was a "proceeding" within the act of February 19, 1903** (32 Stat., 848), providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding" under several statutes mentioned, including such Anti-Trust Act. *In re Hale*, 139 F., 496. 2—804

6. **Same.**—The **examination of witnesses before a grand jury concerning an alleged violation of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), **is a "proceeding" within the meaning of the** proviso to the **act of February 25, 1903** (32 Stat., 854–903), **that no person shall be prosecuted or be subjected to any penalty** or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-Trust Act is one. The word "proceeding" should receive as wide a construction as is necessary to protect the witness in his disclosures. *Hale* v. *Henkel*, 201 U. S., 43. 2—874

7. **Same.—The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, and does not apply if the criminality is taken away.** *Ib.*

IMMUNITY—Continued.

8. **Same.—A witness is not excused from testifying** before a grand jury under a statute which provides for immunity, **because he may not be able, if subsequently indicted, to procure the evidence necessary to maintain his plea.** The law takes no account of the practical difficulty which a party may have in procuring his testimony. *Ib.*

9. **Same.—The difficulty,** if any, **of procuring such testimony** does not render the immunity from prosecution or forfeiture, given by the proviso to the act of February 25, 1903, insufficient to satisfy the guaranty of the Fifth Amendment to the Constitution against self-incrimination. *Ib.*

10. **Same.—A witness can not refuse to testify** before a Federal grand jury in face of a Federal statute granting immunity from prosecution as to matters sworn to, **because the immunity does not extend to prosecutions in a State court.** In granting immunity the only danger to be guarded against is one within the same jurisdiction and under the same sovereignty. *Ib.*

11. **Same.—The privilege against self-incrimination** afforded by the United States Constitution, Fifth Amendment, **is purely personal to the witness,** and he can not claim the privilege of another person, or of the corporation of which he is an officer or employee. [To same effect, *McAlister* v. *Henkel*, 201 U. S., 90 (2—919).] *Ib.*

12. **Same.**—Under the practice in this country the **examination of witnesses by a Federal grand jury need not be preceded by a presentment or formal indictment,** but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committed, and if so, they may indict upon such evidence. *Ib.*

13. **Same.**—In summoning witnesses before a grand jury it is **sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify,** without indicating the nature of the charge against such persons. *Ib.*

14. **Same.—A corporation charged with a violation of the Anti-Trust Act** of July 2, 1890, **is entitled to immunity under the Fourth Amendment to the Constitution from** such an **unreasonable search and seizure** as the compulsory production before a grand jury under a *subpœna duces tecum* of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different States. *Ib.*

IMMUNITY—Continued.

15. **Same.—The protection against unreasonable searches and seizures** afforded by United States Constitution, Fourth Amendment, **can not ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers** in obedience to a *subpœna duces tecum*, issued in aid of an investigation by a grand jury of an alleged violation of the Anti-Trust Act of July 2, 1890, by such corporation. *Ib.*

16. **Same.** *Hale* v. *Henkel* (vol. 2, p. 874) followed as to the inquisitorial powers of the Federal grand jury and the extent of privilege and immunity of a witness under the Fifth Amendment. *McAlister* v. *Henkel*, 201 U. S., 90. **2**—919

17. **Persons who furnished evidence in the "beef trust" investigation** conducted by the Commissioner of Corporations pursuant to a resolution of the House of Representatives of March 7, 1904, **although they did so without being subpœnaed or sworn, can not be prosecuted** for violation of the Anti-Trust Law on account of the transactions, matters, or things to which such evidence relates. *United States* v. *Armour & Co.*, 142 F., 808. **2**—951

18. **Same—Scope of Immunity Provisions of Statutes.**—The immunity provisions of the various statutes applicable to the investigation, to be valid, **must be as broad as** the privilege given by the **Fifth Amendment to the Constitution.** *Ib.*

19. **Same.—Section 6 of the act creating the Department of Commerce and Labor** (act Feb. 14, 1903, 32 Stat., 827), defining the powers and duties of the **Commissioner of Corporations**, requiring him to make **investigation** into the organization, conduct, and management of the business **of all corporations or combinations engaged in interstate or foreign commerce, other than common carriers**, and giving him the same powers in that respect as is conferred on the Interstate Commerce Commission with respect to carriers, including the power to subpœna and compel the attendance of witnesses, and to administer oaths and require the production of documentary evidence, **contemplates that he shall proceed by private hearings.** *Ib.*

20. **Same.—Section 6** (32 Stat., 827) **provides that "all the requirements, obligations, liabilities, and immunities imposed or conferred by the 'act to regulate commerce' and by 'an act in relation to testimony before the Interstate Commerce Commission' shall also apply to all persons who may be subpœnaed to testify** as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section." *Ib.*

21. **Same.—The act of February 11, 1893** (27 Stat., 443), which is supplementary to the Interstate Commerce Act, **provides that "no person shall be prosecuted or subjected to any penalty** or forfeiture for or on account of any transaction, matter,

IMMUNITY—Continued.

or thing concerning which he may testify or produce evidence, documentary or otherwise, **before said commission or in obedience to its subpœna** * * * or in any such case or proceeding. *Ib.*

22. **Same.—And the appropriation act of February 25, 1903** (32 Stat., 904), **making provision for the enforcement of the** interstate commerce and **Anti-Trust Laws, contains a similar immunity provision** relating to persons giving testimony or producing evidence **in any proceeding**, suit, or prosecution **under said acts.** *Ib.*

23. **Corporations can not Claim Immunity because of Testimony Given or Evidence Furnished by its Officers or Agents.**—A corporation, whether State or Federal, can not claim immunity from prosecution for violation of the interstate commerce or Anti-Trust Laws of the United States because of testimony given or evidence produced by its officers or agents before the Interstate Commerce Commission or the Commissioner of Corporations, or in any proceeding, suit, or prosecution under such laws; the **right to immunity** on account of evidence so given in the several cases granted by act of February 11, 1893 (27 Stat., 443), and acts of February 14 and 25, 1903 (32 Stat., 827, 904), being **limited to individuals** who as witnesses give testimony or produce evidence. *United States* v. *Armour & Co.*, 142 F., 808. **2**—951

IN PARI DELICTO. *See* SALE, 6, 7.

INCIDENTALLY, INDIRECTLY, OR REMOTELY. *See* COMBINATIONS, ETC., 9, 105, 135, 136, 138, 139, 142, 151, 174, 176, 205; CONGRESS, 7; STATUTES, 7, 8, 14, 44, 49.

INCITING STRIKES. *See* COMBINATIONS, ETC., 119–125.

INCRIMINATING EVIDENCE. *See* WITNESSES; IMMUNITY.

INDICTMENTS.

1. **Failure to Allege that Defendants Monopolized or Conspired to Monopolize Trade and Commerce Among the Several States, etc.**—An indictment under section 2 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), which fails to allege that defendants monopolized, or conspired to monopolize, trade and commerce among the several States, or with foreign nations, fails to state an offense, even though it does allege that they did certain acts with intent to monopolize the traffic in distilled spirits among the several States, and that they have destroyed free competition in such traffic in one of the States and increased the price of distilled spirits therein. *U. S.* v. *Greenhut*, 50 F., 469. **1**—30

INDICTMENTS—Continued.

2. **Failure to Charge a Crime.**—An indictment under the act of July 2, 1890, relating to monopolies, averred that defendants, in pursuance of a combination to restain trade in distillery products between the States and monopolize the traffic therein, acquired by lease or purchase, prior to the passage of the act, some 70 distilleries, producing three-quarters of the distillery products of the United States, and that they continued to operate the same after the passage of the law, and by certain described means sold the product at increased prices. *Held*, That no crime was charged in respect to the purchase or continued operation of the distilleries, since there was **no averment that defendants obligated the vendors of the distilleries not to build others, or to withhold their capital or experience** from the business. *In re Corning*, 51 F., 33. 1—33

3. **Same.**—The indictment further averred that defendants, in pursuance of the combination, shipped certain of the products to Massachusetts, and sold them there through their distributing agents to dealers, who were promised a **rebate** of 5 cents per gallon on their purchases, provided such dealers purchased their distillery products exclusively from the distributing agents, and sold them no lower than the prescribed list prices, said rebate to be paid when such dealers should sign a certificate that they had so purchased and sold for six months; and that by this means defendants had controlled and increased the price of distillery products in Massachusetts. *Held*, That no crime was charged with respect to such sales, since there was **no averment of any contract whereby the purchasers bound themselves not to purchase from others, or not to sell at less than list prices.** *Ib.* 1—34

4. **Failure to Charge a Crime.**—An indictment under the act of July 2, 1890, relating to monopolies, averred in the fourth count that defendants, in pursuance of a combination to restrain trade in distillery products between the States, shipped certain whisky to Massachusetts and sold it there through their distributing agents to dealers under a contract whereby said dealers were promised a **rebate** of 5 cents per gallon on their purchases, providing such dealers purchased their distillery products exclusively from the distributing agents and sold them no lower than the prescribed list prices; said rebate to be paid when such dealers should sign a certificate that they had so purchased and sold for six months; and that by this means defendants had controlled and increased the price of distillery products in Massachusetts. *Held*, That no crime was charged with respect to such sales, since there was **no averment of any contract whereby the dealers bound themselves not to purchase from others, or not to sell at less than list prices.** *In re Corning*, 51 F., 205, approved. *In re Terrell*, 51 F., 213. 1—46

INDICTMENTS—Continued.

5. **Failure to Allege Contract or Means of Compulsion—Vagueness.**—In an indictment under section 1 of the act of July 2, 1890, to protect trade and commerce against monopolies, one count alleged, in substance, that on a specified date defendants, under the guise of the Distilling and Cattle Feeding Company, sold to certain persons in Boston a quantity of alcohol, then in Illinois, and that, by reason of the fact that said company controlled the manufacture and sale of 75 per cent of all distillery products in the United States, defendants fixed the price at which the purchasers should and did sell such alcohol, and "did compel" said purchasers "to sell said alcohol at no less price than that fixed" by them, but there were no allegations as to the means of compulsion. *Held*, That it could not be assumed from these allegations that the means used was a contract with the purchasers, and the count was bad, as being too vague to charge any contract or restraint of trade between the States. *In re Greene*, 52 F., 104. 1—55

6. **Indictments which Simply Follow the Language of the Statute—Tested by Specific Facts Alleged.**—Under the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," an indictment simply following the language of the statute would be wholly insufficient, for the words of the act do not themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense; and the indictment must, therefore, be tested by the specific facts alleged to have been done or committed. *Ib.*

7. **Indictment of Stockholders for Acts of Corporation—Omission to State Relation Defendants Bore to the Corporation.**—In indictments of individuals under the said statute, where all the acts alleged to constitute the offense are charged to have been done by a corporation, an omission to state what relation defendants bore to the corporation, other than that of stockholders, is fatal, since mere stockholders can not be held criminally responsible for the acts of the corporation. *Ib.*

8. **Must Contain Description of the Offense and a Statement of the Facts Constituting Same—Words of Statute.**—An indictment under the act of Congress, "to protect trade and commerce against unlawful restraint and monopolies" (26 Stat., 209), must contain a certain description of the offense, and a statement of facts constituting same, and it is **not sufficient simply to follow the language of the statute.** *U. S.* v. *Nelson*, 52 F., 646. 1—77

INDICTMENTS—Continued.

9. An indictment under the anti-trust law should describe something that amounts to a conspiracy under that act conformably to the rules of pleading at common law, as perhaps modified by general Federal statutes. *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 823, 831.

10. **Must Show Means Whereby it is Sought to Monopolize.**—In an indictment under the Anti-Trust Act of 1890 it is not sufficient to declare in the words of the statute, but the means whereby it is sought to monopolize the market must be set out, so as to enable the court to see that they are illegal. *U. S.* v. *Patterson*, 55 F., 605. **1—133**

Rehearing on general demurrer, 59 F., 280 (1—244).

11. **Allegations of what was done** in pursuance of an alleged conspiracy **are irrelevant** in an indictment under this statute, and are of **no avail** either to enlarge or **to take the place of** the **necessary allegations as to the elements of the offense.** *Ib.*

12. **Scope of the Statute.**—The words "**trade**" and "**commerce**," as used in the Anti-Trust Act of 1890, **are synonymous.** The use of both terms in the first section does not enlarge the meaning of the statute beyond that employed in the common-law expression, "**contract in restraint of trade**," as they are **analogous to the word "monopolize,"** used in the second section of the act. *Ib.*

13. The word "monopolize" is the basis and limitation of the statute, and hence an **indictment must show a conspiracy in restraint by engrossing or monopolizing** or grasping the market. It **is not sufficient** simply **to allege** a **purpose** to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise. *Ib.*

14. **Acts of Violence.**—Where counts in such indictment allege a purpose of engrossing or monopolizing the entire trade in question, acts of violence and intimidation **may be alleged** as the means to accomplish the general purpose. *Ib.*

15. **Surplusage** in an indictment **can not be reached by demurrer** of any character; but, if it be assumed that a **special demurrer** will lie, it **must point out the specific language objected to**, and not require counsel and the court to search through the indictment for what is claimed as demurrable. *U. S.* v. *Patterson*, 59 F., 280. **1—244**

16. An **indictment** for conspiracy to monopolize interstate commerce in cash registers **need not negative the ownership of patents** by defendants, or aver that the commerce proposed to be carried on is a lawful one. *Ib.*

17. **Averments.**—It **is unnecessary to set out in detail the operations supposed to constitute interstate commerce**, and in this respect it is sufficient to use the language of the statute. *Ib.*

INDICTMENTS—Continued.

18. It **is unnecessary to allege the existence of a commerce which defendants conspire to monopolize**, as the statute does not distinguish between strangling a commerce which has been born and preventing the birth of a commerce which does not exist. *Ib.*

19. The **indictment need not show** that the **purpose** of the conspiracy was **to grasp the commerce** into the hands of one of the defendants, or that defendants were interested in behalf of the party for whose benefit they conspired, or what were their relations to such party. *Ib.*

20. **Grand Jury—Finding—Indictment.**—An indictment should only be found where the grand jury believe that the evidence before them would warrant a conviction. *In re Grand Jury*, 62 F., 840. **1—310**

See also *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 823.

INDIRECTLY. *See* INCIDENTALLY.

INFRINGEMENT OF PATENTS. *See* PATENTS.

INJUNCTIONS.

1. **Must be Brought by the Government.**—The act of July 2, 1890 (26 Stat., 209), does not authorize the bringing of injunction suits or suits in equity by any parties except the Government. *Blindell* v. *Hagan*, 54 F., 40. **1—106**

Case affirmed, 56 F., 696 (**1**—182).

2. **Same.**—The intention of the **Anti-Trust Act** of July 2, 1890 (26 Stat., 209), was to **limit direct proceedings in equity** to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, **to those instituted in the name of the United States**, under section 4 of the act, **by district attorneys** of the United States, acting under the direction of the **Attorney-General**; thus securing the enforcement of the act, so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2—533**

3. The **right to bring suits for injunction** under section 4 of the act **of July 2, 1890 (26 Stat., 209), is limited to suits instituted on behalf of the Government.** *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1—620**

4. The fourth section of the Anti-Trust Act (26 Stat., 209) **invests the Government with full power** and authority **to bring a suit to set aside an agreement between competing railroads for the regulation of rates** and to have an **association** founded for that purpose **dissolved** and its **members enjoined** from carrying out the terms of the agreement. *U. S.* v. *Trans-Missouri Ft. Assn.*, 166 U. S., 290. **1—648**

INJUNCTIONS—Continued.

5. **Jurisdiction of Circuit Courts.**—The circuit courts have jurisdiction under the Anti-Trust Act of July 2, 1890, to issue injunctions to restrain and punish violations of that act. *U. S.* v. *Agler*, 62 F., 824. 1—294

6. **Same—Technical Defects in Bill.**—That a bill for such injunction contains no prayer for process, this being a mere technical defect, although it renders the bill demurrable, does not affect the jurisdiction of the court or render the injunction issued thereon void. *Ib.*

7. **Same—Defendants Not Named in Bill, nor Served with Subpœna.**—An injunction for such purpose becomes binding, as against one not named in the bill, and not served with subpœna, when the injunction order is served on him as one of the unknown defendants referred to in the bill. *Ib.*

8. **Same—Proceedings to Punish Violation.**—An information to punish violation of such an injunction order which fails to allege that the order was a lawful one, in the language of the statute, or that the person charged, not named in the order, was one of the unknown parties referred to therein, or that, either by his words or his acts, he was engaged in aiding the common object with other members of the alleged combination, lacks the necessary certainty. *Ib.*

9. **Equity Jurisdiction—Power to Enjoin—Right to Jury.**—The power given by section 4 of the act July 2, 1890, to circuit courts "to prevent and restrain violations" of the act, is not an invasion of the right of trial by jury, as the jurisdiction so given to equity will be deemed to be limited to such cases only as are of equitable cognizance. *U. S.* v. *Debs*, 64 F., 724. 1—323

See also *U. S.* v. *Elliott*, 64 F., 27 (1—311), and *U. S.* v. *Agler*, 62 F., 824 (1—294).

10. **Obstruction of Mails—Jurisdiction of Circuit Court.**—The circuit court has power to issue its process of injunction upon a complaint which clearly shows an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mails, not only temporarily existing, but threatening to continue. *In re Debs*, 158 U. S., 564. 1—565

11. **Same—Violation of Injunction—Contempt.**—Such an injunction having been issued and served upon the defendants, the circuit court had authority to inquire whether its orders had been disobeyed, and when it found that they had been disobeyed, to proceed under Revised Statutes, section 725, and to enter the order of punishment complained of. *Ib.*

12. **Same—Habeas Corpus.**—The circuit court having full jurisdiction in the premises, its findings as to the act of disobedience are not open to review on *habeas corpus* in this or any other court. *Ib.*

INJUNCTIONS—Continued.

13. **Enforcement—Contempt.**—The proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt. *Ib.*

14. **Such proceedings are not in execution of the criminal laws of the land.** *Ib.*

15. **Penalty for Contempt no Defense in Criminal Action.**—The penalty for a violation of an injunction is no substitute for, and no defense to, a prosecution for any criminal offense committed in the course of such violation. *Ib.*

16. **Obstruction of Railroads.**—An injunction will lie under section 4 of the Anti-Trust Act of July 2, 1890, to restrain a combination whose professed object is to arrest the operation of the railroads whose lines extend from a great city into adjoining States until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust. Such a combination is an unlawful conspiracy in restraint of trade and commerce among the States, within the meaning of section 4 of that act. *U. S.* v. *Elliott*, 62 F., 801. 1—262

Demurrer overruled, 64 F., 27 (1—311).

17. **Same—Power of Congress to Authorize.**—Act of July 2, 1890, section 4, which provides that the circuit courts of the United States have jurisdiction to restrain combinations and conspiracies to obstruct and destroy interstate commerce, before such objects are accomplished, is not void for want of power in Congress to authorize such proceedings. *U. S.* v. *Elliott*, 64 F., 27. 1—311

18. **Injunction Order—Persons not Named in Bill.**—Under act of July 2, 1890, section 5, an injunction order in an action to enjoin an illegal conspiracy against interstate commerce may provide that it shall be in force on defendants not named in the bill, but who are within the terms of the order, where it also provides that it is operative on all persons acting in concert with the designated conspirators, though not named in the writ, after the commission of some act by them in furtherance of the conspiracy, and service of the writ on them. *Ib.*

19. **Strike—Interference with Interstate Commerce.**—Where an injunction is asked against the interference with interstate commerce by combinations of striking workmen, the fact that the strike is ended and labor resumed since the filing of the bill is no ground for refusing the injunction. The invasion of rights, especially where the lawfulness of the invasion is not disclaimed, authorizes the injunction. *U. S.* v. *Workingmen's Amalg. Council*, 54 F., 994. 1—110

Case affirmed, 57 F., 85 (1—184).

INJUNCTIONS—Continued.

20. Injunction in Northern Securities Case no Invasion of States' Rights to Create Corporations.—The enforcement of the provisions of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), by a Federal court decree enjoining a corporation organized in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the power acquired by such corporation by virtue of its acquisition of such stock, does not amount to an invasion by the Federal Government of the reserved rights of the States creating the several corporations. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (48 L. ed., 679). 2—342

21. Same.—A Federal court, by its decree in a suit instituted under the authority of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), section 4, to prevent and restrain violations of the act, **may properly enjoin a corporation** organized in pursuance of a combination of stockholders of two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, **from acquiring any further stock therein, from voting such stock** as it then holds or may subsequently acquire, and **from exercising any control over the railway companies by virtue of its holdings**, and may restrain the railway companies from permitting or suffering any such action on the part of the stockholding corporation, and **from paying any dividends on** account of **the stock held by it.** *Ib.*

22. Allowance—Comparative Hardship or Inconvenience.—In an application for a preliminary injunction to prevent the Northern Securities Company from parting with, disposing of, transferring, assigning, or distributing the stock of the Northern Pacific Railway Company, or any part thereof, by reason of the decision of the Supreme Court in the Northern Securities Company case (193 U. S., 197), during the pendency of a suit to determine the rights of the Northern Pacific Company in regard to such return or distribution, *Held*, That the preliminary injunction should issue, regard being had to the comparative hardship or convenience to the respective parties resulting from the awarding or denial of the injunction. *Harriman* v. *Northern Securities Co.*, 132 F., 464. 2—587

Reversed by Circuit Court of Appeals, 134 F., 331 (2—619).

Action of Circuit Court of Appeals affirmed by Supreme Court, 197 U. S., 244 (2—669).

23. Same.—Where, in a doubtful case, **the denial** of a preliminary injunction would, on the assumption that the complainant ultimately will prevail, **result in greater detriment to him**

INJUNCTIONS—Continued.

than would, on the contrary assumption, **be sustained by the defendant**, through its allowance, the injunction usually should be granted. *Ib.*

24. Same.—The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. *Ib.*

25. Same.—Such doubt may relate either to the facts or to the law of the case, **or to both.** It may equally attach to, or widely vary in degree as between, the showing of the complainant and of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. *Ib.*

26. Same.—Preservation of Fund.—Where the sole object for which an injunction is sought is the preservation of a fund in controversy, or the **maintenance of the status quo**, until the question of right between the parties can be decided on final hearing the injunction **properly may be allowed, although there may be serious doubt of the ultimate success** of the complainant. *Ib.*

27. Same.—While **the consideration that an appeal does not lie from an interlocutory decree** denying a preliminary injunction is entitled to no weight where, on the application, it clearly appears that the complainant can not prevail on the final hearing, it **is often of controlling importance where**, on such application, **there is room for reasonable doubt as to the ultimate result.** *Ib.*

28. Preliminary Injunctions—Where Material Allegations are Denied.—Where the material allegations of a bill filed by the United States against various coal companies, under act of Congress, July 2, 1890, to enjoin their combination in restraint of trade, are denied by defendants' affidavits, a preliminary injunction will not be granted, as plaintiff gives no indemnifying bond in case the injunction should be dissolved. *U. S.* v. *Jellico Mtn. Coke & Coal Co.*, 43 F., 898. 1—1

29. Injunction Pendente Lite—Evidence.—Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorize the court to enjoin interference with the business of the complainants by such combination pendente lite. 54 F., 40, affirmed. *Blindell* v. *Hagan*, 56 F., 696. 1—183

INJUNCTIONS—Continued.

30. **Restraining Orders—May Issue Without Notice.**—Under section 4 of the Anti-Trust Law of July 2, 1890, a restraining order may be issued without notice, under the circumstances sanctioned by the established usages of equity practice in other cases. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. 1—749

31. **Preliminary Injunctions—Review.—Where** the opinion of a **circuit court** in granting a preliminary injunction shows that the judge **regarded as of controlling importance the fact that an order denying the injunction would not be reviewable by appeal**, the rule that the appellate court will not interfere with the exercise of the discretionary power of the court of first instance unless there is strong reason for it does not apply, and **the question** of the right to the injunction **will be determined on the merits.** *Northern Securities Co.* v. *Harriman*, 134 F., 331. 2—618
Reversing 132 F., 464 (2—587).

32. **Same—Should Not be Enjoined from Distributing Assets.**—Defendant corporation having been adjudged an illegal combination in restraint of interstate commerce, and enjoined from voting or receiving dividends on certain railroad stock which it owned, but permitted to transfer the same to its stockholders, a plan adopted by its directors and stockholders to distribute the same pro rata among all its stockholders was equitable, and its execution should not be enjoined. *Ib.*

33. **Same—Dissent.**—It is a proper exercise of discretion for a court to grant a preliminary injunction where the bill and evidence present a prima facie case and raise important and doubtful questions of law and fact, and, unless the injunction is granted to preserve the status quo until the hearing, the suit would be ineffective; and an order for **an injunction, granted on such grounds after** the court has given **due consideration to the balance of inconvenience and injury** which may result to one party or the other, **should not be reversed** by an appellate court before the case has been finally heard and determined by the court below on full proofs. Per Gray, Circuit Judge, dissenting. *Ib.*

34. **Review of Order Granting Temporary Injunction.—The Circuit Court of Appeals will not reverse** an interlocutory order granting or continuing a temporary injunction unless it is clearly shown that the same was improvidently granted and is hurtful to the appellant. *Workingmen's Amalg. Council* v. *U. S.*, 57 F., 85. 1—184
See also *Dr. Miles Medical Co.* v. *Jaynes Drug Co.*, 149 F., 838.

INTERSTATE COMMERCE.

1. **Commerce Defined.**—The word "commerce," as used in the Anti-Trust Act of July 2, 1890, and in the Constitution of the United States, has a **broader** meaning **than the word "trade." Commerce** among the States **consists of intercourse and traffic** between their citizens, **and includes the transportation of persons and property**, as well as the purchase, sale, and exchange of commodities. *U. S.* v. *Cassidy*, 67 F., 698. 1—452

2. **Scope of Anti-Trust Act.**—While the primary object of the statute was doubtless to prevent the destruction of legitimate and healthy competition in interstate commerce, by the engrossing and monopolizing of the markets for commodities, yet its **provisions are broad enough to reach a combination or conspiracy that will interrupt the transportation of such commodities and persons from one State to another.** *U. S.* v. *Workingmen's Amalgamated Council*, 54 F., 995, cited. *Ib.*

3. **Pullman cars** in use upon railroads are instrumentalities of "commerce." *U. S.* v. *Debs*, 64 F., 763, cited. *Ib.*

4. **Commerce—Definition.—Commerce is the sale or exchange of commodities**, but that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. **It includes the intercourse—all the initiatory and intervening acts, instrumentalities, and dealings—that directly bring about the sale or exchange.** *U. S.* v. *Swift & Co.*, 122 F., 529. 2—237

5. **Interstate Commerce Includes Purchase, Sale, and Exchange of Commodities.**—Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. *Addyston Pipe and Steel Co.* v. *United States*, 175 U. S., 211. 1—1009

6. **Same—What Constitutes a Violation of the Statute.—Any agreement or combination which directly operates**, not alone upon the manufacture, but **upon the sale, transportation, and delivery of an article of interstate commerce**, by preventing or restricting its sale, thereby regulates interstate commerce to that extent, and thus trenches upon the power of the national legislature, and violates the Anti-Trust Act of 1890 (26 Stat., 209). *Ib.*

7. **Commerce Between Two Points in Same State—Vessels Passing Over Soil of Adjoining States.**—Where a contract relates to commerce between points within a State, both on a boundary river, it will not be construed as falling within the prohibi-

INTERSTATE COMMERCE—Continued.

tions of the Sherman Act because the vessels affected by the contract sail over soil belonging to the other State while passing between the interstate points. *Cincinnati, etc., Packet Co.* v. *Bay*, 200 U. S., 179. 2—867

8. **Same.—Even if there is some interference with interstate commerce, a contract is not necessarily void** under the Sherman Act if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law. *Ib.*

9. **Same.—A contract for sale of vessels,** even if they are engaged in interstate commerce, **is not necessarily void because the vendors agree,** as is ordinary in case of sale of a business and its good will, **to withdraw from business for a specified period.** *Ib.*

10. **Policy of Congress.**—It is the declared policy of Congress, which accords with the principles of the common law, **to promote individual competition** in relation to interstate commerce, **and to prevent combinations which restrain such competition** between their members, or between such members as individuals and outside competitors. *U. S.* v. *Chesapeake & O. Fuel Co.*, 105 F., 93. 2—34

Affirmed, 115 F., 610 (2—151).

11. **Policy of the Nation in Regard to.**—It has been the public policy of this nation, from the date of the passage of the Interstate Commerce Act of 1887, **to regulate that part of interstate commerce which consists of transportation, and to so far restrict competition** in freight and passenger rates between railroad companies engaged therein as shall be necessary **to make such rates open, public, reasonable, uniform, and steady,** and **to prevent discriminations** and undue preferences. *U. S.* v. *Trans-Missouri Freight Ass'n.*, 58 F., 58. 1—186

Decision reversed, 166 U. S., 290 (1—648).

12. **The Anti-Trust Act** of July 2, 1890, **embraces and declares to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature,** and whoever may be parties to it, **which directly or necessarily** operates in restraint of trade or commerce among the several States or with foreign nations. *Northern Securities Co.* v. *United States*, 193 U. S., 197. (Harlan, Brown, McKenna, Day.) 2—339

13. **Combinations, even among private manufacturers or dealers,** whereby interstate or international commerce is restrained, are equally embraced by the act. *Ib.*

14. **Every combination or conspiracy which would extinguish competition between otherwise competing railroads,** engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act. *Ib.*

INTERSTATE COMMERCE—Continued.

15. **Congress may,** in the exercise of the power conferred upon it by the commerce clause of the Constitution, **prohibit private contracts which** operate **directly and substantially to restrain interstate commerce.** *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—216

16. The **power of Congress to regulate** interstate commerce **comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially** and not merely indirectly, remotely, incidentally, and collaterally, **regulate** to a greater or less degree **commerce among the States.** *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211, 229. 1—1009

17. **A State can not invest a corporation** organized under its laws **with the power to do acts** in the corporate name **which would** operate to **restrain interstate commerce.** *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

18. **Powers of the United States—Transmission of the Mails.**—While the United States is a Government of enumerated powers, it has full attributes of sovereignty within the limits of those powers, among which are the power over interstate commerce and the power over the transmission of the mails. *In re Debs*, 158 U. S., 564. 1—565

19. **Same.—The powers thus conferred are not dormant,** but have been assumed and put into practical exercise by Congressional legislation. *Ib.*

20. **Same—Removal of Obstructions.**—In the exercise of those powers the United States may remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails. *Ib.*

21. **Same—Executive Power May Appeal to Civil Courts.**—While it may be competent for the Government, through the executive branch and in the use of the entire executive power of the nation, to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and the character of any of them, and if such are found to exist or threaten to occur, to invoke the powers of those courts to remove or restrain them, the jurisdiction of courts to interfere in such matters by injunction being recognized from ancient times and by indubitable authority. *Ib.*

22. **Same—Circuit Court had Power to Issue Injunction.**—The complaint filed in this case clearly shows an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mails, not only temporarily existing, but threatening to continue, and under it the circuit court had power to issue its process of injunction. *Ib.*

INTERSTATE COMMERCE—Continued.

23. Carriers—Connecting Lines—Prepayment of Freight.—A common carrier engaged in interstate commerce may at common law, and under the Interstate Commerce Law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier. *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F., 407. 1—823

24. Railroad Companies—Arrangements for Through Billing.—There is no principle of common law which forbids a single railroad corporation, or two or more of such corporations, from selecting, from two or more other corporations, one which they will employ as the agency by which they will send freight beyond their own lines, on through bills of lading, or as their agent to receive freight, and transmit it on through bills to their own lines, and without breaking bulk; and the right to make such selection is not taken away by the Interstate Commerce Law. (*New York & N. Ry. Co.* v. *New York & N. E. R. Co.*, 50 Fed., 867, explained.) *Prescott & A. C. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 73 F., 438. 1—604

25. Kansas City Live Stock Association—Engaged in Interstate Commerce.—Where the shipments of live stock from growers, dealers, and traders in various States and Territories to the defendants, the Kansas City Live Stock Association, was solicited by the latter chiefly through personal solicitation of traveling agents, and through advertisements, the course of business involving frequent loans to shippers in other States, secured by chattel mortgages on herds, and frequent drafts drawn by shippers on the defendants, and discounted at their local banks in other States on the strength of bills of shipment attached thereto, shipments being made to Kansas City, and the loans or drafts paid from proceeds of sale, and the balance remitted to the shippers, and sales at Kansas City were made for shipment to markets in other States, as well as for slaughter at packing houses near by, the traffic being of immense proportions, and defendants active promoters, and frequently interested parties, gathered in for sale and slaughter millions of cattle, sheep, and hogs; and their rules and regulations covered the entire business, and extended over the whole field of operation, *held*, that defendants were engaged in commerce between the States, and were subject to the provisions of the law of July 2, 1890, against trusts and monopolies. *U. S.* v. *Hopkins*, 82 F., 529. 1—725

Reversed, 171 U. S., 578 (1—941).

INTERSTATE COMMERCE—Continued.

26. Same.—Live stock shipped from various States to the yards of a stock-yards association in another State, by the solicitation and procurement of the members thereof, **to be there sold or to be reshipped to other States, if the market should be unsatisfactory, does not cease to be a subject of interstate commerce as soon as it reaches such yards and is there unloaded,** nor until it has been further acted upon so as to become mingled with the mass of property in the State. *Ib.*

27. Same.—The fact that the place of business of an association **is located upon both sides of the line dividing two States is** in itself **of no material importance** in determining whether the business transacted by it is commerce between the States. *Ib.*

28. Same.—The fact that a State line runs through stock yards, and that sales may be made of a lot of stock in the yards which may be partly in one State and partly in another, has no effect to make the business of selling stock interstate commerce. *Hopkins* v. *United States*, 171 U. S., 578. 1—941

29. Same.—The business of buying and selling live stock at stock yards in a city by members of a stock exchange **as commission merchants is not interstate commerce,** although most of the purchases and sales are of live stock sent from other States, and the members of the stock exchange are employed to sell by letter from the owners of the stock in other States, and send agents to other States to solicit business, and advance money to the cattle owners, and pay their drafts, and aid them in making the cattle fit for market. *Hopkins* v. *United States*, 171 U. S., 578. 1—941

Reversing, 82 F., 578 (1—725).

30. Same.—A by-law of the Kansas City Live Stock Exchange, **which regulates the commissions to be charged by members** of that association for selling live stock **is not in restraint of interstate commerce,** or a violation of the act of July 2, 1890, to protect commerce from unlawful restraints. *Ib.*

31. Same.—A commission agent who sells cattle at their place of destination, which are **sent from another State to be sold, is not engaged in interstate commerce;** nor is his agreement with others in the same business, as to the commissions to be charged for such sales, void as a contract in restraint of that commerce. *Ib.*

32. Same.—In order to come within the provisions of the statute, the direct effect of an agreement or combination must be in restraint of trade or commerce among the several States or with foreign nations. *Ib.*

33. Same.—Restrictions on sending prepaid telegrams or telephone messages, made by a by-law of a live-stock exchange, when

INTERSTATE COMMERCE—Continued.

these restrictions are merely for the regulation of the business of the members, and do not affect the business of the telegraph company, are not void as regulations of interstate commerce. *Ib.*

34. **Same.—The business of agents in soliciting consignments of cattle to commisison merchants in another State for sale** is not interstate commerce, and a by-law of a stock exchange restricting the number of solicitors to three does not restrain that commerce or violate the act of Congress. *Ib.*

35. **Same.—A combination of commission merchants** at stock yards, by which they **refuse to do business with those who are not members of their association**, even if it is illegal, is not subject to the act of Congress of July 2, 1890, to protect trade and commerce, since their business is not interstate commerce. *Ib.*

36. **Beef Trust—Combination to Monopolize Interstate Commerce in Fresh Meats.**—Interstate commerce is unlawfully restrained, in violation of the act of July 2, 1890 (26 Stat., 209), by a combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the States, to **bid up prices for live stock for a few days** at a time, in order **to induce** cattle men in other States to make **large shipments** to the stock yards, or by a combination for the same purpose **to fix the selling price of fresh meat**, and to that end to restrict shipments, when necessary, to establish a uniform rule of credit to dealers, and **to keep a black list**, or by a combination in aid of such purpose to make uniform and improper charges for cartage for the delivery of meat sold to be shipped to dealers and consumers in the several States. *Swift & Co.* v. *United States*, 196 U. S., 375. **2—643**

37. **The effect upon interstate commerce of a combination of a dominant portion of the dealers in fresh meat throughout the United States not to bid against, or only in conjunction with, each other** in order to regulate prices in and induce shipments to the live-stock markets in other States, to restrict shipments, etc., with intent to monopolize commerce among the States, **is direct and not accidental** or secondary as in *U. S.* v. *E. C. Knight Co.*, 156 U. S., 1. *Swift & Co.* v. *United States*, 196 U. S., 375. **2—641**

38. **When cattle are sent for sale from a place in one State, with the expectation they will end their transit, after purchase, in another** State, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a constantly recurring course, it constitutes interstate commerce and the purchase of the cattle is an incident of such commerce. *Ib.*

INTERSTATE COMMERCE—Continued.

39. Although the **jurisdiction of Congress** over commerce among the States is full and complete, it is not questioned that it **has none over that which is wholly within a State**, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce; nor does it acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State by reason of the fact that the combination also covers and regulates commerce which is interstate. *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S., 211. **1—1009**

POWER OF CONGRESS OVER. *See* CONGRESS.

PREPAYMENT OF FREIGHT. *See* CARRIERS.

See also CORPORATIONS, 2, 3; ACTIONS AND DEFENSES, 72, 73; and COMBINATIONS, ETC., generally, particularly paragraphs 54–76, 134–151.

IRON PIPE. *See* COMBINATIONS, ETC., 136.

JOINT RATES AND BILLING. *See* CARRIERS.

JOINT TRAFFIC ASSOCIATIONS. *See* COMBINATIONS, 103–104, 189–192.

JUDGMENT.

General expressions in an opinion which are not essential to dispose of a case are not permitted to control the judgment in subsequent suits. *Harriman* v. *Northern Securities Co.*, 197 U. S., 244. **2—669**

JURISDICTION.

1. **In a suit instituted in the name of the United States, under the Anti-Trust Law, jurisdiction depends alone upon the act**, and the court is concerned with no case between private persons or corporations, where jurisdiction depends on other conditions, and in which proceeding a common-law remedy might become available. *U. S.* v. *Addyston Pipe & Steel Co.*, 78 F., 712. **1—631**

2. **Nonresidents.—The authority** given by section 5 of the act of July 2, 1890 (26 Stat., 290), **to bring in nonresidents of the district can not be availed of in private suits**, and the court can acquire no jurisdiction over them. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1—620**

See also COURTS; STATES, 8, 10; UNITED STATES.

JURY.

1. **Reasonable Doubt.**—A reasonable doubt is one arising out of the evidence; not an imaginary doubt, a fanciful conjecture, or strained inference, but such a doubt as a reasonable man would act upon or decline to act upon when his own concerns are involved—a doubt for which a good reason can be given, which reason must be based upon the evidence or want of evidence. *U. S.* v. *Cassidy*, 67 F., 698. **1—452**

JURY—Continued.

2. **Credibility of Witnesses.**—The jury are the exclusive judges of the credibility of the witnesses. A witness is presumed to speak the truth, but this presumption may be repelled by the manner in which he testifies, by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives, and by contrary evidence. But the power of the jury to judge of the effect of evidence is not arbitrary; it must be exercised with legal discretion, and in subordination to the rules of evidence. *Ib.*

3. **Validity of Contract—When Question for Jury.**—Conceding that a contract legal in its terms and in its consideration may be rendered illegal as against public policy by reason of the intention of the parties to so use it as to commit civil injury to third persons, where the evidence as to such intention is conflicting the contract can not be declared illegal by the court as matter of law. *U. S.* v. *Consolidated Seeded Raisin Co.*, 126 F., 364. **2**—288

See also WITNESSES; GRAND JURY.

LABOR ORGANIZATIONS.

1. **The employees of railway companies have a right to organize for mutual benefit and protection**, and for the purpose of securing the highest wages and the best conditions they can command. They **may appoint officers**, who shall advise them as to the course to be taken in their relations with their employer, and they may, if they choose, repose in their officers authority to order them, or any of them, on pain of expulsion from their union, peaceably to leave the employment because the terms thereof are unsatisfactory. **But it is unlawful for them to combine and quit work for the purpose of compelling their employer to withdraw from his relations with a third party**, for the purpose of injuring that third party. *Thomas* v. *Railway Co.*, 62 Fed., 817, followed. *U. S.* v. *Cassidy*. 67 F., 698. **1**—452

2. **Same.**—A **strike**, or a preconcerted quitting of work, by a combination of railroad employees, is, in itself, unlawful, if the concerted action is knowingly and willfully directed by the parties to it for the purpose of obstructing and retarding the passage of the mails, or in restraint of trade and commerce among the States. *Ib.*

See also COMBINATIONS, ETC., IN RESTRAINT OF TRADE, 113–133, 213; COURTS, 7, 8.

LIABILITY. *See* STATUTES, 64.

LICORICE PASTE TRUST. *See* U. S. *v.* MACANDREWS & FORBES CO., 149 F., 823.

LIMITATION OF ACTION. *See* ACTIONS AND DEFENSES, 36.

LIQUOR TRAFFIC. *See* COMBINATIONS, ETC., 217; COURTS, 2.

LIVE-STOCK ASSOCIATIONS AND EXCHANGES, ETC. *See* COMBINATIONS, ETC., 78–81, 167–176.

LUMBER. *See* COMBINATIONS, ETC., 30–32, 134, 135, 211, 212.

MAILS, OBSTRUCTION OF. *See* COMBINATIONS, ETC., 127, 129, 133.

MARKET QUOTATIONS. *See* COMBINATIONS, ETC., 177–180.

MANUFACTURERS.

RIGHT TO REGULATE PRICES OF THEIR OWN PRODUCTS. *See* COMBINATIONS, ETC., 160–166.

MINNESOTA.

1. **Anti-trust Law of Minnesota Should Receive the Same Construction as the Sherman Anti-Trust Law.**—The anti-trust law of Minnesota (Laws 1899, p. 487, c. 359), making unlawful any contract or combination in restraint of trade or commerce within the State, is in substantially the same language as the Sherman Anti-Trust Law of July 2, 1890 (26 Stat., 209), and must receive a similar construction. *Minnesota* v. *Northern Securities Co.*, 123 F., 692. **2**—246
Case reversed, 194 U. S., 48, and remanded to State court. Circuit court without jurisdiction (**2**—533).

2. Following the decisions of the United States Supreme Court construing the latter act, the Minnesota law applies to railroads, and **any contract or arrangement between railroad companies for the purpose** and having the effect **of preventing competition** by fixing rates to be maintained by the parties **is in violation** of its provisions; **but contracts** or combinations **which do not directly** and necessarily **affect transportation, or rates** therefor, **are not in restraint** of trade or commerce, nor within the statute, even though they may remotely and indirectly appear to have some probable effect in that direction. *Ib.*

3. **Same—Stockholding Corporation.**—A holding corporation organized by individual stockholders of two railroad companies, owning and operating substantially parallel and competing lines of railroad within the State of Minnesota, for the sole purpose of acquiring, by the exchange of its own stock therefor, stock of the two companies, and holding and voting the same, but having no power or franchise to operate a railroad, is **not in violation of the Minnesota anti-trust law** (Laws 1899, p. 487, c. 359), which provides that "any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust or otherwise * * * which is in restraint of trade or commerce within this State * * * is hereby prohibited and declared to be

MINNESOTA—Continued.

unlawful," where the purpose of its promoters was thereby to acquire and retain in the same hands a majority of the stock of one or both companies, to insure uniformity of policy and stability of management, although it in fact acquired the controlling interest in both, in the absence of any evidence that it ever exercised its power to prevent competition between the two roads, or to interfere in any manner with the fixing of rates by either company. *Ib.*

4. **Same—Enforcement of Statute—Jurisdiction or Equity.**—The anti-trust law of Minnesota (Laws 1899, p. 487, c. 359) imposes severe penalties for its violation, but contains no provision for restraining or enjoining violations, and without such statutory authority a court of equity has no jurisdiction to enjoin an act which constitutes a criminal offense. *Ib.*

MONOPOLY.

1. **Need not be a Complete Monopoly.** In order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is **sufficient if it really tends to that end** and to deprive the public of the advantages which flow from free competition. *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 16. 1—392

2. **Congress did not attempt** by the act of July 2, 1890, to assert the power to deal with monopoly directly as such; or **to limit and restrict the rights of corporations created by** the **States or the citizens of the States in the acquisition,** control, **or disposition of property**; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, **what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce** among the several States or with foreign nations. *Ib.*

3. **The word "monopolize" was not intended** to be used with reference to the acquisition of exclusive rights under Government concession, but the word was used **to mean "to aggregate" or "concentrate" in the hands of few,** practically, and, as a matter of fact, and according to the known results of human action, to **the exclusion of others;** to accomplish this end by what, in popular language, is expressed in the word **"pooling,"** which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. *Amer. Biscuit & Mfg. Co.* v. *Klotz*, 44 F., 721, 724. 1—7

MONOPOLY—Continued.

4. **To constitute the offense of "monopolizing,** or attempting to monopolize," trade or commerce among the States, within the meaning of section 2 of said act, **it is necessary to acquire, or attempt to acquire, an exclusive right in** such commerce by means which will **prevent others from engaging therein.** *In re Greene*, 52 F., 104. 1—54

5. **A "monopoly,"** in the prohibited sense, **involves** the element of an **exclusive privilege or grant** which restrained others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. *Ib.* 1—71

6. **The word "monopolize,"** used in section 2 of the act of 1890, **is the basis and limitation of** the statute, and hence an **indictment must show a conspiracy** in restraint by engrossing or monopolizing or grasping the market. It is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise. *U. S.* v. *Patterson*, 55 F., 605. 1—133

7. The **statute** is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but **seeks to reach those which directly restrain or impair the freedom of interstate trade.** The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity. *Chesapeake & O. Fuel Co.* v. *United States*, 115 F., 610, 624. 2—168

8. **Monopoly Not Necessary—Tendency Sufficient.**—It is not required, in order to violate this statute, that a monopoly be created. It is sufficient if that be the necessary tendency of the agreement. *Ib.*

9. **Every attempt to monopolize** a part of interstate commerce, the necessary **effect of which is to stifle or to directly and substantially restrict** competition in commerce among the States, **violates section 2** of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

10. **Attempts** to monopolize a part of commerce among the States **which promote, or only incidentally or indirectly** restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were **not,** made **illegal or punishable** by section 2 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), because such attempts are indispensable to the existence of any competition in commerce among the States. *Ib.*

MONOPOLY—Continued.

11. Statute Operates Only on Monopolies in Interstate Commerce, and Not Because Commodity is a Necessary of Life.—The monopoly and restraint denounced by the act of July 2, 1890 (26 Stat., 209), "to protect trade and commerce against unlawful restraints and monopolies," are a monopoly in interstate and international trade or commerce, and not a monopoly in the manufacture of a necessary of life. *U. S.* v. *E. C. Knight Co.*, 156 U. S., 1. 1—379

12. Rebate to Exclusive Purchasers.—An arrangement whereby a distillery company promised persons who purchased from its distributing agents that if, for the ensuing six months, they would purchase their distillery products exclusively from such agents and would not resell the same at prices less than those fixed by the company, then, on being furnished with a certificate of compliance therewith, it would pay a certain rebate on the amount of such purchases, did not operate to "monopolize," or "as an attempt to monopolize," trade and commerce, within the meaning of section 2 of said act. *In re Greene*, 52 F., 104. 1—56

13. A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58, 82. 1—218

14. State Monopoly of Liquor Traffic.—The Anti-Trust Act is not applicable to the case of a State which by its laws assumes an entire monopoly in the traffic in intoxicating liquors (S. C. act of Jan. 2, 1895). *Lowenstein* v. *Evans*, 69 F., 908. 1—589

15. Validity of Sale of Property where Object is Monopoly.—The sale and transfer by a corporation of its property and good will to another corporation, where such sale was within its powers, **can not be repudiated** on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of trade. *Metcalf* v. *Amer. School Furniture Co.*, 122 F., 115. 2—234

See also COMBINATIONS, ETC., IN RESTRAINT OF TRADE, II and III.

MULTIFARIOUSNESS. *See* ACTIONS AND DEFENSES, 8; PLEADING AND PRACTICE, 19, 20.

MUNICIPAL CONTRACTS. *See* COMBINATIONS, ETC., 214–216.

MUNICIPAL ORDINANCE.

The specification in an ordinance, not invalid under the laws of the State, that a particular kind of asphalt produced only in a foreign country shall be used for street improvements

MUNICIPAL ORDINANCE—Continued.

does not violate the Sherman Anti-Trust Law or any Federal right. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. 2—555

NEW JERSEY. *See* CORPORATIONS, 4.

NEW TRIAL. *See* JAYNE v. LODER, 149 F., 21.

NONRESIDENTS. *See* STATUTES, 58.

NOTE. *See* ACTIONS AND DEFENSES, 64.

NOTICE. *See* STATUTES, 55.

OBSTRUCTION OF MAILS.

1. Obstructing the Mails—Section 3995 Revised Statutes.—Although the law (section 3995 Revised Statutes) which makes it an offense to obstruct and retard the passage of the United States mails was originally passed prior to the introduction into the United States of the method of transporting mail by railroads, and the phraseology of the law conforms to conditions prevailing at that time (March 3, 1825), yet it is equally **applicable to the modern system of conveyance and protects alike the transportation of the mail by the "limited express" and by the old-fashioned stage-coach.** *U. S.* v. *Cassidy*, 67 F., 698. 1—451

2. Same.—The statute applies to all persons who "knowingly and willfully" obstruct and retard the passage of the mails or the carrier carrying the same; that is, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the mail, and who perform the acts with the intent that such shall be their operation. *U. S.* v. *Kirby*, 7 Wall., 485, cited. *Ib.*

3. Same.—The statute also applies to persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails. In such case, an intent to obstruct and retard the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S.* v. *Kirby*, 7 Wall., 485, cited. *Ib.*

4. Same—Mail Trains.—A mail train is a train as usually and regularly made up, including not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such train, as a mail train, would include the Pullman car as a part of its regular make-up. Therefore, if such a train is obstructed or retarded because it draws a Pullman car, it is no defense

OBSTRUCTION OF MAILS—Continued.

that the parties so delaying it were willing that the mail should proceed if the Pullman car were left behind. *U. S.* v. *Clark*, Fed. Cas. No. 14805, 23 Int. Rev. Rec., 306, followed. *Ib.*

5. **Same.—Any train which is carrying mail,** under the sanction of the postal authorities, **is a mail train,** in the eye of the law. *Ib.*

6. **Same—Intent.**—It is not necessary that defendants should be shown to have had knowledge that the mails were on board of a train which they have detained and disabled. On the contrary, they are chargeable with an intent to do whatever is the reasonable and natural consequence of their acts; and as the laws make all railways postal routes of the United States, and it is within everyone's knowledge that a large portion of the passenger trains carry mail, it is to be presumed that any person obstructing one of those trains contemplates, among other intents, the obstruction of the mail. *U. S.* v. *Debs*, 65 F., 211, followed. *Ib.*

See also COMBINATIONS, ETC., 121, 127, 129.

PARTIES.

1. **Parties to Conspiracy.**—Where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, **every one of said persons becomes a member of the conspiracy,** although the part any one was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. *U. S.* v. *Cassidy*, 67 F., 698. 1—450

2. **Same.—Any one who, after a conspiracy is formed, and who knows** of its existence **joins therein,** becomes as much a party thereto from that time as if he had originally conspired. *U. S.* v. *Babcock*, Fed. Cas. No. 14487, 3 Dill., 586, cited. *Ib.*

3. **Same.—Any declaration made by one of the parties,** during the pendency of the illegal enterprise, is not only **evidence** against himself, but **against all the other conspirators,** who, when the combination is proved, are as much responsible for such declarations, and the acts to which they relate, as if made and committed by themselves. This rule applies to the declaration of a coconspirator, although he may not himself be under prosecution. *Ib.*

4. **Necessary Parties—Directors of Unincorporated Associations.**—All the directors of an unincorporated association are necessary parties to a suit against it arising out of contractual relations, even though a less number are authorized by the association to transact business. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. 1—620

PARTIES—Continued.

5. **Parties in Equity—Unincorporated Association.**—In a suit in equity to restrain an alleged unlawful combination acting as an unincorporated association, it is **sufficient that the association, together with a large number of its members,** as individuals and officers of the association, **are made parties defendant.** *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. 1—749

6. **Indictment—Joinder of Defendants.**—In an indictment under the Anti-Trust Law, the offenses thereunder being made misdemeanors, all who aid in their commission may be charged as principals, and a corporation and its officers, who personally participates in committing the same, may be joined as defendants, although their acts may have been separate. *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 824.

7. **Injunction—Government Only can Bring Suit for.**—The Anti-Trust Act of 1890 (26 Stat., 209) does not authorize the bringing of injunction suits or suits in equity by any parties except the Government. *Blindell* v. *Hagan*, 54 F., 40. 1—106 Case affirmed, 56 F., 696 (1—182).

8. **Injunctive Relief—United States Attorney.**—The only party entitled to maintain a bill in equity for injunctive relief for violating the provisions of the Anti-Trust Act is the United States attorney, at the instance of the Attorney-General. *Metcalf* v. *Amer. School Furniture Co.*, 122 F., 115. 2—235

9. **The State is a necessary party** to an action under section 7 of the Anti-Trust Act of July 2, 1890, against the officials of a State to recover **damages for acts done under the authority of a State statute,** which gives the State an entire monopoly of the traffic in intoxicating liquors (act of S. C. of Jan. 2, 1895). *Lowenstein* v. *Evans*, 69 F., 908. 1—598

10. **Consent of parties** can never confer jurisdiction upon a Federal court. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. 2—533

11. **Monopolies—Suit by Private Individual.**—The act "to protect trade and commerce against unlawful restraints and monopolies" (act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons, and the right to bring suits in equity being vested in the district attorneys of the United States. *Pidcock* v. *Harrington*, 64 F., 821. 1—377

See also ACTIONS AND DEFENSES, 1–20.

PATENTS.

1. **A corporation organized for the purpose of securing assignments of all patents relating to "spring-tooth harrows,"** to grant licenses to the assignors to use the patents upon pay-

PATENTS—Continued.

ment of a royalty, to fix and regulate the price at which such harrows shall be sold, and to take charge of all litigation, and prosecute all infringements of such patents, **is an illegal combination,** whose purposes are **contrary to public policy,** and which a court of equity should not aid by entertaining infringement suits brought in pursuance thereof. *National Harrow Co.* v. *Quick*, 67 F., 130. **1**—443

2. Corporation Organized to Receive Assignments of Patents.—A combination among manufacturers of spring-tooth harrows, by which each manufacturer assigns to a corporation organized for the purpose the patents under which he is operating, and takes back an exclusive license to make and sell the same style of harrows previously made by him, and no other, all the parties being bound to sell at uniform prices, *held* to be **an unlawful combination** for the enhancement of prices, and in restraint of trade. *National Harrow Co.* v. *Hench*, 76 F., 667. **1**——610

Affirmed, 83 F., 36 (1—742).

See also *Indiana Mfg. Co.* v. *J. I. Case Thrashing Mach. Co.*, 148 F., 21.

3. Same.—Though the fact that several patentees are exposed to litigation justifies them in composing their differences, they can not make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage. *National Harrow Co.* v. *Hench*, 83 F., 36. **1**—743

4. Same—Infringement Suit.—A combination among manufacturers of spring-tooth harrows, whereby a corporation organized for the purpose, becomes the assignee of all patents owned by the various manufacturers, and executes licenses to them, so as to control the entire business and enhance prices, **is void both as to the assignments and licenses,** so that the **corporation can not maintain a suit** against one of its assignors who violates the agreement, **for infringement.** *National Harrow Co.* v. *Hench*, 84 F., 226. **1**—746

5. Contracts by which a number of patents covering similar inventions are conveyed by the several owners **to one of the parties, which grants licenses** under all **to the others,** are **not void** as against public policy, or **as in violation of the Sherman Anti-Trust Law, because of provisions intended to protect and keep up the** patent **monopoly** by requiring the licensor to prosecute all infringers, limiting the licenses to be granted to such licensees as shall be agreed on, and imposing conditions on each license as to the use and ownership of the patented machines, and prohibiting him from using any others. *U. S. Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 F., 364. **2**—288

PATENTS—Continued.

6. Same.—Rights acquired under the patent laws of the United States **can not be affected by a State statute.** *Ib.*

7. The object of the patent laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee, and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts; and **the fact that the conditions in the contracts keep up the monopoly does not render them illegal.** The prohibition was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others, who were engaged in manufacturing and selling other machines under other patents; but it would be unreasonable to so construe the provision as to prevent the defendant from using any letters patent legally obtained by it and not infringing patents owned by others. *Bement* v. *National Harrow Co.*, 186 U. S., 70. **2**—169

8. Conditions imposed by the patentee in a license of the right to manufacture or sell the patented article, **which keep up the monopoly** or fix prices, do not violate the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints or monopolies. *Ib.*

9. Reasonable and legal conditions imposed by the patentee in a license of the right to manufacture and sell the patented article, **restricting the terms** upon which the article manufactured under such license may be used and **the price** to be demanded therefore, do not constitute such a restraint on commerce as is forbidden by the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints and monopolies. *Ib.*

10. The **agreement** of the licensee of a patent for improvements relating to float spring-tooth harrows **not to manufacture or sell any other such harrows** than those which it had made under its patents before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by such licensor, is not void as an unlawful restraint on trade or commerce forbidden by the act of Congress of July 2, 1890 (26 Stat., 209), since the plain purpose of this provision is to prevent the licensee from infringing on the rights of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows. *Ib.*

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PATENTS—Continued.

11. **An agreement by the licensor** of a patent for improvements relating to harrows **not to license any other person** than the licensee to manufacture or sell any harrow of the peculiar style and construction then used or sold by such licensee does not violate the act of Congress of July 2, 1890 (26 Stat., 209), to protect trade and commerce against unlawful restraints and monopolies. *Ib.*

12. **Licenses—Right to Attach Conditions.**—It is within the rights of the owner of a patent to grant licenses conditioned that the licensees shall sell the patented article only at prices fixed by the agreement and also restricting the production of a licensee, and such agreements, **if made in good faith and for the purpose of protecting the patent monopoly**, are not illegal as in restraint of trade and commerce, and such good faith is not impeached by the fact that the patent has been held invalid by the Federal courts in some circuits, where it has been sustained in others. *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 142 F., 531. **2—855**

13. **Same.**—Such patent monopoly **does not include**, however, the **right** of the patentee **to enter into a combination in the form of license contracts** with manufacturers throughout the United States, not only **to raise and maintain the prices** of such articles, being articles of interstate commerce, above the normal market price, but **to crush out competition** by outside manufacturers. *Ib.*

14. **Suit for Infringement—Defenses.**—The fact that the owner of a patent is a corporation alleged to have been formed in violation of the Anti-Trust Law, and that the patent is alleged to have been assigned to it in furtherance of the illegal purpose to create a monopoly and control the price of an article of commerce, is not available to an infringer of such patent to defeat a suit for the infringement. *National Folding-Box & Paper Co.* v. *Robertson*, 99 F., 985. **2—4**

15. **In an action** by a corporation **for the infringement** of elevator patents, a private **defendant** was **not entitled to urge** as a defense **that plaintiff was a corporation organized** merely for the purpose of holding the legal title to various elevator patents alleging to have been infringed, for the purpose of controlling sales and enhancing prices of elevators and apparatus, without itself engagaing in the manufacture and sale of such appliances, **in violation of the** Sherman **Anti-Trust Law** (26 Stat., 209), since until the United States has acted and sought to prosecute the plaintiff for violation of such act an infringer of the plaintiff's patent will not be permitted to raise such issue as a defense thereto. *Otis Elevator Co.* v. *Geiger*, 107 F., 131. **2—66**

PATENTS—Continued.

16. **Infringement of Patent Belonging to Member of a Corporation in Violation of Anti-Trust Law.**—That a complainant is a member of a combination in violation of the Anti-Trust Law of July 2, 1890 (26 Stat., 209), **does not give third persons the right to infringe** a patent of which complainant is owner, nor preclude complainant from maintaining a suit in equity to enjoin such infringement. *General Electric Co.* v. *Wise*, 119 F., 922. **2—205**

PATENT MEDICINES. *See* COMBINATIONS, ETC., 29, 160.

PAYMENT. *See* ACTIONS AND DEFENSES, 63, 64.

PLEADING AND PRACTICE.

1. **Bill and Answer—Waiver of Oath.**—Where the bill for injunction waives the oath of the respondents, an answer, under oath, denying all the equities of the bill, can, under the amendment to equity rule 41, be used at the hearing with probative force of an affidavit alone. Whether the injunction should issue must be determined by the whole evidence submitted. *U. S.* v. *Workingmen's Amalg. Council*, 54 F., 994. **1—110**

   Case affirmed, 57 F., 85 (**1—184**).

2. **Hearing on Bill and Answer—Evidence.**—When a suit is heard on bill and answer, the allegations of fact in the bill that are denied in the answer are to be taken as disproved, and the averments of fact in the answer stand admitted. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. **1—186**

3. **Same.—Where the contract is admitted, but the allegations tending to show its sinister purpose**, tendency, and effect contained in the bill **are denied** by the answer, **and averments** tending to **show a just and honest purpose**, tendency, and effect are made, the latter averments contained in the answer stand admitted, and the contract will be presumed to have been made for an honest and legitimate purpose, unless the provisions of the agreement clearly show the contrary. In the examination of such a contract, fraud and illegality are not to be presumed. *Ib.*

4. **Notice—Restraining Order.**—Under section 4 of the Anti-Trust Law of July 2, 1890, a restraining order may be issued without notice, under the circumstances sanctioned by the established usages of equity practice in other cases. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. **1—749**

5. **Allegations.—A complaint alleging that members of an association have conspired and combined to raise the prices of tiles**, mantels, and grates, to control the output, and to regulate the prices thereof, **with the intent to monopolize trade and commerce between the other States and California**

PLEADING AND PRACTICE—Continued.

in regard thereto, as well as to arbitrarily fix their prices independently of their natural market value, brings the case **within the Anti-Trust Act** of July 2, 1890 (26 Stat., 209). *Lowry* v. *Tile, Mantel & Grate Assn. of Cal.*, 98 F., 817. 1—995

6. **Averments.**—A bill charges a violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), as against the objections of want of equity, multifariousness, and failure to set forth sufficient definite or specific facts, **where it avers the existence of a combination of a dominant proportion of the dealers in fresh meat throughout the United States, not to bid against each other** in the live-stock markets of the different States, **to bid up prices** for a few days, in order to induce shipments to the stock yards, to fix selling prices, and to that end **to restrict shipments of meat** when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and to secure less than lawful freight rates, to the exclusion of competitors. *Swift & Co.* v. *United States*, 196 U. S., 375. 2—643

7. **Same.**—**Trade in fresh meat is sufficiently shown to be commerce among the States,** protected from restraint by the act of July 2, 1890 (26 Stat., 209), **by allegations** in a bill **charging meat dealers with violations of that act,** which, even if they import a technical passage of title at the slaughtering places in cases of sales, also import that the sales are to persons in other States, **and that the shipments to other States are pursuant to such sales,** and by allegations charging sales of such meat by their agents in other States, which indicate that some, at least, of the sales were in the original packages *Ib.*

8. **Same.**—A **general allegation of intent** may color and apply to all the specific charges of a bill which seeks relief against alleged violations of the Anti-Trust Act of July 2, 1890 (26 Stat., 209). *Ib.*

9. **Same.**—**Vagueness can not be asserted** of a charge in a bill seeking relief against an attempt to monopolize commerce in fresh meat among the States, in violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), that a combination exists among independent meat dealers to restrain their respective agents from bidding against each other when purchasing live stock for them in the stock yards. *Ib.*

10. **Sufficiency of Complaint—Action Under Anti-Trust Act.**—The complaint, in an action to recover damages under section 7 of the Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat., 210), which sets forth, among other things, that defendants are members of a local labor union, which is a branch of a larger organization covering several States, which in its turn is subordinate to the American Federation of Labor, which

PLEADING AND PRACTICE—Continued.

covers still other States; that defendants, by reason of such membership, were able to compel, and undertook to compel, and did compel, plaintiffs, against their will, to unionize their factory, by withdrawing from plaintiffs' employment, by preventing others from working for them, and by boycotting, with the aid of their associates, plaintiffs' goods in the hands of plaintiffs' customers in other States. *Held* sufficient on motion for correction of same. *Loewe & Co.* v. *Lawlor et al.*, 130 F., 633. 2—854

SUFFICIENCY—INJUNCTION. *See* DR. MILES MEDICAL CO. v. JAYNES DRUG CO., 149 F., 838.

11. **What Must be Shown.**—In order to maintain a suit under the Anti-Trust Act the Government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, **if such restraint is its necessary effect.** *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—649

12. **Allegations and Proofs—Means Contemplated.**—It is not incumbent upon the prosecution to prove that all the means set out in the indictment were in fact agreed upon to carry out the conspiracy, or that any of them were actually used or put in operation. It is sufficient if it be shown that one or more of the means described in the indictment were to be used to execute that purpose. *U. S.* v. *Cassidy*, 67 F., 698. 1—450

13. **Same—Overt Acts.**—While at common law it was not necessary to aver or prove an overt act in furtherance of a conspiracy, yet, under the statute relating to conspiracies to commit an offense against the United States, the doing of some act in pursuance of the conspiracy is made an ingredient of the crime, and must be established as a necessary element thereof, although the act may not be in itself criminal. *U. S.* v. *Thompson*, 31 Fed., 331, 12 Sawy., 155, cited. *Ib.*

14. **Same.**—**It is not necessary,** however, to a verdict of guilty, **that the jury should find that each and every one of the overt acts charged** in the indictment **was in fact committed;** but it is sufficient to show that one or more of these acts was committed, and that it was done in furtherance of the conspiracy. *Ib.*

15. **Allegation of Amount in Controversy.**—It is **not essential** that a bill in a Federal court should state the amount or value in controversy, **if it appears to be within the jurisdictional limit,** from the allegations of the bill, or otherwise from the record, or from evidence taken in the case before the hearing of objections to the jurisdiction. *Robinson* v. *Suburban Brick Co.*, 127 F., 804. 2—312

PLEADING AND PRACTICE—Continued.

16. **Technical Defects in Bill.—That a bill for injunction contains no prayer for process,** this being a mere technical defect, although it renders the bill demurrable, **does not affect the jurisdiction of the court or render the injunction issued thereon void.** *U. S.* v. *Agler*, 62 F., 824. **1—294**

17. **Same—Defendants not Named in Bill, nor Served with Subpœna.**—An **injunction** for such purpose becomes **binding,** as against one not named in the bill, and not served with subpœna, when the injunction order is served on him as one of the unknown defendants referred to in the bill. *Ib.*

18. **Same—Proceedings to Punish Violation.**—An information to punish violation of such an injunction order **which fails to allege** that the order was a lawful one, in the language of the statute, or that the person charged, not named in the order, was one of the unknown parties referred to therein, or that, either by his words or his acts, he was engaged in aiding the common object with other members of the alleged combination, lacks the necessary certainty. *Ib.*

19. **Multifariousness.**—**A bill setting up a claim for damages** under the Anti-Trust Law of July 2, 1890, **and also asking an injunction** restraining defendant from using complainant's trade-mark and trade name, is multifarious, as joining two distinct causes of action, having no connection with each other, and one of which is triable at law. *Block* v. *Standard Distilling & Distributing Co.*, 95 F., 978. **1—993**

20. **Multifariousness of Bill.**—A bill for relief by a minority stockholder, on behalf of himself and all other stockholders similarly situated, **to set aside an alleged unlawful transfer of the property of the corporation** in pursuance of a conspiracy between its officers and the transferee in restraint of trade and commerce; and **which also seeks the recovery of treble damages** under the Anti-Trust Act of July 2, 1890, **is multifarious,** since such damages are only recoverable in an action at law by the plaintiff as an individual, and not as a stockholder, while the equitable relief prayed for is in behalf of the corporation, and, if granted, would inure to the benefit of all the stockholders. *Metcalf* v. *Amer. School Furniture Co.*, 108 F., 909. **2—75**

21. **Indefiniteness.**—In an action by a corporation for the infringement of elevator patents, an answer alleging as a defense that the plaintiff is an unlawful combination in restraint of trade and in violation of the Sherman Anti-Trust Law (26 Stat., 209), but **which fails to state who are in the combination** in the agreement characterized as unlawful, **and does not disclose fully and in detail that the combination was entered into** after the act took effect, and all the facts necessary to show its illegality, is insufficient for indefiniteness. *Otis Elevator Co.* v. *Geiger*, 107 F., 131. **2—66**

PLEADING AND PRACTICE—Continued.

22. **Duplicity.**—A declaration in an action brought under section 7 of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 210), to recover damages for a violation of section 1 of the act, **which alleges in a single count that defendant entered into a "contract, combination, and conspiracy"** in restraint of trade, is bad for duplicity. *Rice* v. *Standard Oil Co.*, 134 F., 464. **2—633**

23. **Same.**—The Anti-Trust Act of 1890 makes a **distinction between a contract and a combination** or conspiracy in restraint of trade. *Ib.*

See also *U. S.* v. *MacAndrews & Forbes Co.*, 149 F., 824.

24. Under the practice in this country the **examination of witnesses by a Federal grand jury need not be preceded by a presentment or formal indictment,** but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committeed, and if so, they may indict upon such evidence. *Hale* v. *Henkel*, 201 U. S., 43. **2—874**

25. **In summoning witnesses it is sufficient to apprise them of the names of the parties** with respect to whom they will be called to testify without indicating the nature of the charge against them, or laying a basis by a formal indictment. *Ib.*

See also WITNESSES; AND GRAND JURY.

26. In an action against corporations for violations of the Anti-Trust Law the **books of the various defendants both before and after the alleged combination, and the contracts between them,** as well as other papers referred to in the opinion, **are all matters of material proof,** but whether material or not the testimony must be taken and **exceptions can be noted by the examiner** and the materiality of the evidence passed on by the court. *Nelson* v. *United States*, 201 U. S., 92. **2—921**

PRELIMINARY INJUNCTIONS. *See* INJUNCTIONS, 28, 31, 34.

PREPAYMENT OF FREIGHT. *See* CARRIERS.

PROCEDURE. *See* PLEADING AND PRACTICE.

PRODUCTION OF DOCUMENTS. *See* CORPORATIONS, 12–15, 17, 18, 20–23; WITNESSES, 8, 16, 20, 23; SEARCH, 2–4.

PROFIT AND LOSS. *See* DAMAGES, 3, 5.

PUBLIC POLICY.

1. **Public Policy—How Determined.**—The public policy of the nation must be determined from its constitution, laws, and judicial decisions. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. **1—186**

Case reversed, 166 U. S., 290 (1—648).

PUBLIC POLICY—Continued.

2. **Same—Interstate Commerce.**—The act of February 4, 1887, entitled "An act to regulate commerce," demonstrates the fact that from the date of the passage of that act it has been the public policy of this nation to regulate that part of interstate commerce which consists of transportation, and to so far restrict competition in freight and passenger rates between railroad companies engaged therein as shall be necessary to make such rates open, public, reasonable, uniform, and steady, and to prevent discriminations and undue preferences. *Ib.*

3. **Contracts—Public Policy.**—Freedom of contract is as essential to unrestricted commerce as freedom of competition, and one who asks the court to put restrictions upon the right to contract ought to make it clearly appear that the contract assailed is against public policy. *Ib.*

See ACTIONS AND DEFENSES, 73; COMBINATIONS, 92, 157.

PUBLISHERS. *See* COMBINATIONS, ETC., 28, 96.

PURCHASE AND SALE. *See* SALE, 4.

PROPRIETARY PATENT MEDICINES. *See* COMBINATIONS, ETC., 29, 160.

RAILROADS *See* COMBINATIONS, ETC., 100–111, 189–201.

RAILROAD EMPLOYEES. *See* COMBINATIONS, ETC., 117–133.

RATES. *See* RAILROADS.

REASONABLE DOUBT. *See* JURY, 1.

REASONABLENESS OR UNREASONABLENESS. *See* COMBINATIONS, ETC., 3, 4, 13, 48, 55, 59, 63, 79, 81, 163, 174; STATUTES, 5, 6, 13, 16, 19, 31.

REBATES. *See* ACTIONS, 49,; COMBINATIONS, ETC., 161, 162; INDICTMENTS. 3, 4.

RECEIVERS. *See* COURTS, 7; CONTEMPT, 1, 2; COMBINATIONS, ETC., 119, 122.

RECOVERY. *See* ACTIONS AND DEFENSES, 11, 13, 14, 38, 39, 41, 66.

REMEDIES.

1. **Suit by Private Individual Must Be at Law.**—The act "to protect trade and commerce against unlawful restraints and monopolies" (act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons. and the right to bring suits in equity being vested in the district attorneys of the United States. *Pidcock* v. *Harrington*, 64 F., 821. 1—377

REMEDIES—Continued.

2. **Voluntary Associations—Suspension of Members.**—Where a member of a voluntary association has been suspended by the directors for nonpayment of a fine for violation of the by-laws, his action to be restored to the privileges of membership is founded upon the contract between himself and the association, which he must either accept in its entirety or repudiate. He does not occupy the position of a stranger injured by the acts of cotrespassers. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. 1—620

See also ACTIONS AND DEFENSES.

REMOTELY. *See* INCIDENTALLY, INDIRECTLY, AND REMOTELY.

REMOVAL FROM STATE COURT. *See* COURTS, 16.

REMOVAL OF PRISONERS.

1. **From One State to Another for Trial.**—On an application to a Federal court for the removal of a resident of the district to a distant State and district for trial, it is the **duty of the court to scrutinize the indictment,** disregarding technical defects, but **to refuse the warrant if** the crime alleged is not triable in the district to which a removal is sought, or if the indictment fails to charge any offense under the law. *In re Corning*, 51 F., 203. 1—33

2. **Habeas Corpus—Jurisdiction of Circuit Courts.**—Where a prisoner, arrested under warrant based upon an indictment in a distant State and district, is held pending an application to the district court for a warrant of removal for trial, the **circuit court** of the district in which he is held **has authority on habeas corpus to examine such indictment, and to release the prisoner, if,** in his judgment, the indictment should be quashed on demurrer. *In re Terrell*, 51 F., 213. 1—46

3. **Same.—On habeas corpus** to release a person held under a warrant of a United States commissioner to await an order of the district judge for his removal to another district to answer an indictment, it is the **right and duty of the circuit court to examine the indictment to ascertain whether** it charges any offense against the United States or whether the offense comes within the jurisdiction of the court in which the indictment is pending. *In re Greene*, 52 F., 104. 1—54

RESTRAINING ORDERS. *See* INJUNCTIONS, 30.

RESTRAINT OF TRADE.

See COMBINATIONS, ETC., IN RESTRAINT OF TRADE, particularly paragraphs 1, 3–5, 7–16, 18, 20, 22, 23, 43, 48, 54–77, 79, 81, 91, 107, 108, 133–150, etc.; *and* Statutes, 5–7, 10, 11, 13, 17, 19, 21–24. 26, 28, 31, 35, 36, 43, 44, 48, 49.

RIGHT OF ACTION. *See* ACTIONS AND DEFENSES, 9, 57.

RUBBER TIRES. *See* COMBINATIONS, ETC., 99.

RULES OF LABOR UNIONS. *See* COMBINATIONS, ETC., 117.

SALE.

1. **Validity of Sale.**—The sale and transfer by a corporation of its property and good will to another corporation, where such sale was within its powers, **can not be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly** of the business and in pursuance of an illegal combination in restraint of trade. *Metcalf* v. *Amer. School Furniture Co.*, 122 F., 115. **2**—234
2. **A contract for sale of vessels,** even if they are **engaged in interstate commerce, is not necessarily void because** the **vendors agree,** as is ordinary in case of sale of a business and its good will, **to withdraw from business** for a specified period. *Cincinnati, &c., Packet Co.* v. *Bay*, 200 U. S., 170. **2**—867
3. **Contract for Sale of Goods by Member of Combination.**—The act of July 2, 1890, section 1 (26 Stat., 209), known as the "Sherman Anti-Trust Act," **does not invalidate or prevent a recovery for the breach of a collateral contract** for the manufacture and sale of goods **by a member of a combination** formed for the purpose of restraining interstate trade in such goods. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. **2**—995
4. **The transaction between the complainants and the Northern Securities Company** by which the former parted with and delivered to the latter, as a holding corporation, certain shares of the stock of the Northern Pacific Railway Company and received in exchange certain other shares of the Securities Company stock, **held to be one of purchase and sale** of the Northern Pacific stock, **and not a bailment or trust.** *Harriman* v. *Northern Securities Co.*, 197 U. S., 244. Affirming 134 F., 331 (**2**—618). **2**—669
5. **Same.**—When a **vendor** testifies that the transaction was an unconditional sale and that he attached to his negotiations no other conditions than that of price, **he is estopped from** afterwards **denying** that this is a statement of fact and claiming that he only swore to a conclusion of law. *Ib.*
6. **Same.—Property delivered under an executed illegal contract can not be recovered back** by any party *in pari delicto*, and the courts can not relax the rigor of this rule where the record discloses no special considerations of equity, justice, or public policy. *Ib.*
7. **Same.—The fact that the complainants in this case acted in good faith** and without intention to violate the law **does not exempt them from the doctrine of** *in pari delicto*. All

SALE—Continued.

the parties having supposed the statute would not be held applicable to the transaction neither can plead ignorance of the law as against the other and the defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed. *Ib.*

8. **Same.—Where a vendor after transferring shares** of railway stock to a corporation in exchange for its shares **becomes a director of the purchasing corporation** and participates in acts consistent only with absolute ownership by it of the railway stocks, **and does so after an action has been brought to declare the transaction illegal, his right to rescind the contract** and compel restitution of his original railway shares, if it ever existed, **is lost** by acquiescence and laches. *Ib.*
9. **Restriction of Sales of Goods.**—A manufacturer, a corporation, and its employee restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but refused to refrain from handling the goods of the corporation's competitors, and sued it for damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again. *Held*, the restriction of their own trade by the defendants to those purchasers who declined to deal in the goods of their competitors was **not violative of the Anti-Trust Act.** *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. **2**—271
10. **Same.—The owner of goods may dictate the prices** at which he will sell them, and the damages which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit constitute no legal injury, and are **not actionable,** because they are not the result of any breach of duty or of contract by the owner. *Ib.*

See also COMBINATIONS, ETC., 18.

SEARCH AND SEIZURE.

1. **Unreasonable Searches—Subpœna Duces Tecum—Rights of an Agent.**—A *subpœna duces tecum* commanding the secretary and treasurer of a corporation supposed to have violated the Anti-Trust Act to testify and give evidence before the grand jury, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, de-

SEARCH AND SEIZURE—Continued.

scribed generically, in effect including all the correspondence and documents of his corporation originating since the date of its organization, to which nineteen other named corporations or persons were parties, for the purpose of enabling the district attorney to establish a violation of such act on the part of the witness' principal, **constituted an unreasonable search** and seizure of papers, prohibited by Fourth Amendment to the Constitution. *In re Hale*, 139 F., 496. **2—804**

2. **Same.—A corporation charged with a violation of the Anti-Trust Act** of July 2, 1890, **is entitled to immunity** under the Fourth Amendment to the Constitution **from** such an **unreasonable search and seizure** as the compulsory production before a grand jury, **under a subpœna duces tecum, of all understandings, contracts, or correspondence** between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different States. *Hale* v. *Henkel*, 201 U. S., 43. **2—874**

3. **The search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel the production** upon a trial **of documentary evidence** through a *subpœna duces tecum*. *Ib.*

4. **The protection** against unreasonable searches and seizures afforded by the **Fourth Amendment** tothe Constitution **can not ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books** and papers in obedience to a *subpœna duces tecum*, issued in aid of an investigation by a grand jury of an alleged violation of the Anti-Trust Act of July 2, 1890, by such corporation. *Ib.*

5. **In a suit in equity** brought **by the United States to enjoin the carrying out of a contract** or combination in restraint of interstate commerce, under the act of 1890, there can be **no seizure of goods in course of transportation pursuant to the unlawful contract.** Such seizure can only be made under the sixth section of the act, which authorizes seizures and condemnation by like proceedings to those provided in cases of property imported into the United States contrary to law. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F., 271. **1—773**

SHINGLES. *See* COMBINATIONS, ETC., 32, 211, 212.

SOUTH CAROLINA DISPENSARY LAWS. *See Lowenstein* v. *Evans*, 69 F., 908 (1—598).

SPECIFIC PERFORMANCE. *See* CONTRACTS, 7.

SPECULATIVE DAMAGES. *See* DAMAGES, 2.

STATES.

1. **Right to Create Corporations—Interstate Commerce.—A State can not invest a corporation** organized under its laws **with the power to do acts** in the corporate name **which would operate to restrain interstate commerce.** *U. S.* v. *Northern Securities Co.*, 120 F., 721. **2—216**

2. **Same.—No State can, by merely creating a corporation,** or in any other mode, project its authority into other States, so as to **prevent Congress from exerting the power it possesses** under the Constitution **over interstate and international commerce,** or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce; nor can any State give a corporation created under its laws authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (Harlan, Brown, McKenna, Day). **2—341**

3. **Right to Create Corporations—Injunction in Northern Securities Case no Invasion.**—The enforcement of the provisions of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), by a Federal court decree enjoining a corporation organized in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the power acquired by such corporation by virtue of its acquisition of such stock, does not amount to an invasion by the Federal Government of the reserved rights of the States creating the several corporations. *Northern Securities Co.* v. *United States*, 193 U. S., 197 (48 L. ed., 679). **2—342**

4. **Jurisdiction of Federal Courts.—A State is not a citizen** within the meaning of the provisions of the Constitution or acts of Congress regulating the jurisdiction of the Federal courts. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2—533**

5. **Same.—A State can not maintain an action** in equity to restrain a corporation from violating the provisions of the **act of July 2, 1890, on the ground that such violations** by decreasing competition **would depreciate the value of its public lands** and enhance the cost of maintaining its public institutions, the damages resulting from such violations being remote and indirect and not such direct actual injury as is provided for in section 7 of the act. *Ib.*

STATES—Continued.

6. **State Corporations—Power of Congress.**—Congress has no authority, under the commerce clause or any other provision of the Constitution, to limit the right of a corporation created by a State in the acquisition, control, and disposition of property in the several States, and it is immaterial that such property, or the products thereof, may become the subjects of interstate commerce: and it is apparent that by the act of July 2, 1890, in relation to monopolies, Congress did not intend to declare that the acquisition by a State corporation of so large a part of any species of property as to enable the owners to control the traffic therein among the several States constituted a criminal offense. *In re Greene*, 52 F., 104. 1—55

7. **State Corporations—Interstate Commerce—Power of Congress.—Franchises of** a corporation chartered by a State are, so far as they involve questions of interstate commerce, exercised in subordination to the power of Congress to regulate such commerce. While Congress may not have general visitatorial power over State corporations, its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress. *Hale* v. *Henkel*, 201 U. S., 43. 2—874

8. **State courts** are without jurisdiction of a suit to recover damages under section 7 of the Federal **Anti-Trust Act** of 1890. *Loewe* v. *Lawlor*, 130 F., 633. 2—563

9. A State is neither a "person" nor a "corporation," within the meaning of the Anti-Trust Act of 1890, and the provisions of that act are not applicable to the case where the State by its laws assumes a monopoly of the traffic in intoxicating liquors. *Lowenstein* v. *Evans*, 69 F., 908. 1—598

10. **Where an action is brought against the officials of a State** under section 7 of the Anti-Trust Law of July 2, 1890, to recover damages for acts done under authority of a State statute which gives the State an entire monopoly of the traffic in intoxicating liquors (act S. C., Jan. 2, 1895), the State itself is a necessary party thereto, and consequently the Federal courts would have no jurisdiction of the action. *Ib.*

11. **Manufactures within a State.**—The Anti-Trust Act of 1890 has no reference to the mere manufacture or production of articles or commodities within the limits of the several States. *Northern Securities Co.* v. *United States*, 193 U. S., 197. 2—339

STATE MONOPOLIES. *See* STATES, 9.

STATUTES.

I. ANTI-TRUST ACT OF JULY 2, 1890.

1. Construction and operation—In general.

1. **Act Operates on Monopolies in Interstate Commerce, and Not Because Commodity is a Necessary of Life.**—The monopoly and restraint denounced by the act of July 2, 1890 (c. 647, 26 Stat., 209), "to protect trade and commerce against unlawful restraints and monopolies," are a monopoly in interstate and international trade or commerce, and not a monopoly in the manufacture of a necessary of life. *U. S.* v. *E. C. Knight Co.*, 156 U. S., 1. 1—379

2. **The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but seeks to reach those which directly restrain** or impair the **freedom of interstate trade.** The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity. *Chesapeake & O. Fuel Co.* v. *United States*, 115 F., 610, 624. 2—168

3. **Common Carriers Not Included Within the Statute.**—It was not the intention of Congress to include common carriers subject to the act of February 4, 1887, within the provisions of the act of July 2, 1890, which is a special statute, relating to combinations in the form of trusts and conspiracies in restraint of trade. *U. S.* v. *Trans-Mo. Ft. Assn.*, 53 F., 440. Case reversed, 166 U. S., 290 (1—648). 1—80

4. **Applies to Common Carriers by Railroads—Contracts Affecting Rates.**—The provisions respecting contracts, combinations, and conspiracies in restraint of trade or commerce among the several States or with foreign countries, contained in the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," apply to and cover common carriers by railroad; and a contract between them in restraint of such trade or commerce is prohibited, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

5. **Act Applies to All Contracts in Restraint of Interstate or Foreign Commerce—Not Confined to Unreasonable Restraints.**—The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable. *Ib.*

STATUTES—Continued.

I. Act of 1890—Continued.

6. Act Aimed at all Restraints—Reasonableness of Restraints Immaterial.—The act of Congress is aimed against all restraints of interstate commerce, and its purpose is to permit commerce between the States to flow in its natural channels, unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever. The reasonableness of the restrictions in a given case is immaterial. *U. S.* v. *Hopkins*, 82 F., 529. 1—725

Reversed, 171 U. S., 579 (1—941).

7. Test of Validity of Contract or Combination under Anti-Trust Act.—The test of the violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209, c. 647), by a contract or combination, is its effect upon competition in commerce among the States. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law, but if it promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law. *Phillips* v. *Iola Portland Cement Co.*, 125 F., 593. 2—284

8. The Sherman Act of July 2, 1890, is not intended to affect contracts which have only a remote and indirect bearing on commerce between the States. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S., 618. 2—555

9. The Anti-Trust Act of July 2, 1890 (26 Stat., 209), does not apply to a contract or combination relating to the business of manufacturing within a State. *Robinson* v. *Suburban Brick Co.*, 127 F., 804. 2—312

10. The act of July 2, 1890, commonly known as the "Anti-Trust Act," does not, and could not constitutionally, affect any monopoly or contract in restraint of trade, **unless it interferes directly and substantially with interstate commerce,** or commerce with foreign nations. *U. S.* v. *Addyston Pipe & Steel Co.*, 78 F., 712. 1—630

11. Any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce by preventing or restricting its sale thereby regulates interstate commerce to that extent, and thus trenches upon the power of the national legislature and violates the statute. *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S., 211. 1—1009

12. Effect of Anti-Trust Law upon Contracts in Restraint of Trade which at Common Law were Not Unlawful.—The effect of the Anti-Trust Law of 1890 is to render contracts in restraint of trade, as applied to interstate commerce, unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and also to create a right of civil action for damages in favor of persons injured thereby, and a remedy by injunction in favor both of private persons and the public against the execution of such contracts and the maintenance of such trade restraints. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F., 271. 1—772

STATUTES—Continued.

I. Act of 1890—Continued.

13. Test of Legality.—The Anti-Trust Act of July 2, 1890 (26 Stat., 209), declaring all contracts and combinations illegal if in restraint of trade or commerce among the States, does not leave to the courts the consideration of the question whether the restraint is or is not unreasonable and such as would have rendered the contract invalid at common law. **The only question in each case** where the validity of a contract or combination under the law is involved is **whether or not its necessary effect is to restrain interstate commerce.** *Chesapeake & Ohio Fuel Co.* v. *U. S.*, 115 F., 610. 2—151

14. Same.—The test of the violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), by a contract or combination **is its effect upon competition in commerce among the States.** If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law, but if it promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law. *Phillips* v. *Iola Portland Cement Co.*, 125 F., 593. (*See also* Combinations, etc., 9–15.) 2—284

15. Construction—Act Includes Every Combination which Directly and Substantially Restricts Interstate Commerce.—The generality of the language used in the Anti-Trust Act of 1890 (act July 2, 1890, 26 Stat., 209), declaring illegal "every contract, combination, or conspiracy in restraint of trade or commerce among the several States or with foreign nations," indicates the purpose of Congress to include in the prohibition every combination which directly and substantially restricts interstate commerce, whatever its form. *U. S.* v. *Northern Securities Co.*, 120 F., 721. 2—215

16. Same.—The Anti-Trust Act (act July 2, 1890, 26 Stat., 209) **applies to interstate carriers of freight and passengers,** and any contract or combination which directly and substantially restricts the right of such a carrier to fix its own rates, independently of its natural competitors, places a direct restraint upon interstate commerce, in that it tends to prevent competition, and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable. *Ib.*

17. Same.—The Anti-Trust Act of July 2, 1890, **embraces and declares to be illegal every contract, combination, or con-**

STATUTES—Continued.

I. Act of 1890—Continued.

spiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations. *Northern Securities Co.* v. *United States*, 193 U. S., 197. (Harlan, Brown, McKenna, Day.) 2—339

18. That act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States. *Ib.*

19. The act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy, or monopoly upon such trade or commerce. *Ib.*

20. Railroad carriers engaged in interstate or international trade or commerce are embraced by the act. *Ib.*

21. Combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained, are equally embraced by the act. *Ib*

22. Every combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act. *Ib.*

23. The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce. *Ib.*

24. The act of July 2, 1890, was leveled, as appears by its title, at only unlawful restraints and monopolies. Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. *Northern Securities Co.* v. *United States*, 193 U. S., 197. (Brewer, concurring.) 2—341

25. The general language of the act is limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. *Ib.*

26. In determining whether or not a combination is in violation of the Federal Anti-Trust Law, as in restraint of interstate commerce, it is immaterial that such is not its ultimate object, which is in most cases to increase the trade and profits of the parties to such combination; nor is it material to ascertain what proportion the resulting restraint of interstate commerce bears to other results. The true inquiry is whether it tends directly to appreciably restrain interstate trade, and, if it does, it is within the statute, although such effect may not be so considerable as its other effects. *Ellis* v. *Inman, Poulsen & Co.*, 131 F., 182. 2—577

STATUTES—Continued.

I. Act of 1890—Continued.

27. The statute under review (act of July 2, 1890) is a legitimate exercise of the power of Congress over interstate commerce, and a valid regulation thereof. *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505. 1—869

28. Section 1 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), makes a distinction between a contract and a combination or conspiracy in restraint of trade. *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633

29. The Interstate Commerce Act and the act known as the "Sherman Anti-Trust Law" are separate and independent acts, not germane in character and purpose; and therefore jurisdiction in the circuit court of the United States over a bill in equity to enjoin a railroad company from granting rebates to favored shippers can not be maintained upon the ground that such act of the railroad company is a monopoly within the meaning of the second section of said Anti-Trust Act (act July 2, 1890, 26 Stat., 209). *United States* v. *Atchison, T. & S. F. Ry. Co.*, 142 F., 176. 2—831

30. Acts done under an agreement legal when made, but which became illegal on the passage of the act of July 2, 1890, are done in violation of that act. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—669

31. The statute has no concern with prices, but looks solely to competition and to the giving of competition full play by making illegal any effort at restriction upon competition. Restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination averred, nor is it to be tested by the prices that result from the combination. *U. S.* v. *Swift & Co.*, 122 F., 529. 2—237

32. The Anti-Trust Act should have a reasonable construction—one which tends to advance the remedy it provides and to abate the mischief at which it was leveled. *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

33. Scope of the Statute.—The words "trade" and "commerce," as used in the Anti-Trust Act of 1890, are synonymous. The use of both terms in the first section does not enlarge the meaning of the statute beyond that employed in the common-law expression "contract in restraint of trade," as they are analogous to the word "monopolize," used in the second section of the act. *U. S.* v. *Patterson*, 55 F., 605. 1—133

34. Same.—The word "monopolize" is the basis and limitation of the statute, and hence an indictment must show a conspiracy

STATUTES—Continued.

I. Act of 1890—Continued.

in restraint by engrossing or monopolizing or grasping the market. It is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise. *Ib.*

35. **Scope of the Statute—Conspiracy.**—The act of July 2, 1890 (26 Stat., 209), section 1, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy" in restraint of trade or commerce among the States or with foreign nations, **is not aimed at capital merely and combinations of a contractual nature**, which by force of the title, "An act to protect trade and commerce against unlawful restraints and monopolies," are limited to such as the courts have declared unlawful, the words "in restraint of trade" having, in connection with the words "contract" and "combination," their common-law significance, but the term "conspiracy" is used in its well-settled legal meaning, so that **any restraint of trade or commerce, if to be accomplished by conspiracy**, is unlawful. *U. S.* v. *Debs*, 64 F., 724. 1—322

36. **Same—Construction.**—The construction of the statute is not affected by the use of the phrase "**in restraint of trade**," rather than one of the phrases "to injure trade" or "to restrain trade." *Ib.*

37. **Same.—The word "commerce,"** in the statute, **is not synonymous with "trade,"** as used in the common-law phrase "restraint of trade," but has the meaning of the word in that clause of the Constitution which grants to Congress power to regulate interstate and foreign commerce. *Ib.*

38. **Supreme Court Does Not Dissent from Conclusions in U. S. v. Debs.**—The court enters into no examination of the act of July 2, 1890 (26 Stat., 209), on which the circuit court mainly relied to sustain its jurisdiction; but it must not be understood that it dissents from the conclusions of that court in reference to the scope of that act, but simply that it prefers to rest its judgment on the broader ground discussed in its opinion, believing it important that the principles underlying it should be fully stated and fully affirmed. *In re Debs*, 158 U. S., 564. 1—565

39. **While the primary object** of the Anti-Trust Act of 1890 was doubtless **to prevent the destruction of** legitimate and healthy **competition in interstate commerce** by the engrossing and monopolizing of the markets for commodities, yet **its provisions are broad enough to reach a combination or conspiracy that will interrupt the transportation** of such commodities and persons **from one State to another.** *U. S.* v. *Workingmen's Amalgamated Council*, 54 F., 995, cited. *U. S.* v. *Cassidy*, 67 F., 698. 1—452

STATUTES—Continued.

I. Act of 1890—Continued.

Section 1.

40. **Conspiracy in Restraint of Interstate Commerce.—A combination by railroad employees to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers,** and to induce persons to leave the service of such railroads, is within act of July 2, 1890, section 1, which provides that every contract, combination in the form of trust or otherwise, "or conspiracy in restraint of trade or commerce" among the States is illegal. *U. S.* v. *Elliott*, 64 F., 27. 1—311

41. **Same.**—Act of July 2, 1890 (26 Stat., 209), section 1, **is not aimed at capital merely and combinations of a contractual nature**, which by force of the title, "An act to protect trade and commerce against unlawful restraints and monopolies," are limited to such as the courts have declared unlawful. *U. S.* v. *Debs*, 64 F., 724. 1—322

42. **Same.—The term "conspiracy"** in section 1 of the act of July 2, 1890 (26 Stat., 209), **is used in its well-settled legal meaning, so that any restraint of interstate trade or commerce, if accomplished by conspiracy, is unlawful.** *Ib.*

43. **What Contracts, Combinations, or Conspiracies Violate Anti-Trust Act.**—Every contract, combination or conspiracy **the necessary effect of which is to stifle or to directly and substantially** restrict competition in commerce among the States is in restraint of interstate commerce, and violates section 1 of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

44. **What Acts, Contracts, and Combinations Do Not Violate Anti-Trust Act.**—Acts, contracts, and combinations which **promote, or only incidentally or indirectly restrict,** competition in commerce among the States, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce or violative of section 1 of the act of July 2, 1890 (26 Stat., 209). *Ib.*

45. **Section 1** of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209), **makes a distinction between a contract and a combination or conspiracy** in restraint of trade. *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633

46. **Contract for Sale of Goods by Member of Combination.**—The act of July 2, 1890, section 1 (26 Stat., 209), known as the "Sherman Anti-Trust Act," **does not invalidate or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination**

STATUTES—Continued.

I. Act of 1890—Continued.

formed for the purpose of restraining interstate trade in such goods. *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F., 242. **2—995**

See also Indictments, 5.

Section 2.

47. Monopolies.—To constitute the offense of "monopolizing, or attempting to monopolize," trade or commerce among the States, within the meaning of section 2 of the Anti-Trust Act of 1890, it is necessary to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engaging therein. *In re Greene*, 52 F., 104. **1—55**

48. Every attempt to monopolize a part of interstate commerce, the necessary **effect of which is to stifle or to directly and substantially restrict** competition in commerce among the States, **violates section 2** of the act of July 2, 1890 (26 Stat., 209). *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. **2—271**

49. Same.—Attempts to monopolize a part of commerce among the States **which promote, or only incidentally or indirectly restrict,** competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were **not, made illegal or punishable** by section 2 of the Anti-Trust Act of July 2, 1890 (c. 647, 26 Stat., 209), because such attempts are indispensable to the existence of any competition in commerce among the States. *Ib.*

See also Indictments, 1; Monopoly.

Section 4.

50. Power of Congress to Authorize Injunction.—Act of July 2, 1890, section 4, which provides that the circuit courts of the United States have jurisdiction to restrain combinations and conspiracies to obstruct and destroy interstate commerce, before such objects are accomplished, is not void for want of power in Congress to authorize such proceedings. *U. S.* v. *Elliott*, 64 F., 27. **1—311**

51. Government Has Power to Bring Suit.—The fourth section of the act of 1890 invests the Government with full power and authority to bring suit against the Trans-Missouri Freight Association; and, if the facts alleged are proved, an injunction should issue. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. **1—649**

52. Who May Sue to Restrain.—The intention of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public.

STATUTES—Continued.

I. Act of 1890—Continued.

or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, **to those instituted in the name of the United States,** under section 4 of the act, **by district attorneys** of the United States, acting under the direction of the **Attorney-General;** thus securing the enforcement of the act, so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. *Minnesota* v. *Northern Securities Co.*, 194 U. S., 48. **2—533**

53. The right to bring suits for injunction under section 4 of the act of July 2, 1890 (26 Stat., 290), is limited to suits instituted on behalf of the **Government.** *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. **1—620**

54. Although the act of July 2, 1890, contains criminal provisions, the **Federal court has power under section 4** of the act **in a suit in equity to prevent and restrain violations of the act,** and may mold its decree so as to accomplish practical results such as law and justice demand. *Northern Securities Co.* v. *United States*, 193 U. S., 197. **2—339**

55. Restraining Order—Notice.—Under section 4 of the Anti-Trust Law of July 2, 1890, a restraining order **may be issued without notice,** under the circumstances sanctioned by the established usages of equity practice in other cases. *U. S.* v. *Coal Dealers' Assn. of Cal.*, 85 F., 252. **1—749**

56. Injunction.—A combination whose professed object is **to arrest the operation of the railroads** whose lines extend from a great city into adjoining States **until such roads accede to certain demands** made upon them, whether such demands are in themselves reasonabe or unreasonabe, just or unjust, is an unlawful conspiracy in restraint of trade and commerce among the States, within the act of July 2, 1890, and acts threatened in pursuance thereof **may be restrained by injunction under section 4** of the act. *U. S.* v. *Elliott*, 62 F., 801. **1—262**

See also Injunctions, 9, 16, 17, 21.

Section 5.

57. Injunction Order—Persons Not Named in Bill.—Under act of July 2, 1890, section 5, an injunction order in an action to enjoin an illegal conspiracy against interstate commerce may provide that it shall be in force on defendants not named in the bill, but who are within the terms of the order, where it also provides that it is operative on all persons acting in concert with the designated conspirators, though not named in the writ, after the commission of some act by

STATUTES—Continued.

I. Act of 1890—Continued.

them in furtherance of the conspiracy, and service of the writ on them. *U. S.* v. *Elliott*, 64 F., 27. 1—311

58. **The authority** given by section 5 of the act of July 2, 1890 (26 Stat., 290), **to bring in nonresidents of the district can not be availed of in private suits**, and the court can acquire no jurisdiction over them. *Greer, Mills & Co.* v. *Stoller*, 77 F., 1. 1—620

See also Injunctions, 18.

Section 6.

59. **Forfeiture of Property.**—The provision of act of July 2, 1890, section 6, for forfeiture of "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in this act, and being in the course of transportation from one State to another or to a foreign country," does not imply that only cases in which property shall be found subject to forfeiture shall be deemed within the scope of the act. *U. S.* v. *Debs*, 64 F., 724. 1—322

60. **Seizure of goods in course of transportation pursuant to the unlawful contract can only be made under the sixth section** of the act of 1890, which authorizes seizures and **condemnation** by like proceedings to those provided in cases of property imported into the United States contrary to law. *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F., 271. 1—773

61. **There can be no such seizure** in a **suit in equity** brought by the United States under the act of 1890 to enjoin the carrying out of a contract or combination in restraint of interstate commerce. *Ib.*

Section 7.

62. **Necessary Parties—Jurisdiction of Federal Courts.**—Where a person brings an **action** under section 7 of the Anti-Trust Law of July 2, 1890, **against the officials of a State** to recover damages for acts done under authority of a State statute which gives the State an entire monopoly of the traffic in intoxicating liquors (act S. C., Jan. 2, 1895), **the State itself is a necessary party thereto**, and consequently the Federal courts would have no jurisdiction of the action. *Lowenstein* v. *Evans*, 69 F., 908. 1—598

63. **A municipal corporation** engaged in **operating water, lighting, or similar plants**, from which a revenue is derived, is, in relation to such matters, a business corporation, and **may maintain an action under section 7** of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), for injury to its business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F., 23. Affirmed, 203 U. S., 390. 2—299

STATUTES—Continued.

I. Act of 1890—Continued.

64. **Same—Who Liable.—Every member of such an illegal combination** is liable for the injury resulting to the business or property of a plaintiff by reason of such combination, regardless of any contract relation between the plaintiff and defendant. *Ib.*

65. **Does Not Authorize an Action for Damages by Party to the Trust.**—Section 7 of the Anti-Trust Act (26 Stat., 209), giving to any person injured by any other person or corporation by reason of anything forbidden in the act the right to recover treble damages, does not authorize an action against an alleged trust corporation by one who was a party to its organization **and a stockholder therein** to recover damages resulting from the enforcement by defendant of rights given it by the alleged unlawful agreement. *Bishop* v. *American Preservers Co.*, 105 F., 845. 2—51

Affirming 51 F., 272 (1—49).

66. For an **action for recovery** under this section brought under this section **against an association of manufacturers** of and dealers in tiles, mantels, and grates, **where the party suing was not a member of the association**, and the sales were made within the State, *see Montague* v. *Lowry*, 193 U. S., 38. 2—327

67. **Attorneys' Fees.**—**The discretion of the trial court** under the Anti-Trust Act of July 2, 1890 (26 Stat., 209), section 7, to allow a reasonable attorney's fee to the successful plaintiff in an action brought under that section to recover damages for a violation of the provisions of that act against combinations in restraint of trade, is not abused by an allowance of $750, although the verdict was for but $500, where the trial took five days, and from the proof offered it appeared that from $750 to $1,000 would be a reasonable sum. *Ib.*

68. A **recovery of the treble damages** authorized by the Sherman Anti-Trust Act of July 2, 1890, section 7 (26 Stat., 209), in case of injury sustained by violation of the act, **can be had only by direct action, and not by way of set-off** in an action brought for the price of goods by a company illegally formed in violation of the act, especially when the State practice does not permit the set-off of unliquidated damages. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540. 2—118

69. A **declaration** in a suit based on section 7 of the Anti-Trust Act of 1890 (26 Stat., 210), to recover damages resulting to plaintiff from a violation of such provision, **which alleges in a single count that defendant entered into a "contract, combination, and conspiracy"** in restraint of trade, **is bad for duplicity.** *Rice* v. *Standard Oil Co.*, 134 F., 464. 2—633

70. **The pendency of a suit in a State court can not be pleaded in abatement** of an action in a circuit court of the United

STATUTES—Continued.

I. Act of 1890—Continued.

States to recover treble damages under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), since the State court is without jurisdiction to enforce the remedy given by said section, and therefore the same case can not be depending in both courts. *Loewe* v. *Lawlor*, 130 F., 633. **2—563**

71. **Limitation.**—An action under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States, * * * and shall recover threefold the damages by him sustained," is **not an action for a penalty or forfeiture within Revised Statutes, section 1047**, prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but one for the enforcement of a civil remedy for a private injury, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, and **such action is governed as to limitation by the statutes of the State in which it is brought.** *City of Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 F., 900. **2—11**

Affirmed, 127 F., 23 (**2**—299).

Affirmed, 203 U. S., 390.

For Combinations, etc., prohibited, *see* Combinations, Conspiracies, Contracts, etc., in Restraint of Trade, II.

For Combinations, etc., not within the Statute, *see* Combinations, Conspiracies, Contracts, etc., in Restraint of Trade, III.

For Actions, Defenses, or Parties, *see* Actions and Defenses; and Parties.

For Jurisdiction of Federal Courts, *see* Courts.

For Damages, *see* Actions and Defenses, 21–42; and Damages.

II. Immunity Statutes.

Act of February 11, 1893.

72. **Immunity of Witnesses.**—Act of February 11, 1893 (27 Stat., 443), providing that no person shall be excused from testifying in a proceeding growing out of an alleged violation of an act to regulate interstate commerce, approved February 4, 1887, on the ground that his testimony will tend to incriminate him, and that no person shall be prosecuted, etc., on account of anything concerning which he may testify in such proceeding, applies only to proceedings connected with the act of February 4, 1887, and **does not apply to a prosecution for violation of the act of July 2, 1890** (26 Stat., 209), **so as to abrogate in relation thereto the Fifth Amendment to the Constitution**, providing that no person shall be compelled in a criminal case to be a witness against himself. *Foot* v. *Buchanan*, 113 F., 156. **2—104**

STATUTES—Continued.

II. Immunity Statutes—Continued.

73. The act of February 11, 1893 (27 Stat., 443), which is **supplementary to the Interstate Commerce Act**, provides that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpœna * * * or in any such case or proceeding." *U. S.* v. *Armour & Co.*, 142 F., 808. **2—951**

Act of February 19, 1903.

74. **Immunity of Witnesses—Anti-Trust Act—Inquisitions.**—An inquisition before a grand jury to determine the existence of supposed violations of the Anti-Trust Act was a "proceeding" within act of Congress, February 19, 1903 (ch. 708, 32 Stat., 848), providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding" under several statutes mentioned, including such Anti-Trust Act. *In re Hale*, 139 F., 496. **2—804**

Act of February 25, 1903.

75. **The examination of witnesses before a grand jury concerning an alleged violation of the Anti-Trust Act of July 2, 1890** (26 Stat., 209), **is a "proceeding" within** the meaning of the **proviso to the act of February 25, 1903** (32 Stat., 854–903), that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-Trust Act is one. *Hale* v. *Henkel*, 201 U. S., 43. **2—874**

76. **The right of a witness to claim his privilege against self-incrimination**, afforded by the Fifth Amendment to the Constitution, when examined concerning an alleged violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), **is taken away by the proviso to the act of February 25, 1903** (32 Stat., 904), that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may tes-

STATUTES—Continued.

II. Immunity Statutes—Continued.

tify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-Trust Act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the State courts for the offense disclosed. [*See* also *Nelson* v. *United States*, 201 U. S., 92 (2—920).] *Ib.*

77. **Immunity Provision.**—The appropriation act of February 25, 1903 (32 Stat., 904), making provision for the enforcement of the Interstate Commerce and Anti-Trust Laws, contains an immunity provision relating to persons giving testimony or producing evidence in any proceeding, suit, or prosecution under said laws. *U. S.* v. *Armour & Co.*, 142 F., 808. 2—952

III. Commerce and Labor Act.

Act of February 14, 1903.

78. **The primary purpose of Commerce and Labor Act** of February 14, 1903 (32 Stat., 825), was legislative, to enable Congress, by information secured through the work of officers charged with the execution of that law to pass such remedial legislation as might be found necessary, and the act must be construed in view of such purpose. *United States* v. *Armour & Co.*, 142 F., 808. 2—951

79. **Commissioner of Corporations—Investigation of Corporations or Combinations.—Section 6 of that act** (32 Stat., 827), defining the powers and duties of the Commissioner of Corporations, requiring him to make investigation into the organization, conduct, and management of the business of all corporations or combinations engaged in interstate or foreign commerce other than common carriers, and giving him the same powers in that respect as is conferred on the Interstate Commerce Commission with respect to carriers, including the power to subpœna and compel the attendance of witnesses, and to administer oaths and require the production of documentary evidence, **contemplates that he shall proceed by private hearings; and, having such powers, a person who appears** before him on his demand or by his request, and gives testimony or produces documents, **although not sworn, is entitled to the same privileges and immunities as though** his attendance was **compelled by subpœna** and his testimony given under oath. *Ib.*

80. **Same—Immunity.—Section 6** (32 Stat., 827) requires the Commissioner of Corporations to investigate all corporations and combinations engaged in interstate or foreign commerce, except common carriers, and provides that "all the requirements, obligations, liabilities, and **immunities** imposed or

STATUTES—Continued.

III. Commerce and Labor Act—Continued.

conferred by said 'Act to regulate commerce' and by 'An act in relation to testimony before the Interstate Commerce Commission' * * * **shall also apply to all persons who may be subpœnaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section."** *Ib.*

IV. Interstate Commerce Act.

Act of February 4, 1887.

81. **Public Policy.**—The act of February 4, 1887, entitled "An act to regulate commerce," demonstrates the fact that from the date of the passage of that act it has been the public policy of this nation **to regulate that part of interstate commerce which consists of transportation, and to so far restrict competition in freight and passenger rates** between railroad companies engaged therein as shall be necessary to make such rates open, public, reasonable, uniform, and steady and to prevent discriminations and undue preferences. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186
Case reversed, 166 U. S., 290 (1—648).

82. **Not Inconsistent with Anti-Trust Act.**—The act of February 4, 1887 (24 Stat., 379), "to regulate commerce," is not inconsistent with the act of July 2, 1890, as it does not confer upon competing railroad companies power to enter into a contract in restraint of trade and commerce, like the one which forms the subject of this suit. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

83. **Express Companies.**—The Interstate Commerce **Act does not apply** to independent express companies not operating railway lines. *Southern Ind. Exp. Co.* v. *U. S. Exp. Co.*, 88 F., 659. 1—862

V. Revised Statutes.

84. **Section 725.**—Where an **injunction** had been issued and served upon the defendants, **the circuit court had authority to inquire whether its orders had been disobeyed,** and when it found that they had been disobeyed, to proceed under Revised Statutes, section 725, and to enter the order of **punishment** complained of. *In re Debs*, 158 U. S., 564. 1—566

85. **Section 1047.—An action under section 7 of the Anti-Trust Act of July 2, 1900** (26 Stat., 209), to recover threefold the damages, **is not an action for a penalty or forfeiture,** within Revised Statutes, section 1047, prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," **but one for the enforcement of a civil**

STATUTES—Continued.

V. REVISED STATUTES—Continued.

remedy for a private injury, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the State in which it is brought. *Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 F., 900. 2—11

Affirmed, 127 F., 23 (2—299).

Affirmed, 203 U. S., 390.

86. **Section 3995.—Obstructing the Mails.**—Although the law, which now appears in Revised Statutes, section 3995, and which makes it an offense to obstruct and retard the passage of the United States mails, was originally passed prior to the introduction into the United States of the method of transporting mail by railroads, and the phraseology of the law conforms to conditions prevailing at that time (Mar. 3, 1825), yet it is equally applicable to the modern system of conveyance and protects alike the transportation of the mail by the "limitel express" and by the old-fashioned stage-coach. *U. S.* v. *Cassidy*, 67 F., 698. 1—449

87. **Same.—The statute applies to all persons who "knowingly and willfully" obstruct** and retard the passage of the mails or the carrier carrying the same; that is, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the mail, and who perform the acts with the intent that such shall be their operation. *U. S.* v. *Kirby*, 7 Wall., 485, cited. *Ib.*

88. **Same.—The statute also applies to persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing** and retarding the passage of the mails. In such case, an intent to obstruct and retard the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S.* v. *Kirby*, 7 Wall., 485, cited. *Ib.*

89. **Section 5440—Conspiracy.**—Construing several clauses of the interstate commerce law recited in the opinion with section 5440 of the Revised Statutes, it follows that **a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate commerce law,** inhibiting discriminations in the transportation of freight and passengers, **and further to restrain the trade or commerce of the country, will be obnoxious to the penalties therein prescribed.** *Waterhouse* v. *Comer*, 55 F., 149. 1—119

STATUTES—Continued.

V. REVISED STATUTES—Continued.

90. **Same.—The statute** relating to conspiracies to commit offenses against the United States (Rev. Stat., sec. 5440) **contains three elements which are necessary to constitute the offense.** These are: (1) The act of two or more persons conspiring together; (2) to commit any offense against the United States; (3) the overt act, or the element of one or more of such parties doing any act to effect the object of the conspiracy. *U. S.* v. *Cassidy*, 67 F., 698. 1—449

VI. State Laws.

91. **The anti-trust law of Minnesota** (Laws **1899**, p. 487, c. 359), making unlawful any contract or combination in restraint of trade or commerce within the State, **is in substantially the same language as the Sherman Anti-Trust Law of July 2, 1890** (26 Stat., 209), **and must receive a similar construction.** *Minnesota* v. *Northern Securities Co.*, 123 U. S., 692. 2—246

Decision reversed, 194 U. S., 38. Circuit court had no jurisdiction (2—533).

STATUTORY CONSTRUCTION.

1. **When Congress adopts or creates a common-law offense, the courts may properly look to the common law for the true meaning** and definition thereof, in the absence of a clear definition in the act creating it. *In re Greene*, 52 F., 104. 1—55

2. **Where Congress adopts or creates a common-law offense,** and in doing so uses terms which have acquired a well-understood meaning by judicial interpretation, the presumption is that the terms were used in that sense, and **courts may properly look to prior decisions interpreting them** for the meaning of the terms and the definition of the offense where there is no other definition in the act. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186

3. **Every statute must be read in the light of the general laws upon the same subject** in force at the time of its enactment. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58. 1—186

4. **The Anti-Trust Act should have a reasonable construction**—one which tends to advance the remedy it provides, and to abate the mischief at which it was leveled. *Whitwell* v. *Continental Tobacco Co.*, 125 F., 454. 2—271

5. **Debates in Congress are not appropriate sources of information** from which to discover the meaning of the language of a statute passed by that body. *U. S.* v. *Trans-Mo. Ft. Assn.*, 166 U. S., 290. 1—648

STOCK AND STOCKHOLDERS. *See* CORPORATIONS, 2–11; COMBINATIONS, 177–182.

STATUTES—Continued.

V. REVISED STATUTES—Continued.

remedy for a private injury, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the State in which it is brought. *Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 F., 900. **2—11**

Affirmed, 127 F., 23 (**2—299**).

Affirmed, 203 U. S., 390.

86. Section 3995.—Obstructing the Mails.—Although the law, which now appears in Revised Statutes, section 3995, and which makes it an offense to obstruct and retard the passage of the United States mails, was originally passed prior to the introduction into the United States of the method of transporting mail by railroads, and the phraseology of the law conforms to conditions prevailing at that time (Mar. 3, 1825), yet it is equally applicable to the modern system of conveyance and protects alike the transportation of the mail by the "limitel express" and by the old-fashioned stage-coach. *U. S.* v. *Cassidy*, 67 F., 698. **1—449**

87. Same.—**The statute applies to all persons who "knowingly and willfully" obstruct** and retard the passage of the mails or the carrier carrying the same; that is, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the mail, and who perform the acts with the intent that such shall be their operation. *U. S.* v. *Kirby*, 7 Wall., 485, cited. *Ib.*

88. Same.—**The statute also applies to persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing** and retarding the passage of the mails. In such case, an intent to obstruct and retard the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S.* v. *Kirby*, 7 Wall., 485, cited. *Ib.*

89. Section 5440—Conspiracy.—Construing several clauses of the interstate commerce law recited in the opinion with section 5440 of the Revised Statutes, it follows that **a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate commerce law,** inhibiting discriminations in the transportation of freight and passengers, **and further to restrain the trade or commerce** of the country, will be obnoxious to the penalties therein prescribed. *Waterhouse* v. *Comer*, 55 F., 149. **1—119**

STATUTES—Continued.

V. REVISED STATUTES—Continued.

90. Same.—**The statute** relating to conspiracies to commit offenses against the United States (Rev. Stat., sec. 5440) **contains three elements** which are **necessary to constitute the offense.** These are: (1) The act of two or more persons conspiring together; (2) to commit any offense against the United States; (3) the overt act, or the element of one or more of such parties doing any act to effect the object of the conspiracy. *U. S.* v. *Cassidy*, 67 F., 698. **1—449**

VI. State Laws.

91. The anti-trust law of Minnesota (Laws **1899**, p. 487, c. 359), making unlawful any contract or combination in restraint of trade or commerce within the State, **is in substantially the same language as the Sherman Anti-Trust Law** of July 2, 1890 (26 Stat., 209), **and must receive a similar construction.** *Minnesota* v. *Northern Securities Co.*, 123 U. S., 692. **2—246**

Decision reversed, 194 U. S., 38. Circuit court had no jurisdiction (**2—533**).

STATUTORY CONSTRUCTION.

1. When Congress adopts or creates a common-law offense, the **courts may properly look to the common law for the true meaning** and definition thereof, in the absence of a clear definition in the act creating it. *In re Greene*, 52 F., 104. **1—55**

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STOCK AND STOCKHOLDERS. *See* CORPORATIONS, 2–11; COMBINATIONS, 177–182.

STOCK QUOTATIONS. *See* COMBINATIONS, 177–180.

STRIKES. *See* COMBINATIONS, ETC., 115, 116, 121–127, 132, 133, 213.

SUBPŒNA DUCES TECUM. *See* CORPORATIONS, 12–15; COURTS, 22.

SUGAR. *See E. C. Knight Co. case*, Vol. I, pages 250, 258, 379.

SUIT. *See* ACTIONS AND DEFENSES.

TELEGRAMS AND TELEPHONE MESSAGES. *See* INTERSTATE COMMERCE, 33.

TESTIMONY. *See* WITNESSES.

THROUGH TRANSPORTATION. *See* CARRIERS.

TICKET BROKERS. *See* COMBINATIONS, ETC., 111.

TILES. *See* COMBINATIONS, 33–37.

TOBACCO TRUST CASES.

Whitwell v. *Continental Tobacco Co.*, 125 F., 454 (2—271).
In re Hale, 139 F., 496 (2—804).
Hale v. *Henkel*, 201 U. S., 43 (2—874).
McAlister v. *Henkel*, 201 U. S., 61 (2—918).

TRANSPORTATION. *See* CARRIERS; AND STATUTES, 81.

TREBLE DAMAGES. *See* ACTIONS AND DEFENSES 21–42; STATUTES, 62–71.

TRINIDAD ASPHALT. *See* COMBINATIONS, ETC., 214–216.

TRUSTS. *See* WORDS AND PHRASES.

UNITED STATES.

The Government of the United States has jurisdiction over every foot of soil within its territory, and acts directly upon each citizen. *In re Debs*, 158 U. S., 564. 1—565

See also ACTIONS AND DEFENSES, 15–18.

UNREASONABLE SEARCHES. *See* SEARCH AND SEIZURE.

WAGES, ETC., OF EMPLOYEES. *See* COURTS, 8.

WALL PAPER TRUST. *See* CONTINENTAL WALL PAPER CO. *v.* LEWIS VOIGHT & SONS CO., 148 F., 939.

WITNESSES.

1. **Incriminating Evidence—Protection—Constitution—Statute.**—A witness before the grand jury can not be required, under the Fifth Amendment to the Constitution, to answer as to his participation in and knowledge of a combination to regulate and control the price of cotton seed and the product and price of oil throughout certain States, in violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat., 209), notwithstanding

WITNESSES—Continued.

section 860, Revised Statutes, providing that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court in any criminal proceeding, since such section does not exempt the witness from prosecution for the offense which may be disclosed by his testimony. *Foot* v. *Buchanan*, 113 F., 156. 2—103

2. **Same—Immunity of Witnesses.—Act of February 11, 1893** (27 Stat., 443), providing that no person shall be excused from testifying in a proceeding growing out of an alleged violation of an act to regulate interstate commerce, approved February 4, 1887, on the ground that his testimony will tend to incriminate him, and that no person shall be prosecuted, etc., on account of anything concerning which he may testify in such proceeding, applies only to proceedings connected with the act of February 4, 1887, and **does not apply to a prosecution for violation of the act of July 2, 1890** (26 Stat., 209), **so as to abrogate** in relation thereto **the Fifth Amendment to the Constitution**, providing that no person shall be compelled in a criminal case to be a witness against himself. *Ib.*
3. **Same—Question of Incrimination for Judge to Decide.**—Where a witness claims that the answer to a question will tend to incriminate him, it is not for the witness, but for the judge, to decide whether, under all the circumstances, such might be the effect, and the witness entitled to the privilege of silence. *Ib.*
4. **Same.—Where a person has already been indicted for an offense about which he is to be examined** as a witness, and the questions asked him tend to connect him with such offense, the testimony sought is within the inhibition of the Fifth Amendment to the Constitution, providing that no person shall be compelled in any criminal case to be a witness against himself.
5. **Same—Assurance of Safety—Relinquishment of Privilege—Can Not Be Compelled.**—Where a witness before a grand jury declines to answer certain questions, and is taken before the judge, who assures him that he can safely answer, as his testimony can not be used against him, he is not compelled by such assurance to relinquish his constitutional privilege where the answer may tend to criminate him. *Ib.*
6. **Same — Contempt — Commitment — Habeas Corpus — Relief.**—Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on habeas corpus because some of the questions might be safely answered. *Ib.*

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WITNESSES—Continued.

7. **Immunity of Witnesses—Anti-Trust Act—Inquisitions.**—An inquisition before a grand jury to determine the existence of supposed violations of the Anti-Trust Act was a "proceeding" within act of Congress of February 19, 1903 (32 Stat., 848), providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding" under several statutes mentioned, including such Anti-Trust Act. *In re Hale*, 139 F., 496. 2—804

8. **Same—Unreasonable Searches—Rights of an Agent—Subpœna Duces Tecum.**—A subpœna duces tecum commanding the secretary and treasurer of a corporation supposed to have violated the Anti-Trust Act to testify and give evidence before the grand jury, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, described generically, in effect including all the correspondence and documents of his corporation originating since the date of its organization, to which nineteen other named corporations or persons were parties, for the purpose of enabling the district attorney to establish a violation of such act on the part of the witness' principal, constituted an unreasonable search and seizure of papers, prohibited by the Fourth Amendment to the Constitution. *Ib.*

9. **Same—Habeas Corpus.**—Where a subpœna duces tecum was directed to be issued by a circuit judge, and the witness was committed for contempt for failure to obey the same, he **would not be discharged on habeas corpus by another judge of the same court**, though the latter was of the opinion that the subpœna authorized an unconstitutional search and seizure of private papers. *Ib.*

10. **Protection of Witness—Act of February 25, 1903** (32 Stat, 905).—**The examination of witnesses before a grand jury concerning an alleged violation of the Anti-Trust Act** of July 2, 1890 (26 Stat., 209), **is a "proceeding" within the meaning of the** proviso to the **act of February 25, 1903** (32 Stat., 903), that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-Trust Act is one. **The word "proceeding" should receive as wide a construction as is necessary to protect the witness** in his disclosures. *Hale* v. *Henkel*, 201 U. S., 43. 2—874

11. **The constitutional right of a witness to claim his privilege against self-incrimination**, afforded by the Fifth Amendment,

WITNESSES—Continued.

when examined concerning an alleged violation of the Anti-Trust Act of July 2, 1890 (26 Stat., 209), **is taken away by the proviso to the act of February 25, 1903** (32 Stat., 904), that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-Trust Act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the State courts for the offense disclosed. [*See* also *Nelson* v. *United States*, 201 U. S., 92 (2—920).] *Ib.*

12. The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, and does not apply if the criminality is taken away. A **witness is not excused from testifying** before a grand jury under a statute which provides for immunity, **because he may not be able, if subsequently indicted, to procure the evidence necessary to maintain his plea.** The law takes no account of the practical difficulty which a party may have in procuring his testimony. *Ib.*

13. **The difficulty, if any, of procuring the testimony which a person has given on his examination** before a grand jury concerning an alleged violation of the Anti-Trust Act of July 2, 1890, **does not render the immunity from prosecution, or forfeiture,** given by the proviso to the act of February 25, 1903, **insufficient** to satisfy the guaranty of the Fifth Amendment against self-incrimination. *Ib.*

14. **A witness can not refuse to testify** before a Federal grand jury in face of a Federal statute granting immunity from prosecution as to matters sworn to, **because the immunity does not extend to prosecutions in a State court.** In granting immunity, the only danger to be guarded against is one within the same jurisdiction and under the same sovereignty. *Ib.*

15. **The privilege against self-incrimination** afforded by the Fifth Amendment **is purely personal to the witness**, and he can not claim the privilege of another person, or of the corporation of which he is an officer or employee. [To same effect *McAlister* v. *Henkel*, 201 U. S., 90 (2—919).] *Ib.*

16. **A witness who can not avail himself of the Fifth Amendment as to oral testimony**, because of a statute granting him immunity from prosecution, **can not set it up as against the production of books and papers**, as the same statute would equally grant him immunity in respect to matters proved thereby. *Ib.*

WITNESSES—Continued.

17. **Corporations Can Not Refuse to Answer Unless Protected by Immunity Statute.**—While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, a corporation is a creature of the State, and there is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. *Ib.*

18. Under the practice in this country the **examination of witnesses** by a **Federal grand jury need not be preceded by a presentment or formal indictment**, but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committed, and, if so, they may indict upon such evidence. *Ib.*

19. **In summoning witnesses** before a grand jury **it is sufficient to apprise them of the names of the parties with respect to whom they will be called to testify** without indicating the nature of the charge against them, or laying a basis by a formal indictment. *Ib.*

20. *Hale* v. *Henkel* (vol. 2, page 874) followed to the effect that **officers and employees of corporations can not**, under the Fourth and Fifth Amendments, **refuse to testify or produce books of corporations** in suits against the corporations for violations of the Anti-Trust Law of July 2, 1890, in view of the immunity given by the act of February 25, 1903. *Nelson* v. *United States*, 201 U. S., 92. 2—920

21. **Witnesses can not by objections to materiality of evidence be relieved from testifying.** The tendency or effect of the testimony on the issues between the parties is no concern of theirs. *Ib.*

22. **Objections to the materiality of the testimony are not open to consideration on a writ of error** sued out by witnesses **to review a judgment for contempt** entered against them for disobeying an order to testify. *Ib.*

23. **Refusal to Answer or Produce Books—Order of Circuit Court to Answer or be Held in Contempt Not Reviewable by Supreme Court.**—In a suit in a circuit court of the United States brought by the United States against corporations for violations of the Anti-Trust Law of July 2, 1890, a witness refused to answer questions or produce books before the examiner on the ground of immateriality, also pleading the privileges of the Fifth Amendment; the court overruled the objections and ordered the witness to answer the questions and produce the books; an appeal was taken to this court. *Held*, that while such an order might leave the witness no alternative except to obey or be punished for contempt it **is interlocutory** in the principal suit and not a final order, nor does it constitute a practically independent proceeding amounting to a final judgment, **and an appeal will not lie** therefrom to this court. *Alexander* v. *United States*, 201 U. S., 117. 2—945

24. **Same—But an Appeal from a Judgment of Contempt is Reviewable.**—If the witness refuses to obey and the court goes further and punishes him for contempt there is a right of review, and this is adequate for his protection without unduly impeding the process of the case. [*See* also *Nelson* v. *United States*, 201 U. S., 92 (2—920).] *Ib.*

CREDIBILITY. *See* JURY, 2.

IMMUNITY. *See* IMMUNITY.

WOODEN WARE. *See* COMBINATIONS, ETC., 38, 149.

WORDS AND PHRASES.

1. "**Boycott.**"—A combination by employees of railway companies to injure in his business the owner of cars operated by the companies, by compelling them to cease using his cars by threats of quitting and by actually quitting their service, thereby inflicting on them great injury, where the relation between him and the companies is mutually profitable, and has no effect whatever on the character or reward of the services of the employees so combining, is a boycott, and an unlawful conspiracy at common law. *Thomas* v. *Cin., N. O. & T. P. Ry. Co.*, 62 F., 803. 1—267

2. "**Commerce.**"—The word "commerce," in the statute, is not synonymous with "trade," as used in the common-law phrase "restraint of trade," but has the meaning of the word in that clause of the Constitution which grants to Congress power to regulate interstate and foreign commerce. *U. S.* v. *Debs*, 64 F., 724. 1—322

3. **Same.**—The word "commerce," as used in the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies, and in the Constitution of the United States, has a broader meaning than the word "trade." Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities. *U. S.* v. *Cassidy*, 67 F., 698. 1—452

4. **Same.**—Commerce is the sale or exchange of commodities, but that which the law looks upon as the body of commerce is not restricted to specific arts of sale or exchange. It includes the intercourse—all the initiatory and intervening acts, instrumentalities, and dealings—that directly bring about the sale or exchange. *U. S.* v. *Swift & Co.*, 122 F., 529. 2—237

WORDS AND PHRASES—Continued.

5. **"Conspiracy."**—The term "conspiracy," in section 1 of the act of July 2, 1890 (26 Stat., 209), is used in its well-settled legal meaning, and any restraint of interstate trade or commerce, if accomplished by conspiracy, is unlawful. *U. S.* v. *Debs*, 64 F., 724. 1—322

6. **Same.**—A conspiracy consists in an agreement to do something; but in the sense of the law, and therefore in the sense of this statute, it must be an agreement between two or more to do, by concerted action, something criminal or unlawful, or, it may be, to do something lawful by criminal or unlawful means. A conspiracy, therefore, is in itself unlawful, and, in so far as this statute is directed against conspiracies in restraint of trade among the several States, it is not necessary to look for the illegality of the offense in the kind of restraint proposed. Any proposed restraint of trade, though it be in itself innocent, if it is to be accomplished by conspiracy, is unlawful. *Ib.* (1—352)

7. **Same.**—A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. *Pettibone* v. *U. S.*, 13 Sup. Ct., 542; 148 U. S., 203, cited. *U. S.* v. *Cassidy*, 67 F., 698. 1—449

8. **Same.**—Unlike "combination," "conspiracy" is a term of art. In the Anti-Trust Law it is to be interpreted independently of the preceding words, and an indictment thereunder should therefore describe something that amounts to a conspiracy under the act conformably to the rules of pleading at common law, as perhaps modified by general federal statutes. *U. S.* v. *Mac Andrews & Forbes Co.*, 149 F., 851.

9. **"In Restraint of Trade."**—The words "in restraint of trade," in section 1 of the act of July 2, 1890 (26 Stat., 209), have, in connection with the words "contract," and "combination," their common-law significance, but the term "conspiracy" is used in its well-settled legal meaning, so that any restraint of trade or commerce, if to be accomplished by conspiracy, is unlawful. *U. S.* v. *Debs*, 64 F., 724. 1—322

10. **Same.**—The construction of the statute is not affected by the use of the phrase "in restraint of trade," rather than one of the phrases "to injure trade" or "to restrain trade." *Ib.*

11. **"Mail Trains."**—A mail train is a train as usually and regularly made up, including not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such train, as a mail train, would include the Pullman car as a part of its regular make-up. Therefore, if such a train is obstructed or retarded because it draws a Pullman car, it is no defense that

WORDS AND PHRASES—Continued.

the parties so delaying it were willing that the mail should proceed if the Pullman car were left behind. *U. S.* v. *Clark*, Fed. Cas. No. 14805, 23 Int. Rev. Rec., 306, followed. *U. S.* v. *Cassidy*, 67 F., 698. 1—449

12. **Same.**—Any train which is carrying mail under the sanction of the postal authorities is a mail train in the eye of the law. *Ib.*

13. **"Monopolize."**—The word "monopolize" can not be intended to be used with reference to the acquisition of exclusive rights under Government concession, but that the lawmaker has used the word to mean "to aggregate" or "concentrate" in the hands of few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word "pooling," which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. *Amer. Biscuit & Mfg. Co.* v. *Klotz*, 44 F., 724. 1—7

14. **"Monopolizing, or Attempting to Monopolize."**—To constitute the offense of "monopolizing, or attempting to monopolize," trade or commerce among the States, within the meaning of section 2 of said act, it is necessary to acquire, or attempt to acquire, as exclusive right in such commerce by means which will prevent others from engaging therein. *In re Green*, 52 F., 104. 1—55

15. **Monopoly of trade** embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. *U. S.* v. *Trans-Mo. Ft. Assn.*, 58 F., 58, 84. 1—218

16. **"Municipal Corporation."**—A municipal corporation engaged operating water, lighting, or similar plants, from which a revenue is derived, is, in relation to such matters, a business corporation, and may maintain an action under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat., 210), for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F., 23. 3—200

17. **"More or Less."**—Where, in a contract for the manufacture and delivery of goods, the statement of quantity is qualified by the words "more or less," these, unless supplemented by language giving them a broader scope, apply only to such accidental or immaterial deviations in quantity as would naturally occur in connection with such a transaction. *Dudley Dean Plate Glass Co.* v. *Highland Glass Co.*, 148 F., 242. 2—304

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WORDS AND PHRASES—Continued.

18. **"Trust."**—What is commonly termed a "trust" is a species of combination organized by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles and commodities, which were well known and fully understood when the Anti-Trust Act was approved. *U. S.* v. *Northern Securities Co.*, 120 F., 721, 724. **2—220**

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